

The Indian Evidence Act, 1872

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THE INDIAN EVIDENCE ACT, 1872.

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4.—“If by themselves.....improbable.”—(Continued).

- (p) Acts of ownership by A on the bed, banks, and fences of a river on B's side, but below his land, are relevant to show that A was the owner of the entire bed between his land and B's. *Neill v. Devonshire*, 8 App. Ca. 135 and also *Lord Advocate v. Lord Blantyre*, 4 Ap. Ca. 770; *Phipson Ev.* 4th Ed. pp. 144 and 149. **F**
- (q) Acts of ownership from 1837 to 1872 were held evidence of similar acts from 1661 to 1837. *Bristow v. Carnicau*, 3 App. Ca. 341, 369—70; *Phipson Ev.* 4th Ed. p. 90. **G**
- (r) The question being whether a strip of waste land by the road-side belonged to the lord of the manor or to the owner of the adjacent land, acts of ownership by the lord of the manor—on other parts of the waste—in immediate connection with, and similar to, the strip under dispute, were deemed to be relevant. *Doe v. Kemp*, 2 Bing N.C. 102; *Phipson Ev.* 4th Ed. p. 148; *Taylor Ev.* 10th Ed. p. 124; *Steph. Dig.* 7th Ed. p. 6; *Best Ev.* 9th Ed. p. 358; See, also, under Ss. 6, and 2 (2), p. 61, *supra*. **H**
- (s) A statement, not amounting directly or indirectly to an admission of any incriminating circumstance, made by an accused person to a policeman on duty, that a box he was found carrying at night under suspicious circumstances belonged to him, was held to be relevant against him on his trial for theft of the box. 5 Bom. L. R. 312 (313). **I**
- (t) Acts of possession over a part of any immoveable property may no doubt, in many cases, be evidence of *de facto* possession of the whole, though this rule operates with full force only in favour of the rightful owners, and should be cautiously applied, if at all, in favour of wrongdoer 24 C. 256 (259), referring to *Jones v. Williams*, 2 M. & W. 226, and *Lord Advocate v. Lord Blantyre*, L. R. 4 Ap. Ca. 770 (791). **J**
- (u) The fact that a deceased person, after an alleged *nika* marriage, had executed a will, in which there was no mention of the *nika* wife, was held to be an item of evidence, at best, only—more or less cogent, against the marriage having taken place; its cogency depending on whether the circumstances of the marriage made it natural that the wife should be an object of the husband's testamentary bounty and improbable that he should have left her to depend on her legal right to maintenance. 27 B. 485 (490) (P.C.) = 7 C. W. N. 665 (668). **K**
- (v) An auctioneer holding a sale did not knock down the lots, but intimated to the bidder that his bid was accepted *kutchu pucca*; the contention was that, by the custom of auction sale-rooms, there was an agreement by the bidder that, in consideration of the agreement by the auctioneers to submit the offer to their principals, the bidder promised not to retract his bid, until it had been accepted or refused; the auctioneers did not state anything of the kind in the conditions of sale, where such a contract, if it existed, would naturally find a place; the only evidence on the subject being that of an assistant in the sale-room that such an arrangement had never been repudiated, it was held insufficient to establish a custom of the kind and, under the circumstances, it was held there was no contract. 16 C. 704 (705). **L**

(6) (A) Instances of other facts held not relevant.

- (a) Where a person was convicted of the offence of keeping a common gaming house, under S. 4 of Bombay Act IV of 1837, evidence of previous

4.—“If by themselves.....improbable.”—(Concluded).

convictions, for offences under the same Act could not be let in under S. 54 or S. 11 of the Evidence Act. Per *Jacob, J* in 28 B. 129 (140, 141, 144). See also under S. 54 *Infra*. **M**

(b) Where a public servant was tried for receiving illegal gratifications from a certain firm in 1876, evidence of similar receipts by him in 1877 and 1878 was held not to be relevant under Ss. 5 to 14 of the Act. 6 C. 655 (659) = 8 C.L.R. 197. See also under S. C., p. 60 *supra*, S. 8 pp. 64 & 71. **N**

(c) Bundles of documents found in the house of the accused, alleged to be forgeries or inchoute forgeries, were held to be improperly admitted as evidence to prove that he had forged the particular document, with having forged which he was charged, 11 B.H.C.R. 90 (91). **O**

(d) On the question whether a deceased testator had entered into a *nuptial* marriage with a certain woman, a draft of the will, executed by him after the marriage, containing no mention of the *nika* wife and daughter, which was tendered in evidence, under S. 11, as of itself furnishing evidence similar to that afforded by the will, was held to be rightly rejected as it was not a written statement made by the deceased. 7 C.W.N. 665 (667, 669) = 27 B. 485 (491) (P.C.). **P**

(6) (B) An instance of erroneous application of S. 11, cl. 2.

On the question whether a particular receiving of stolen property was criminal, the admission in evidence of other similar dealings, which have not themselves been shown to have been of a criminal character, was held to be an erroneous application of S. 11, cl. (2) 5 A.W.N. 27. **Q**

(7) Instances of evidence admissible under English Law and under this section are:—

1. Long continued absence of demand to prove the payment of an alleged debt, or the settlement of accounts subsequently to the accrual of the debt without mention of it. *Colsell v. Budd*, 1 Camp. 27.
2. The resemblance of a child to the defendant to prove paternity in a maintenance case. *Barnby v. Baillie*, 42 Ch.D. 290.
3. Impossibility of sexual intercourse to disprove alleged rape. Field Ev. 6th Ed., p. 73.

(8) No presumption of survivorship in English Law as to *commorientes*.

The English Law raises no presumption as to survivorship in the case of *Commorientes*, that is, where two or more persons perish by the same accident or calamity. *Wing v. Angrave*, 8H.L.C. 183; *Phipson Ev.*, 4th Ed., p. 629; *Steph. Dig.*, 7th Ed., p. 116; *Best Ev.*, 9th Ed., p. 348; *Taylor Ev.*, 10th Ed., p. 197. See, also, “Probabilities” under S. 3 *Supra*, pp. 43 and 44; also under S. 5, pp 53 and 54, *Supra*. **U**

In suit for damages, facts tending to enable Court to determine amount are relevant.

12. In suits in which damages (1) are claimed any fact which will enable the Court to determine the amount of damages which ought to be awarded is relevant. (2)

Notes.

1—Damages.

(1) **Extrinsic evidence relevant to show whether sum is damages or penalty.**

Extrinsic evidence is admissible to show that a sum, stated to be liquidated damages, was intended merely as a penalty. *Pye v. British Syndicate*, (1905), 1 K.B. 425; *Diestal v. Sterenson* (1906), 2 K.B. 345; Phip. Ev., 4th Ed., p. 537. **Y**

(2) **Nature of damages claimable.**

The party breaking a contract is liable for damages (1) arising according to the usual course of things, and (2) as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. *Hadley v. Baxendale*, 9 Exch. 341 (354); Poll. and Mul. Contr., p. 259. **W**

2.—“Any Fact...relevant.”

(1) **Facts of the case to be taken into consideration in awarding damages.**

In awarding damages for the breach of a contract, the facts of the case may be taken into consideration. 1 L.B.R. 21 (22). **X**

(2) **Prospective damages also to be taken into consideration.**

A Court should consider not only the damage that has accrued, but also any damages that will spring up in the future from the defendant's defamatory words. *Townsend v. Hughes*, 1 Mod. 150. R. and D. Torts, 3rd Ed. p. 213. **Y**

(3) **Time and place to be considered.**

The circumstances of time and place deserve to be taken into account in assessing damages; it is a greater insult to be beaten on the Royal Exchange than in a private room. *Tullidge v. Wade*, 3 Wills., 19. A.A. and. W. 4th Ed., p. 62. **Z**

(4) **Conduct and language will aggravate.**

Damages may be aggravated by the defendant's conduct of his case and by the language of his counsel at the trial. *Darley v. Onsley*, 25 L.J., Ex. 230; R. and D. Torts, 3rd. Ed., p. 214. **A**

(5) **Bona fides always relevant.**

Good faith, honesty of purpose and absence of malice are relevant in every case in mitigation of damages. *Pearson v. Lemaitre*, 5 M. and G. 700; R. and D. Torts, 3rd Ed., p. 214. **B**

(6) **But means of diminishing damage will affect claim.**

(a) In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must, under the Explanation to S. 73 of the Contract Act (IX of 1872), be taken into account. 1 L.B.R. 21 (22); 26 B. 744 (747). **C**

(b) The Court, in determining the amount of damages claimed will, take into account all the reasonable means, available to the plaintiff, of obviating or diminishing his loss. *Frost v. Knight*, L.R. 7 Ex., iii; Shap. and Cun. Contr. 6th Ed., p. 220; Nelson Contr., p. 474. **D**

2.—“Any Fact.. relevant.”—(Continued).

- (c) An agent or servant, wrongfully discharged from employment, is bound, if possible, to seek fresh employment; and the emoluments that have, or might have, been earned by him thereby, will be subtracted from the amount of damages, to which he may be found entitled. *Hochster De La Tour*, 22 L.J.Q.B. 458; *Shep. and Cun. Contr.*, 6th Ed., p. 220; *Nel. Contr.*, p. 474. E

Difference in the evidence relevant in contracts and torts.

In actions of contract, evidence of malicious motive is not admissible, while it is in cases of tort. *Sears v. Lyons*, 2 Stark. 317; *R. and D. Torts*, 3rd Ed., p. 137. F

(8) **Accidental benefits will not lessen damages claimed.**

- (a) Where a person claimed damages from a Railway Company for negligence, it was held that the fact of his having received a certain sum under an accident policy could not affect the damages he claimed. *Bradburn v. C. W. Ry. Co.*, L.R. 10 Ex. 1; *Shep. and Cun. Contr.*, 6th Ed., p. 220; *Nels. Contr.*, p. 474. G

- (b) Where the plaintiffs acquired certain benefits through abnormal or accidental circumstances, it was held that such benefits could not reduce the damages claimed by them. *Jebson v. East and West India Dock and Co.*, L.R. 10 C.P. 300 *Shep. & Cun. Contr.*, 6th Ed., p. 220; *Nelson Contr.*, p. 474. H

(9) **Expediency not to reduce damages claimed.**

It is not open to the Courts to reduce the real damages arising from the breach of a contract by the introduction of considerations of expediency. 21 B. 175 (185). I

(10) **Amount of damages not to be stated beforehand.**

In opening a case to the jury, they should not be informed of the amount of damages claimed in any action. 41 Sol. Jo. 204; *Phil. Ev.* 4th Ed., p. 29. J

(11) **Facts relevant to determine damages in seduction and marriage cases**

- (a) Actual damage, expenses incurred through a servant's or daughter's illness, loss which the plaintiff has sustained by not having the society and comfort of a seduced child, the dishonour he has received, and the anxiety and distress suffered by him must be taken into consideration. *Bedford v. M'kowl*, 3 Esp. 120; *R. and D. Torts*, 3rd Ed., p. 229. K

- (b) It would be an aggravating circumstance that a seduction was effected under the cloak of honourable overtures. *Tullidge v. Wade*, 3 Wills. 18; *R. D and Torts*, 3rd Ed., p. 229. L

- (c) The high rank of the parties may be an aggravation of the wrong for which damages are claimed. *Andrews v. Askey*, 8 C. and P. 9; *R. and D. Torts*, 3rd Ed., 229. M

- (d) In estimating the damages, the injury done, where there has been seduction, to the plaintiff's future prospects of marriage, to her feelings and affections, and to her social position, may be taken into account. L. B.R. (1872-1892) 533 (535). N

2.—“Any Fact...relevant.”—(Continued).

- (e) In Estimating the damages, in an action for breach of promise of marriage, where the plaintiff had been seduced by the defendant, the altered position of the plaintiff in relation to her house and family, through the defendant's conduct towards her may be taken into consideration. *Berry v. Ducosta*, L. R. 1 C. P. 331; referred to in L. B. R (1872-1892) p. 534. O
- (f) In an action for breach of promise of marriage brought by a bridegroom, his confirmed gambling habits and inability to maintain a wife, were taken into consideration in refusing him damages. 174 P.R. 1882. P
- (g) In assessing damages, on the breach of a contract of betrothal, moneys advanced to the girl's father may be taken into consideration. 141 P.R. 1890 (following 107 P.R. 1879). Q

(12) Evidence irrelevant in action for seduction.

Evidence may not be given, in action for seduction, of the means of the defendant, and his fortune should not affect the amount of damages. *Hodgson v. Taylor*, L.R. 8 Q.B. 79. R and D. Torts, 3rd Ed., p. 229. R

(13) Facts relevant in cases of libel and slander.

- (a) “In actions for libel and slander, in which the defendant does not, by his defence, assert the truth of the statement complained of, the defendant is not entitled, on the trial, to give evidence in chief with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, without the leave of the Judge, unless seven days at least before the trial he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence.” Steph. Dig., 7th Ed., p. 69. S
- (b) In mitigation of damages, a defendant may show that the plaintiff's conduct in having previously published a libel, of which the defendant knew but recently, provoked him to act as he had done. *Watts v. Fraser*, (1837) 7 C.&P. 369; Tay. Ev., 10th Ed., p. 269. T
- (c) In mitigation of damages, the plaintiff's habit of libelling the defendant is relevant, as a circumstance which provoked the libel for which the defendant is under trial. *Finnerty v. Tipper*, 2 Camp., 76; R. & D. Torts, 3rd Ed., p. 215. U
- (d) A defendant may, in mitigation of damages, adduce evidence palliating his publication of a libel by showing that he copied it from another newspaper. *Upton v. Hume*, 41 Am. St. R. 863; Tay. Ev., 10th Ed., p. 269. Y
- (e) Evidence of the truth of a particular portion of the defamatory words may be given in mitigation of damages, if that portion is separable from the rest, intelligible by itself and carries a distinct imputation on the plaintiff. *McGregor v. Gregory*, 11 M. & W. 287; R. & D. Torts, 3rd Ed., p. 214. W

(13) (A)—Facts irrelevant in case of malicious prosecution.

In a suit for damages for malicious prosecution, it was held that the judgment of the Magistrate and the evidence given before him in the prosecution in question should not be utilised as evidence. 9 Boim. L.R. 1134. X

2.—“Any Fact...Relevant.”—(Continued).

(14) Facts relevant in cases of deceit and untrue representation.

- (a) To determine the damages arising from the deceit of the directors of a company in inducing a plaintiff to buy shares, the difference between the purchase money paid, and that which would have been a fair price for the shares, according to the real condition of the company at the time of the purchase should be ascertained. *Davidson v. Tulloch*, 6 Jur.N.S. 545; R. & D. Torts, 3rd Ed., p. 385. Y
- (b) To determine the damages arising from untrue representation, the difference between the position in which the plaintiff would have been, and that in which he actually is, should be considered. (1896) P. J. 385; R & D. Torts, 3rd Ed., p. 379. Z

(15) Facts relevant in cases of assault and abuse.

- (a) The jury are at liberty, in the case of a wrong, to take into account the injury to a party's feelings and the pain experienced by him, as, for instance, the extent of violence in an action for assault. Many topics, and many elements of damage, find place in an action for tort that have none in an ordinary action on contract. *Hamlin v. Great Northern Ry. Co.*, 26 L. J. Ex. 20, cited in A.A. & W. Ev. 4th Ed. p. 62. A
- (b) If, in a case of assault, corporal punishment was resorted to, that should always count as an important element of mitigation, in subsequently assessing the amount of damages. 1 A. W.N. 131. B
- (c) Where the damages awarded in a case of assault were beyond the defendant's means, the Court reduced them upon the defendant's tendering to the plaintiff a written apology expressing his regret for what had passed. 6 W.R. 95 (97). C
- (d) Where the evidence, in an action of trespass for assault and battery, shewed that, previous to the assault, the plaintiff's language and manner were by no means rude and provoking, it was held that, though the vindictive damages claimed by the plaintiff were groundless, it was still a case for awarding full damages commensurate with the injury and annoyance caused. W.R. (1864) 370. D
- (e) In a case of abuse and assault, the defendant's means of life is an element which ought to be considered in awarding damages. 17 W.R. 280 (281). E
- (f) In awarding damages, in a case of abuse and assault, the position of the plaintiff should be considered only for the purpose of seeing how far the compensation awarded is commensurate with the injury inflicted, but not for giving a decree against the defendant beyond any possibility of his ever satisfying it, simply because the plaintiff is a man of a somewhat high position in life. 17 W.R. 280 (281). F

(16) Facts relevant in cases of arrest.

- (a) In cases of malicious arrest, the plaintiff's being, by reason of the arrest,
- (1) injured in his credit, (*Jennings v. Florence*, 26 L. J. C. P. 277) G
 - (2) put to various expenses in obtaining his discharge, (*Churchill v. Eiggs*, 3 E. & B. 929), may be taken into consideration. R. & D. Torts, 3rd Ed., p. 248. H
- (b) A defendant, who had given the plaintiff in charge of a constable for felony, was allowed to show reasonable ground of suspicion in mitigation of damages. *Chinn v. Morris, Ry. & M.* 424. A.A. & W., 4th Ed. p. 61. I

2.—“Any Fact ..relevant.”—(Continued).

(16-a) For character as affecting damages in Civil Cases.

See S. 55, *post*.

(17) Facts relevant in transfers of immoveable property.

(a) In calculating the damages to be awarded to a transferee of an occupancy holding, who is protected by a covenant from his transferor that he will be entitled to damages if he is ejected within a certain time, the loss that the transferee will sustain by the deprivation of the enjoyment of the land for the residue of the term is to be taken into consideration. 3 A.L.J. 501 (508) = A.W.N. (1906) 207 (208). **K**

(b) In awarding damages to a purchaser, evicted from his holding by reason of the defect in the vendor's title covenanted for by him, the value of the land at the date of the eviction will be taken into consideration. In making an estimate of the loss of future profits, all circumstances must be taken into account. 21 B. 175 (186, 187). **L**

(c) In cases of breach of contract of sale (of a house) by purchasers, the fact how much worse off the vendor was, by reason of the loss of the purchase money in consequence of the non-performance of the contract, must be taken into consideration. 4 Bom. L.R. 814. **M**

(18) Facts relevant in cases of loans.

(a) In assessing damages, in the case of a breach of an agreement to borrow money from the plaintiff, the expenses incurred by him in preparing the necessary deeds, and on the question of interest claimed, the amount to be lent—which, the larger it is, would require a longer time to find a borrower—must be taken into consideration. 12 B. 242 (246). **N**

(b) The measure of damages, on the failure of a defendant to pay within a reasonable time a debt, due by the plaintiff to a third party and undertaken by the defendant to be discharged, would be the sum payable by the defendant to the third party. 23 M. 441 (444). **O**

(19) Facts relevant in case of partnership.

In assessing damages, on the breach of a contract to enter into a partnership, regard must be had to the share of profits which would have accrued to the plaintiff if it had been carried out. 68 P.R. 1867. **P**

(20) Facts relevant in case of indemnity.

In measuring the damages that a surety for a servant's honesty can be held liable for the servant's actual defalcations must be taken into consideration; all other damages would be too remote. 106 P.R. 1866. **Q**

(21) Facts relevant in cases of sales of goods.

(a) If, in assessing damages in the case of a breach of contract to deliver goods, the market value is uncertain, then the Court must take into consideration such surrounding circumstances as affect the probabilities, and, among them, real prices proved about the time of the due date. 26 B. 235 (239). **R**

(b) In awarding damages, in the absence of evidence as to the market price of a commodity agreed to be sold, a statement made by the plaintiff, as to the rates at which he had settled the price of the same commodity in respect of contracts with other persons may properly be received in evidence for the purpose of enabling the Court to fix the actual value. 26 B. 744 (749). **S**

2.—“Any Fact...relevant.”—(Concluded).

- (c) In awarding damages to a buyer on the ground of the goods being inferior to the quality guaranteed, methods of assessing damages, recognised by the trade, may be considered. 29 C.323. T
 - (d) When a person contracts to deliver goods of specified quality in certain period, as they are manufactured, and no delivery is made, no such goods being manufactured at all during that period, evidence of the market rate on the last day of the contracted period, of a similar article manufactured sometime previously to that period, may be taken into consideration in calculating the damages. 1 L.B.B. 262. U
 - (e) In awarding damages, in cases of sales of goods, the difference between the contract and market rates at the due date is ordinarily taken into consideration. 26 B. 744 (747). Y
 - (f) The difference between the contract price and the price which the seller could realise for the article of sale at the time of the breach of the contract should be taken into account, in calculating the damages in the case of a purchaser failing to perform his part of the contract of sale. 19 A. 535=17 A.W.N. 150. W
 - (g) In determining the amount of damages to be awarded in a suit for a contract to supply sleepers, the difference between the contract price and that at which the plaintiff could have purchased them elsewhere—not that between the contract price and that at which he might have sold the goods—must be taken into consideration. 103 P.R. 1867. X
- (22) **Facts relevant in the case of carriers.**
- (a) In assessing damages, in the case of a breach of contract to convey the plaintiff for a certain distance, but where the defendant, carriers, conveyed the plaintiff only a part of that distance, leaving him to make his own arrangements for the rest of the journey, not only the actual outlay but the injury to the health and feelings of the plaintiff, may be taken into consideration. 77 P.R. 1867. Y
 - (b) In awarding damages for goods delivered to a carrier at one place for being conveyed to another, and lost *en route*, the market value of the goods at the place of delivery is to be taken into consideration. 10 P. R. 1866. Z
- (23) **Measure of damages—Time of delivering goods vague or not specified.**
- (a) Where no time is specified for delivery to the purchaser, the measure of damages, in an action by him on non-delivery, is the difference between the contract-price and that which goods of a like description bore on the lapse of a reasonable time for delivery. 1 M.H.C.R. 162. A
 - (b) Where the time is only vaguely specified, as “in two or three days”, the measure of damages is to be calculated on the price current on the lapse of a reasonable time for delivery, not less than three days from the date of the contract. 1 M.H.C. 168. B

Facts relevant
when right or cus-
tom is in question,

13. Where the question is as to the existence of any right⁽¹⁾ or custom⁽²⁾, the following facts⁽³⁾ are relevant:—

(a) Any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted, or denied⁽⁴⁾, or which was inconsistent with its existence⁽⁵⁾;

(b) Particular instances in which the right or custom was claimed, recognized, or exercised, or in which its exercise was disputed, asserted, or departed from. (6)

Illustration.

The question is, whether A has a right to a fishery. A deed conferring the fishery on A's ancestors, a mortgage of the fishery by A's father, a subsequent grant of the fishery by A's father, irreconcilable with the mortgage, particular instances in which A's father exercised the right, or in which the exercise of the right was stopped by A's neighbours, are relevant facts.

(Notes.)

General.

(1) *Scope of section.*

The opening words of the section are of a limiting and defining character. If the words "where the question is as to the existence of any right or custom" are omitted, the section would altogether lose its distinctive character. The whole context indicates that the section is dealing with continuing rights which may be interrupted without being necessarily destroyed. 31 B. 143 (155), *per Denman, J.* C

(2) *Requirements of section.*

To satisfy the requirements of the section the question must be as to the existence of a right or custom. 31 B. 143 (153), *Per Beaman, J.* D

I.—"Right."

(1) *Rights contemplated by section.*

The rights contemplated by S. 13 are plainly conceived as admitting of proof by cumulative instances and transactions, and not by a single and decisive and final way, namely, the terms of a document. 31 B. 143 (154), *Per Beaman, J.* E

(2) *What "right" means—the restricted view.*

(a) The term "right" was intended to include those properties only of an incorporeal nature, which, in legal phraseology, are generally called "rights", more especially as it is used in conjunction with the word "custom", (see Ss. 32 (4) and 48); and, in S. 13, the word is probably intended to include both public or private rights of that nature. The "right of fishery" mentioned in the illustration is a right which may be either public or private, according to circumstances. 6 C. 171 (187) (F.B.), *per Garth, C.J.* F

(b) That the expression "right" is used in the limited sense of a right of an incorporeal nature is shown by the words with which it is associated. The right mentioned in the section is one which can be created or exercised, which expressions are perfectly appropriate when speaking of an incorporeal right, but wholly inapplicable to the word "right" when used in its more extended sense. It would be quite correct to speak of the creation of the exercise of a right of way or of a franchise, but no lawyer would think of saying that a right to a chattel or to damages had been "created or exercised." 6 C. 171 (187) (F.B.), *Per Garth, C.J.* G

I.—“*Right.*”—(Continued).

(c) What is referred to in S. 13 is evidently a right which attaches either to some property or *status*; in short, incorporated rights, which, though transmissible, are not tangible or objects of the bodily senses. 6 C. 171. (184), *Per Jackson, J.* H

(d) Right in S. 13 of the Act implies an incorporeal right. 8 C. 483 (506), (F.B.) 1 C. 171, *referred to.*

(3) Inconsistency consequent on giving ‘right’ an extended meaning.

If the word ‘right’ should truly mean any right which can possibly be made the subject of a suit, the provisions of the section would necessarily apply to all suits, because the plaintiff in every suit claims a right of some kind, the existence of which forms the ground of his claim; but such a view is inconsistent with the first sentence of the section, because that sentence seems very plainly intended to confine its operation to a particular class of suits, viz., those in which “a question as to the existence of some right or custom” is raised. 6 C. 171 (186) (F.B.), *per Garth, C.J.* J

(4) The Comprehensive view.

(a) At present the balance of authority favours the extension of the term “right”, to include any and every right known to the law. 31 B. 143 (154), *per Beaman, J.* K

(b) Right and customs, in S. 13, must be understood as comprehending all right and customs recognised by law, and, therefore, including a right of ownership. 10 B. 439 (442), *per Sargent, C. J.*; *referred to* in 31 B. 143 (151). L

(c) The word “right” includes not only incorporeal rights, but a right of ownership; there are no words in the section which could not be applied to a right of ownership. 12 A. 1 (13) (F.B.), *Per Edge, C. J.*, (Observing that 6 C. 171 (F.B.) put too narrow a construction on the word.) M

(d) The contention that the section refers only to incorporeal rights whether of a public or private nature, is not warranted by any general principle. 6 C. 171 (180). *Per Mitter, J., dissentient.* N

(e) The proposition that, in S. 13 of the Evidence Act, the Legislature intended to refer to incorporeal rights only, because, in other parts of the Act, for example, in Ss. 32 and 48, where the word “right” occurs in conjunction with the word “custom”, it has been used in that sense, is liable to two objections:— O

i. it is by no means clear that Ss. 32 & 48 deal only with incorporeal rights; a corporeal right may be of a public or general nature, though generally rights of the latter kind may be incorporeal; P

ii. the word “right” is qualified by the word “public” in cl. 4, S. 32, and by the word “general” in S. 48; and there is no such qualification in S. 13. 6 C. 171 (180), *per Mitter, J., dissentient.* Q

(f) The term “rights”, in S. 13, occurs only once in the Act before that section in the definition of “facts in issue”, where it must necessarily have been used in its largest sense. 10 B. 439 (442); *per Sargent, C. J.* R

(g) It is impossible to agree with *Garth, C. J.*, either in the restricted meaning attached by him to the word “right” as used in S. 13 or as to

1.—“**Right.**”—(Concluded.)

the mode in which he treats the term “ transaction.” *Per Straight, J.*, 12 A 1 (24). S

- (h) The interpretation placed upon the words “ right and transaction ” in 6 C. 171 (F. B.), seems not to have been accepted by the Privy Council (*Vide* : 19 A. 277 and 22 C. 593) and its correctness is questioned in the Full Bench judgment in 12 A. 1, in so far as the exclusion of such judgments from being received as evidence under any section is concerned. 24 B. 591 (599). *Per Ranade, J.* T

(5) **Effect of not largely construing section.**

If S. be not largely construed, the result would be, that a class of judicial proceedings, which were always considered as furnishing cogent evidence on the question of possession, would be excluded. 6 C. 171 179, *per Mitter, J.* *dissentient.* U

N.B.—(The reference is to awards under Act IV of 1840, and the corresponding sections of the Criminal Procedure Code). Y

(6) **Right includes both public and private right.**

The illustration to this section shows that the right mentioned in the section is not a public right only, the right there mentioned being a private one, viz., A's right to a fishery. 23 W.R. 311 (312). W

(7) **Right, same meaning of, throughout section.**

Whatever be the meaning of the word “right” in clause (a) of S. 13, the meaning of that word in clause (b) must, according to the principles of construction, be the same. 12 A. 1 (14) (F.B.), *per Edge, C.J.* X

(8) **A right distinguishable from that denoted in section.**

A right which is created by, and inseparably bound up in, a document does not admit of proof or disproof by particular instances of assertion and denial, and is, therefore, plainly and essentially distinguishable from all the rights denoted in S. 13. 31 B. 143 (154). *Per Beman, J.* Y

(9) **A case that cannot be logically brought under section.**

Where the only question is whether a registered sale deed is genuine or fraudulent, it is inconceivable that the language of S. 13 can reasonably and logically be fitted to the case. 31 B. 143 (154). *per Beaman, J.* Z

(10) **Facts relevant when any right is in question.**

When any right is in question, every act of enjoyment or possession is a relevant fact, since the right claimed is constituted by an indefinite number of acts of user exercised *animodominii*. Wills' Ev. 41, cited in A.A. & W. Ev. 4th Ed. p. 63. A

2.—“**Custom.**”(1) **Custom, meaning and definition of.**

(a) Custom is, for the people that has established it, a mirror in which that people may recognise itself. (Puchta), 3 M.H.C.R. 50 (57). B

(b) A custom is a rule which, in a particular family or a particular district, has, from long usage, obtained the force of law. 26 W.R. 55 = 3 I.A. 259 C

(c) Custom is an unwritten law established by long usage and the consent of our ancestors; if it be universal, it is a part of the common law of the land; if particular, it is then properly a custom. Field Ev. 6th Ed. p. 497. D

2.—“Custom.”—(Continued.)

(2) Customary Law, a deluding phrase.

The use of the phrase ‘customary law’ is deluding, inasmuch as it would lead to the supposition that the first solution of a question of law was purely accidental, and that the same question was subsequently resolved in the same manner, because it was so resolved before. 3 M. H. C. 50 (56 & 57). **E**

(3) Customary Law, Austin's view of.

Austin altogether denies that customary law has any inherent force as substantive law, and holds that it is in truth a species of judiciary law, and that this judiciary law obtains its force by virtue of powers, really legislative, which, with the tacit sanction of the supreme authority, have been exercised by tribunals. 3 M.H.C.50 (56). **F**

(4) “General custom or right” does not exclude public custom.

The expression “general custom or right” does not exclude public custom, for when a definition is intended to be exclusive, the form of words would seem to be “means and includes.” [4 C. 493 (F.B.), see p. 19, under “consolidate,” *supra*], A.A. & W. Ev. 4th Ed. p. 67. **G**

(5) Usage, what it includes.

The word “usage” would include what the people are, now or recently, in the habit of doing in a particular place. 23 C. 427 (429). **H**

(6) Usage of trade, meaning of.

The term “usage of trade” should be understood as referring to a particular usage which is to be established by evidence of instances and cannot be supported by evidence of opinion thereby. *Cunningham v. Faublanque*, 6 C. and P., 44. Field Ev. 6th Ed. p. 501. **I**

(7) Custom, evidence of Law.

Usages and customs are only evidence of law (Savigny). 3 M.H.C.R. 50 (57). **J**

(8) Operation of custom.

(a) Custom adopts the ancient law, modifies and rejects and supersedes it. 11 B.H.C.R. 249 (269), *per West, J.* **K**

(b) Custom is a branch of Hindu Law which, wherever it obtains, supersedes its general maxims. *Strange's Hindu Law*, Ch. 1 p.138. Field Ev. 6th Ed. p. 502. **L**

(9) Custom also sometimes coincides with general law.

Customary law does not lay down any rule different from that of the Hindu Law by which a female heir has no uncontrolled power over moveables inherited by her. 58 P.L.R. 1900. **M**

(10) Effect of Reg. IV of 1827 on the usage of the country.

(a) By Reg. IV of 1827, S. 26, the usage of the country, in which the suit arose, is in the determination of civil actions to have precedence over the law of the defendant, and, hence, by the custom of the Broach District the mortgage of *wakf* land is permissible, though contrary to the Mahomedan Law. 1 B.H.C.R. 86 (87). **N**

(b) It is an incorrect statement of the law that, under Reg. IV of 1827, S. 26, the written Hindu law should have the effect of British Statute Law, and take precedence of the usage of the country. 4 B.H.C.R. 113 A.C.J.O

2. "Custom".—(Continued).

(11) Customs covered by Section.

Customs of a private or local character are covered by this section. Field Ev. 6th Ed. p. 75. P

(12) Essentials of a good custom under English Law.

Under the English Law several essentials are required to make a particular custom good ; it must have been Q

(1) used so long that the memory of man runneth not to the contrary, R

(2) continued, S

(3) peaceable, T

(4) reasonable, U

(5) certain, Y

(6) compulsory, and not left to the option of every person whether he will use it or not, W

(7) and it must be consistent with other customs, for one custom cannot be set up in opposition to another. Field Ev. 6th Ed. p. 497. X

(13) Requisites under the Indian Law.

(a) Whether all the requisites of the English Law for the validity of a custom are necessary to make a good custom in India has not been decided ; but there are many cases in which reasonableness and certainty have been insisted upon. Field Ev. 6th Ed. p. 497. Y

(b) The legal title of customs to recognition depends on their antiquity and certainty. 14 M.L.A. 570 (586). Z

(c) Amongst the conditions essential for establishing a custom are that the custom is of remote antiquity, that it has been continued and acquiesced in, that it is reasonable, and that it is certain and not indefinite in its character. 2 A. 49 (51). A

(d) A custom to be good must be definite. 1 A. 440 (442).

(e) A custom must be ancient, certain and reasonable, and, being in derogation of the general rules of law, must be construed strictly. 26 W. R. 55 - 3 I.A. 259. B

(f) The acts required for the establishment of customary law ought to be plural, uniform, and constant. They may be judicial decisions, but these are not indispensable for its establishment, although some have thought otherwise. The authors of the acts must have performed them with the consciousness that they spring from legal necessity. 3 M.H.C.R. 50 (57). C

(g) What the law requires before an alleged custom can receive the recognition of the Court and so acquire legal force is, satisfactory proof of usage so long and invariably acted upon in practice as to show that it has, by common consent, been submitted to as the established governing rule of the particular family, class, or district of country ; and the course of practice, upon which the custom rests, must not be left in doubt, but be proved with certainty. 3 M.H.C.R. 75 (77). D

(14) Length of time to constitute immemoriality of custom :—

Although in this country we cannot go back to that period which constitutes legal memory in England, viz., the reign of Richard I, yet still there must be some limitation without which a custom ought not to

2.—“Custom.”—(Continued).

be held good. In regard to Calcutta, I should say that the Act of Parliament in 1773, which established this Supreme Court, is the period to which we must go back to found the existence of a valid custom, and that, after that date, there can be no subsequent custom or any change made in the general law of the Hindus, unless it be by, some Regulation by the Governor-General in Council, which has been duly registered in this Court. In regard to the mofussil we ought to go back to 1793. Prior to that, there was no registry of the Regulations and the relics of them were extremely loose and uncertain. I admit that a usage for 20 years may raise a presumption, in the absence of direct evidence, of a usage existing beyond the period of legal memory, *Per Grey, C. J.*; in *Doe v. Jagomohan Rai v. Ninnu Dasi*, Montr. Cases of Hindu Law, 596, Field Ev. 6th Ed. p. 498. E

(14 a) Case where practice of generations held insufficient proof of custom.

The mere fact of an estate not having been partitioned for 6 or 7 generations was held by the Judicial Committee of the Privy Council to be insufficient proof of a custom of impartibility. 13 B.L.R. 165. F

(15) Custom must be reasonable to be binding.

(a) A custom must be a reasonable custom protecting the rights of some persons or classes. 6 W.R. (Act X) 40. G

(b) A “usage” to be binding must be reasonable. 1 B.H.C.R. 229 (231) O.C.J.

(c) An unreasonable custom, even if proved, cannot be regarded as having the force of law. 8 B. 408 (411). H

(16) Qualification imported from Canon Law.

The Qualification that a custom must not be unreasonable has been imported from the Canon Law by continental and English jurists. 3 M. H.C. R. 50 (57). I

(17) Instance of enforcement of reasonable custom.

The custom of the potters in Tinnevely that a marriage was dissolved on one party paying to the other the expenses of that marriage, shown to be ancient and reasonable, was held to be not immoral, as it did not ignore marriage as a legal institution. 17 M. 479 (480). J

(18) Instance where unreasonable customs were not enforced.

(a) A custom, by virtue of which, all the inhabitants of a zamindari were alleged to possess the right of fishing in certain bails, was rejected as invalid as being unreasonable, though there might be evidence to establish it. 9 C. 698 (703). K

(b) A custom so very unreasonable as enabled a man, after having granted a lease, to deprive, by simply resorting to a dodge, the lessee of the entire benefit of his lease, and that, not only in the absence of such a power reserved, but in the face of an express stipulation not to remove the tenant, and without any compensation to the lessee, even if proved cannot be regarded as having the force of law. 8 B. 408 (410). L

(c) The usage of a certain place that the certificate of mahajans was conclusive, upon an underwriter, and that upon proof of it alone, unaccompanied by the manifest and the account-sales, and of the policy of insurances the owner of goods insured was entitled to recover the percentage of loss was, even should it be proved, held to be unreasonable, and the certificate was held inadmissible in evidence. 1 B. H.C.R. 229 (232) O.C.J. M

2. — "Custom." — (Continued).

- (d) A custom allowing a broker to deviate from his instructions, if the state of the market appear to render it desirable, even if proved, cannot be held reasonable, as it would deprive a principal of all security and leave him at the mercy of his agent. 8 B. H. C. R. (A.C.) 19 (29) ; referring to *Ireland v. Livingston*. L. R., 5 Q. B. 516. N
- (e) A custom that a ryot has no right to build a pukka house on his holding, though reasonable enough in the case of ryots without rights of occupancy, would be utterly unreasonable where there is a permanent hereditary right of occupancy. 6 W. R. (Act X) 40. O
- (19) **Immoral customs and those contravening Penal Law will not be enforced.**
- (a) Where certain dancing girls sued to be declared to have by custom a veto upon the introduction of any new Deva Dasis, held, that, though such a custom might fulfil the requirements of a valid custom, it could not be enforced, as it was an immoral custom for an association of women to enjoy a monopoly of the gains of prostitution and contravened the Penal Law. 1 M. 168 (170); 2 M.H.C.R. 56 and 5 M.H.C.R. 161, distinguished. P
- (b) All the customs and practices of the Kanchans aiming at the continuance of prostitution as a family business, and having a distinctly immoral tendency should not be enforced in Courts of justice as customs or laws. 21 C. 149 (155 and 156) (P.C.) = 20 I.A. 193. Q
- (c) If the custom set up was one to sanction not merely the transfer of a trusteeship, but the sale of it for the pecuniary advantage of the trustee, that circumstance alone was held sufficient to justify a decision that the custom was bad in law. 1 M. 235 (252) (P.C.) = 4 I.A. 76. R
- (20) **Distinction between practice and custom should be appreciated.**
- In a case where the Parsi Law as to infant marriage was in question, held, the distinction between practice and custom should be appreciated and the custom should be found both common and recognised as binding. 22 B. 490 (438). S
- (21) **Trade usages must conform to general law.**
- (a) Trade usages or customs must always be in conformity with the general law. *Meyer v. Dresser*, 16 C. B. N. S. 646 (660), per *Erle, C. J.*, cited in Poll. & Mull. Contr. p. 9. T
- (b) Any usage or custom of trade alleged by the parties to a contract must not be inconsistent with the provisions of the Contract Act. 14 B. L. R. 76. U
- (22) **Usage of trade relevant to explain acts of parties.**
- A usage of trade, known to both parties may be admitted in evidence to explain the meaning of their acts when no special agreement, in respect of the subject to which the usage applies, was proved. 11 M. 459 (462). V
- (23) **Evidence and proof of custom.**
- (a) A custom must be proved to be "part of the legal conscience" of all those whom it is said to bind and the *consens suletium*, which is the basis of all legal customs, must be shown to be uniform and constant. Per *Scott, J.*; 10 B. 528 (543). W
- (b) 1. The evidence should be such as to prove the uniformity and continuity of the usage, and the conviction of those following it that they

2. — "Custom." — (Continued).

were acting in accordance with law, which must be inferred from the evidence. X

2. Evidence of acts of the kind, acquiescence in those acts, their publicity, decisions of Courts or even of punchayets up-holding such acts, the statements of experienced and competent persons of their belief that such acts were legal and valid, will all be admissible. Y
3. Though admissible, evidence of this latter kind will be of little weight if unsupported by actual examples of the usage asserted. 7 M. H. C. R. 250 (254) referred to in 10 B. 528 (540). Z

(c) The ruling of the Madras High Court in 7 M.H.C.R. 250 as to what constitutes sufficient proof of custom has been, perhaps somewhat too strongly expressed. 7 M. 3 (10) (F.B.) A

(d) A custom might be shown by uniform practice which was not mentioned in any customal Court roll or other record. *Johnstone v. Lord Spencer*, 30 Ch. D. 587; Steph. Dig. 7th Ed. p. 9.

(e) The course of practice, upon which the custom rests, must not be left in doubt, but must be proved with certainty. 10 Bom. H.C.R. 228; referred to in 21 B. 110 (116). B

(f) To prove a local custom, the evidence must be precise and conclusive. 20 W.R. 154 (157), referring to 9 M.I.A. pp. 450—1 and 9 B.L.R. p. 297. C

(24) Examples.

(a) On the question whether certain kinds of tenures were, according to local custom, transferable, it was held to be sufficient if there was credible evidence of the existence and the antiquity of the custom and nothing to the contrary; there was no necessity for the witnesses to fix any particular time from which such tenures became transferable from one party to the other. 11 W.R. 348 (349). D

(b) Where a Mahomedan sued a Hindu to enforce against him a right of pre-emption, relying upon such a local custom obtaining between the two classes, *held*, that unless he could show that the custom is undoubted and invariable, he was not entitled to a decree. 1 W.R. 250 (251). E

(25) Mercantile usage, evidence of.

(a) With regard to the evidence of mercantile usage, the Privy Council said, "To support such a ground there needs not either the antiquity, the uniformity, or the notoriety of custom, which in respect of all these becomes a local law. The usage may be still in course of growth; it may require evidence for its support in each case; but, in the result, it is enough if it appear to be so well known and acquiesced in, that it may reasonably be presumed to have been an ingredient tacitly imported by the parties into their contract." 7 M.I.A. 263 (282). F

(b) A custom or usage of trade must be shown to be certain and reasonable and so universally acquiesced in that everybody in the particular trade knows it or might know it, if he took the pains to inquire. 11 M. 459 (462). G

(26) Use of books to prove custom.

(a) For observations on the use of books of history to prove a local custom, See 12 M. 495. H

(b) Where, in the Court below, sworn translations of Sanscrit works, little known, embodying the Hindu Law, as to the custom of the various

2.—"Custom."—(Continued)

schools regarding adoption, were admitted and acted on, the Privy Council, on special application, ordered the translations to be made part of the record sent to it, to be used on the hearing of the appeal. 10 W.R. 17 (P.C.) = 1 B.L.R. 1 (P.C.) = 12 M.I.A. 397. I

(27) Principle of admissibility of extrinsic evidence of custom amplifying contracts.

In commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has been applied to contracts in other transactions of life in which known usages have been established and prevailed; and this has been done upon the principle of presumption that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to these known usages. *Hutton v. Warren*, 1 M. & W. 474, cited in 17 B. 129 (148). J

(28) Scope of enquiry regarding custom need not be limited to particular locality of dispute.

(a) Where a custom is in dispute, the scope of enquiry regarding its existence need not be confined to the particular locality in which the persons alleging the custom reside. 27 C. 379, and see also, 23 C. 427. K

(b) Evidence of the prevalence of a custom, that, among the Paravars, a person's self-acquisition goes in equal shares to his children and *seshakars*, among the caste people generally in the district is relevant, but need not be confined to the particular village in dispute. 22 T.L.R. 13. L

(29) Burden of proving custom.

(a) The burden of proving a custom lies upon the party setting it up, and he ought to prove, by clear and unambiguous evidence, that it is ancient and invariable. 19 B. 428 (473). M

(b) If any particular usage, at variance with the general Hindu Law applicable to certain communities, (e.g. Suni Borah Mahomedans of Ranfur) in matters of succession, be alleged to exist, the burden of proof lies on the party alleging such special custom. 20 B. 53 (57). *Per Ranade*, J. N

(c) It was observed, with reference to a boy given in adoption to a deceased couple after their death, that when amongst Hindus (and Jains are Hindu Dissenters) some custom different from the normal Hindu Law of the country, in which the property is located, and the parties resident, is alleged to exist, the burden of proving the antiquity and invariability of the custom is placed on the party averring its existence. 10 B.H.C. R. 241 (260). O

(30) Kind of custom or usage regarding which evidence will be admitted:

A custom or usage of trade that, under a contract, which expressly provides that there shall be a shipment in a particular month, delivery to an inland carrier will satisfy the contract, being a usage which does not add an incident to the contract in respect of which the contract is silent, but one which goes to establish that the performance, in a different manner from that stipulated for, is a performance of it, the evidence of such a usage was held inadmissible. 17 B. 129 (144); see under S. 92, *infra*. P

2.—“Custom.”—(Continued).

(31) Certain presumptions regarding custom.

- (a) The Courts will, from uniform modern usage, presume an indefinitely ancient usage of the like kind, in the absence of circumstances leading to a contrary inference; (*Shepherd v. Payne*. 12 C.B.N.S. 414, & *Waterpark v. Fennel*, 7 H.L. 650); but no such presumption can be made where the practice is traced to a recent agreement. 11 B.H.C.R. 249 (271). **Q**
- (b) Where a Hindu family, governed by the Mitakshara Law, migrated to a place where the Dayabhaga prevailed, a continuance of its former usages and customs is presumable, and the onus would lie on the party, alleging an interruption or cessation, to prove such allegation. 12 M. I.A. 81 (92). **R**
- (c) If there be an invariable, certain and general usage or custom of any particular trade or place, the law will imply on the part of one who contracts, or employs another to contract for him, upon a matter to which such custom or usage has reference, a promise for the benefit of the other party in conformity with such usage or custom, provided, there be no express stipulation between them which is inconsistent with such usage. 11 M. 459 (461). **S**

(32) Effect of customs satisfactorily proved.

- (a) The consequence of a well-proved and established custom is that it must prevail against the general law. 1 M. 235 (250) (P.C.). **T**
- (b) Custom, where it is ancient, invariable, and established by clear and positive proof, does override the usual law of inheritance. W.R. (1864) 39 (41). **U**
- (c) Where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom. 12 M.I.A. 523 (542) = 12 W.R. (P.C.) 21. **Y**
- (d) On proof of conduct amounting to a mutual agreement to adopt particular customs, a customary law will be established from which the persons or classes of persons, expressly or tacitly parties to such agreements, will not be at liberty to dissent. (Thibaut). 3 M.H.C.R. 50 (58) **W**
- (e) Under the Hindu system of law, clear proof of usage will outweigh the written text of the law. 12 M.I.A. 436; cited and applied in 17 A. 294 (339) (F.B.), and held by the Privy Council in (S.C.) 21 A. 412 (423, 424) (P.C.) to have been misapplied. **X**
- (f) Though the Mahomedan Law generally governs converts to that faith from the Hindu religion, yet a well-established custom of such converts following the Hindu law of inheritance would override the general presumption. 20 B. 53 (57). Per *Ranade, J.* **Y**
- (g) But in the absence of a local custom of pre-emption among Hindus, a Hindu purchaser is not bound by the Mahomedan Law of pre-emption in favour of a Mahomedan co-partner, although he purchased from one of several Mahomedan co-parceners, nor is the said purchaser bound by that law on the ground of vicinage. 13 W.R. (F.B.) 21 (30). **Z**

(33) Proof of special family custom.

- (a) The attributes of antiquity and uniformity of usage in a plurality of instances must needs be wanting in cases of a family custom of inheritance, as it would be hard to show that the usage has been submitted

2.—“Custom.”—(Continued).

- to in a single family from a sense of legal necessity rather than by way of conventional arrangement; the custom must, in theory at least, be of an origin as ancient as the law itself to which it constitutes an exception. 11 B. H. C. R. 249 (271). **A**
- (b) A family custom must be proved by something like what would be called in England immemorial usage. 13 M. I. A. 542 (549). **B**
- (c) A family custom in derogation of the ordinary law cannot be supported on a slender foundation. 24 A. 263 (281) (P. C.). **C**
- (d) In order to establish a family-custom at variance with the ordinary law of inheritance, it is necessary to show that the usage has been ancient and invariable, and it should be established by clear and positive proof. W. R. (1864), 20 (23). **D**
- (e) A family custom as to intermarriages, being matter of family history, ought to be proved by declarations made by members of the family. W. R. (1864), 20 (23). **E**
- (f) A custom of a special course of descent in a family, differing from the ordinary course of descent in the locality, must have had a legal origin and have continuance to be recognised. 12 M. I. A. 81 (91), referring to 9 M. I. A. 242 and 243. **F**
- (g) It is of the essence of family usages that they should be certain, invariable and continuous, and well established discontinuance must be held to destroy them. 1. C. 186 (195, 196) (P. C.). **G**
- (h) The power of a family to make a new law for itself is no where recognised, but an ancient custom is held to have always been the law or to have had a legal origin, when this is possible. 11 B. H. C. R. 249 (271). **H**
- (i) A particular custom in derogation of the general rules of law, must be strictly construed and clearly proved. 3 I. A. 235 = 26 W. R. 55; referred to in 16 B. 528 (539). **I**
- (j) It is of the essence of special usages, modifying the ordinary law of succession that they should be ancient and invariable, and be established to be so by clear and unambiguous evidence. 17 W. R. 553 (P. C.) = 14 M. I. A. 570 (585), 12 B. L. R. 396 referred to in 10 B. 528 (539). **J**
- (k) No evidence of the acts of a single family repugnant or antagonistic to the general law, will establish a valid custom or usage which can be enforced by a Court of Justice. 3 M. H. C. R. 50; followed in 4 B. H. C. R. 113 (114), A. C. J., commented on in 11 B. H. C. R. 271. **K**
- (l) A family custom of inheritance is a thing that cannot be predicated of a simple and single estate, the title to which dates from comparatively a short period of time back. *Per Lord Justice James* in 13 M. I. A. 549, referred to in 11 B. H. C. R. 249 (271). **L**
- (m) When an alleged custom is a family custom, the testimony must show clearly that it has been submitted to as legally binding, not as a mere arrangement by mutual assent for peace or convenience. 11 B. H. C. R. 249 (277). **M**
- (n) A single family cannot make a special customary law for itself. 10 M. I. A. 511, referred to in 20 B. 53 (57). **N**
- (o) A special usage of inheritance (exclusion of daughters among the Utpat families of Pandharpur) proved to exist in a Hindu family and found to extend to other families, not repugnant to the fundamental principles of Hindu Law, not opposed to any universal popular conviction,

2.—“Custom.”—(Continued).

ancient, uniform, reasonable, having a legal origin and not traced back to any mistake should not be refused recognition. 11 B.H.C.R. 249 (277). O

(34) Footing on which special laws are made to rest.

(a) The prevalence in any part of India of a special course of descent, differing from the ordinary course of descent in that place, stands on the footing of usage or custom of the family. 12 M.I.A. 91, referred to in 11 B.H.C.R. 249 (273). P

(b) In a good many cases the question of family custom has been mixed up with that of the supposed impartible character of a *raj* or principality, leading perhaps to some little confusion in particular instances, but the special law of descent has been usually put on the ground of ancient family custom whether the property was a *raj* or not. 11 B.H.C.R. 249 (272), referring to 12 M.I.A. 523. Q

(35) Customs of the Jains.

(a) When a Jain litigant sets up a custom, in conflict with the ordinary Hindu Law, which is the law usually applicable to Jains, he must establish the existence of such custom by the most convincing and satisfactory evidence. 16 M. 182, referring to 6 I.A. 15. R

(b) When the customs of the Jains are set up, they must be proved like the customs varying the ordinary law, and when so proved, effect should be given to them. 3 C.L.R. 465 = 6 I.A. 15 = 4 C. 744 (753) (P.C.) ; see also, 3 A. 55 (58), 16 B. 347 and 22 B. 416. S

(c) The customs of the Jains, where they are relied upon, must be proved by evidence, as other special customs and usages varying the general law should be proved, and in the absence of proof, the ordinary law must prevail. 1 A. 688 (P.C.) = 5 I.A. 87, explained in 4 C. 744 (752) (P.C.) T

(36) Customs of the Khojas.

(a) If a custom as to succession is found to prevail amongst a sect of Muhamadans (Khojas) and is valid in other respects, the Court will give effect to it, although it differ from the rule of succession laid down in the Kuran, 2 B.H.C.R. 276 (279), per *Couch, C.J.*, following the dictum of Sir Erskine Perry, in the case of the Khojas and the Memons. U

(b) The Khojas, not being bound in matters of succession and inheritance by the Hindu Law, as Mahomedans proper are by the Mahomedan Law, or Hindus by the Hindu Law, such stringent proof of a custom of inheritance amongst them differing from the Hindu Law, should not be required of them, as from a Hindu. Satisfactory proof that the custom has existed for a considerable time and has been generally accepted by the great majority of the Khoja community will suffice. 12 B.H.C.R. 294 (321 and 322) ; commented upon in 3 B. 84. V

(37) Tribal customs.

(a) Where a caste custom, prohibiting widows of the Kadwa Kunbi caste from adopting, was set up against a particular adoption of the kind, held, that such a custom, before the Court can give judicial effect to it, ought to be established by very clear proof that the conscience of the members of the caste had come to regard it as forbidden, and that

2.—“Custom.”—(Concluded).

with regard to the custom in the particular case, “a uniform and persistent usage has not moulded the life of the caste.” 16 B. 470 (476) *Per Sargent, C. J.* **W**

- (b) The custom that a widow of the Ferozepur agriculturist tribe, leaving her husband's house and living openly in unchastity loses her right of succession was laid down as a general proposition not requiring proof in the way in which a special custom requires proof. 24 P.L.R. 1903. **X**

(38) Customs of religious institutions.

- (a) The custom and practice in matters connected with the constitution and rules of religious brotherhoods attached to Hindu temples is to be proved by testimony. 1 I. A. 209. **Y**
- (b) When, owing to the absence of documentary or other direct evidence of the nature of the foundation and the rights, duties and powers of the trustees, it becomes necessary to refer to usage, the custom to be proved must be one which regulates the particular institution. 1 M. 235 (250) (P.C.) = 1 I. A. 76, referring to 11 M. I. A. 428. **Z**

(39) Special family customs may yield to ordinary law under certain circumstances.

- (a) There is no principle or authority for holding that, in point of law, a manner of descent of an ordinary estate, depending solely on family usage may not be discontinued, so as to let in the ordinary law of succession; such family usages are in their nature different from a territorial custom which is the *lex loci* binding all persons within the local limits in which it prevails. 1 C. 186 (195) (P.C.). **A**
- (b) A family custom is capable of being destroyed by disuse where a legal origin and continuance had given it efficacy as to both ancestral and acquired possession. 12 M. I. A. 281 (291); referred to in 11 B.H.C.R. 249 (267). **B**
- (c) Those interested in the maintenance of a special custom of descent may waive it and then the ordinary law will prevail for the future. 2 W.R. 80, referred to in 11 B.H.C.R. 249 (267). **C**

(40) Special customs not legally proved—Interference of High Court in second appeal.

If a decree appealed against is based on wrong views of the Law of Evidence, or on a misconception of the canons, which the Privy Council and the High Court have defined as to how a special custom should be proved, the High Court ought to interfere in second appeal. 21 B. 110 (115) *per Jardine, J.* **D**

(41) Reason for thus jealously watching customs.

Were the Court not to look with a jealous eye at attempts to establish local or caste customs in derogation of the general canons of descent amongst Hindus, the exceptions would soon become as frequent as the rule; and *Miseria est servitus ubi jus vagum est.* 10 B.H.C.R. 241 (261). **E**

3.—Facts.

(1) Judgment, whether a fact.

- (a). A judgment as to whether a certain person was or was not the heir to another is neither a transaction nor a fact within the meaning of S. 13 12 A. 1 (13) (F.B.); approving 6 C. 171 and 12 M. 9. *Per Edge, C. J.* **F**
- (b) In a suit for damages for malicious prosecution, it was held that the judgment of the Magistrate and the evidence given before him in the prosecution in question should not be utilised as evidence or as a record of

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the facts found, and that S. 13 did not apply to the case. 9 Bom. L.R. 1134 (1136 & 1137). See, also, under S. 11, *supra* and S. 43, *infra*. **G**

(2) Class of facts covered by section.

The class of cases the section was intended to meet is as plain as possible not only from its language but from the illustrations; they are cases in which the right or custom in question is regarded as capable of surviving repeated instances of its assertion and denial, where transactions may be supposed to have gone on modifying, asserting, denying, creating or recognising it, or being inconsistent with its existence; leaving it, after all that has been given in evidence, fair matter for judicial consideration, as to whether the Court should or should not decree it. 31 B. 143 (153) *per Beaman, J.* **H**

4.—“Any transaction by which denied”.

(1) Transaction, meaning of.

(a) A transaction, in the ordinary sense of the word, is some business or dealing which is carried on or transacted between two or more persons. If the parties to a suit were to adjust their differences *inter se*, the adjustment would be a transaction; and, by a somewhat strained use of the word, the proceedings in a suit might also be called “transactions,” but to say that the decision of a Court of Justice is a transaction would be a misapplication of the term. 6 C. 171 (186) (F.B.), *per Garth, C. J.* See also, under S. 6, *supra*. **I**

(b) A transaction is something which has been concluded between persons by a cross or reciprocal action as it were, whereas the judgment of a Court is something imposed by the Authority of the tribunal. The Court neither creates, claims, modifies, recognizes, asserts, nor denies a right or custom; it determines for or against; it is a misuse of language to call a judgment of a Court of justice a transaction. *per Jackson, J.* 6 C. 171 (185) (F.B.). **J**

(2) Wide import of ‘transaction.’

(a) The term “transaction” is one of large import, and might, although by a somewhat strained use of it, be held to be applicable to proceedings in a suit. 12 B. 439 (442). **K**

(b) Where the existence of a right to some immoveable property was in question, that right having been asserted and recognised in a previous proceeding of a Court of Justice, it would not be unwarrantably straining the language of the section to say that the proceeding was a “transaction” within the meaning of S. 13; for the word “transaction” in its largest sense means “that which is done.” 6 C. 171 (175). *per Mitter, J.* dissentient. **L**

(c) Reports accompanying orders under S. 145, Crim. Pro. Code, and not referred to in the orders, are admissible in evidence, the words “a transaction in which the right or custom in question.....existence,” being *wide enough* to let in the reports forming part of the orders; the reports to come under S. 13 must be transactions, such as are described above. 29 C. 187 (198) (F.C.) = 18 M.L.J. 33 (85) = 6 C.W.N. 386 (391 & 392). **M**

(3) Judgment whether a transaction.

(a) The word “transaction” in S. 13 included judgments, not conclusive, but still admissible as evidence for what they are worth, even when they

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might not be admissible under Ss. 40 to 43. 22 W.R. 365, referred to in 24 B. 591 (598). N

- (b) A judgment in a former suit as to whether a person is or is not the heir of another is not a transaction within the meaning of S. 23, and if it were, it does not relate to the sort of right which is intended by the section. 6 C. 171 (187), *per Garth, C. J.* O†

(4) Nature of transaction referred to in section.

- (a) The transactions which are referred to in cl. (a), S. 13 are transactions by which a right or custom in question was created, claimed, modified, recognised, asserted or denied. 11 C. W. N. 703 (704). P
- (b) To prove or disprove a right or custom, it is not enough to adduce evidence of a transaction, *in which* or, *in the course of which*, the right or custom was asserted or denied. The transaction will be relevant under S. 13 cl. (a), if it be one by which the right or custom was asserted or denied. *Ibid*; *per Gault, J.* Q

(5) Effect of construing term "transaction" widely.

The result of holding the term "transaction" to be applicable, in S. 13, to proceedings in a suit, being to effect a most important departure from the English rule of Evidence, which would make judgments, decrees, and verdicts of juries only admissible in matters of public interest, it is doubtful whether such was the intention of the Legislature; a special section framed for that purpose might be expected amongst those relating to judgments, if such had been the intention. 20 B. 439 (442); *per Sargent, C.J.* R

(6) Effect of not construing term widely.

If the words "transaction" and "right" be not largely construed, judgments, decrees, and orders which were, before the passing of the Evidence Act, considered conclusive, and which now, according to the law of evidence administered in England, are considered, when not pleaded as estoppel, cogent evidence would be excluded. 6 C. 171 (175). *Per Mitter, J.*, dissentient. See also, the example given therein, and 12 B.L.R. 304, and 1 C. 144. S

(7) A difficulty.

It is difficult to see what could, within the meaning of S. 13, clause (a), be a transaction by which the right of a man to have it declared that he is the son of another man out of a particular woman, or that he is not some other man could be said to be "created" or "modified". 12 A 1. (14) (F.B.) *per Edge C.J.* T

(8) Language and object of section would exclude judgments.

"I think that, were there no case law on the subject, no one would hesitate for a moment, upon being asked to bring a former judgment, impeaching the genuineness of a sale deed on which a subsequent suit was brought, in evidence in the later suit, to reply that neither the language nor the object of S. 13 served the purpose." 31 B. 143 (153). *Per Beaman, J.* U

(9 a) But authority would include judgments.

A formidable array of authority exists for the general proposition that judgments not *inter partes* are admissible under this section. 31 B. 143 (125). Y

4.—“Any transaction by which denied”.—(Continued).

(9) How a former judgment comes in under section.

- (a) Under the last words of S. 43 a former judgment may be relevant if it can be brought in under some other provisions of the Act. 23 W.R. 162. W
- (b) The words contained in S. 43—“unless the existence of the judgment is relevant under some other provision of the Act”—introduce another section of the Act, viz., S. 13, besides those sections (40, 41, 42 and 43) which specially deal with judgments, orders, and decrees. 3 B. 3 (5), referring to the remarks of *Couch, C.J.*, in 22 W.R. 365. See also, under S. 43, *infra*. X

(10) Former judgments to be relevant must be transactions or instances.

Allowing to “right” the amplest possible meaning, judgments, brought in under S. 43 and S. 13, must be either “transactions or instances,” and as such, may be the simplest and most convenient proof of the transaction, viz., the litigation, or the instance, viz., the assertion by the plaintiff, and the denial by the defendant, of the right. 31 B. 143 (157); *per Beaman, J.*; *q.v.* for an elaborate discussion of the section. Y

(11) Effect of making judgments relevant as transactions or instances.

The effect of extending the concluding words of S. 43, read with S. 13, so as to make all judgments, though not *in rem* and not *inter partes*, and not upon questions of public right, relevant as transactions or instances, of the assertion or denial of the right in question, where one party to the subsequent was also a party to the prior litigation, has been to conclude the point to prove which they are admitted, though in every case the courts have been most particular to disclaim the doctrine of *res judicata* regarding judgments so admitted. 31 B. 143 (155), *per Beaman, J.* See also under S. 43, *infra*. Z

(11 a) The resulting dilemma.

If a former judgment is admitted *qua* judgment, then the whole of its contents must be *pro tanto*, *res judicata*; if that effect is denied, then the thing is mere opinion, and does not appear admissible, as to its contents, under any section or provision or known principle of evidence or the Evidence Act. 31 B. 143 (157); *per Beaman, J.* A

(12) Ground on which judgments not *inter partes* are held inadmissible.

- (a) The cases, which decide that judgments, not *inter partes*, are not admissible in evidence, proceed chiefly on the ground that those judgments are sought to be used as having the effect, more or less, of *res judicata*. 24 B. 591 (598) = 2 Bom. L.R. 386; *per Ranade, J.* B
- (b) A party who has been allowed to put in a previous judgment not *inter partes*, for the purposes of S. 13, cannot be allowed to use its contents *qua* judgment virtually thereby converting it into a *res judicata*. 31 B. 143 (158 & 159). *Per Beaman, J.* C

(13) Meaning of, “while relevant it is not conclusive.”

A former judgment, “while relevant, is not conclusive” means that the judgment, if its subject matter is co-extensive with the subject matter of the suit, in which it is offered as evidence, must be altogether or not at all *res judicata*. 31 B. 143 (157); *per Beaman, J.* D

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(14) **Distinction between relevancy and conclusiveness of judgment is a matter of nicety.**

Where the subject matter of a former judgment coincides with and is identical with the entire right in issue, or that can ever be in issue, on the same state of facts, it becomes a matter of the utmost nicety, to distinguish between the relevancy and the conclusiveness of the judgment. 81 B. 143 (156); *Per Beaman, J.* E

(15) **Section does not require former judgment to be between same parties.**

In this section, there is not the limit that the suit must be between the same parties as the one in which the judgment or decree in it is sought to be used. 22 W. R. 365 (366); referred to in 12 A. 1 (17) (F.B). F

(16) **Restriction under which judgments are admitted under section.**

If judgments are admissible only under Ss. 43 and 13, they must be rigidly restricted to proving the transaction or the instance meant by the section. 31 B. 143 (158). G

(17) **Former suit, not former judgment is transaction or instance.**

Former judgments and decrees themselves are not a “transaction” or an “instance,” but the *suit* in which they were made was a transaction or an instance, in which rights were asserted or recognised; and to establish that such a transaction took place they were the best evidence. *Per Straight, J.* 12 A. 1 (25). H

(18) **Instances where former judgments held inadmissible.**

(a) Where the ultimate determination of the right to recover possession of certain property depended on the admission in evidence of a judgment in a previous suit to which the plaintiff was no party, but where the present defendant was the plaintiff, *held*, that the former judgment was not admissible as evidence in the subsequent suit, as it was not a transaction, and the right claimed was not a ‘right’ within the meaning of S. 13, and as a final construction given to S. 13 would make Ss. 40–43 a surplusage. 6 C. 171 (186) (192) (F.B.) = 6 C.L.R. 439 (F.B). *Matter, J., dissentient*; referred to in 24 B 591 (597); see also, under S. 11 *supra*. I

(b) Where a plaintiff sued his brother and the wives of his brothers to recover possession of a house and grounds alleged to have been purchased by him from his father, a judgment in a previous suit against him and his parents holding the sale to be a sham transaction, was held not to come within either the word “transaction” in S. 13 or “particular instances” in that section. 31 B. 143 (150); *per Russell, C.J.*, but see *infra*. J

(c) Where a putnidar of a taluk sued to eject the defendant, on the ground that the defendant failed to enter into an agreement with him to pay a proper rent, the judgment and award in a previous arbitration suit by virtue of which the defendant recovered possession of the property was held to be inadmissible in evidence against the plaintiff. 12 C. 82 (91). K

(d) The amount claimed by a plaintiff as arrears of rent for his shop being in dispute, a judgment in a suit, between the defendant and the plaintiff's brother who were partners, and decided against the defendant,

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tendered by the plaintiff to prove the *bona fides* of the entries made in the firm's book in his brother's handwriting, was held to be inadmissible against the defendant. 10 B. 439 (440, 443), *distinguishing* 3 B. 3. L

(19) Instances where former Judgments held admissible.

- (a) Where, in a suit between P and D, the question was whether D was the son of H and his wife K, or whether one R was that son, a previous suit between P and K, in which K had defeated P by showing that she had had by H a son called D then living, was a "transaction", in which the right of D, as the living son H, to proprietary possession of his estates was asserted to defeat P's claim, and recognised by a judicial tribunal for that purpose, and the judgments and decrees in that suit were evidence of that transaction and admissible for that purpose. *Per Straight, J.*, 12 A. 1 (26) (F.B.). M
- (b) The word 'transaction' is certainly large enough to allow the proceedings (certain transcript decisions) in *utmanee* suits to be admitted as evidence, not as conclusive, but of such weight as the Court may think they ought to have. 22 W.R. 365 (366); *referred to* in 12 A. 1 (17) (F.B.). N
- (c) Where in a suit by the plaintiffs, as purchasers of the rights of one of three defendants, for a third share of the ancestral property of the defendants, the *bona fide* character of a partition-deed was in question, the record and judgment in a previous suit, where the deed was held to be fraudulent and collusive, were held to be relevant under S. 13, as showing the conduct of the parties and their admissions, though the former decision would not estop the defendants from contesting the claim as *res judicata*. 24 B. 591 (599). *Per Ranade, J.* O
- (d) Where a suit was disposed of in accordance with a compromise, the terms of which were set out in the judgment in the form of a recital, held, that the judgment was undoubtedly the record of a transaction by which the rights of the parties were previously recognised, and, therefore, that transaction was relevant under the provisions of S. 13. 23 W.R. 162 (163). P
- (e) In a suit for confirmation of the plaintiff's title as representing a decree-holder and to have the property sold in execution of a decree, the defendant alleging a purchase for valuable consideration, a former judgment, not pronounced between the parties to the suit, declaring the purchase spurious, though not binding and conclusive evidence against the defendant, was held to be sufficient to give the plaintiff a *prima facie* case which, by the rules of pleading, the defendant should rebut. 11 W.R. 118 (119). Q
- (f) In a suit by the plaintiffs for possession of certain lands, on the ground that the title to them was acquired by adverse possession, the plaintiff and judgment in a former suit *inter partes* by the plaintiffs' father for a declaration of his title to those lands, based on mortgages alleged to have become irredeemable, where only a part of the claim was decreed, would be admissible to prove the fact that the plaintiff's father claimed to be entitled to the land and to be in possession. 7 O.C. 122 (125) *per Chamier, J.* R

- * (g) Where it was contended that there was no legal evidence for inferring that a certain land in dispute was *debutter* property, a former *rubkar*, by

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which the Collector released the land in suit, was held to be a transaction, within the meaning of S. 13, and a relevant fact from which a previous grant might be inferred, though the release of itself did not constitute such a grant. 10 C.W.N.L.C. **S**

- (h) In a suit for a balance of rent on the ground that the defendants were *blowlee* tenants of a jaghir, and not *mokurraridars* as claimed by them, a *roobakaree* (proceedings of Court), in which certain decree-holders of an ancestor of the defendants sought to attach his *mokurraree* rights in the jaghir were held to be relevant evidence under S. 13 of the Act. 24 W. R. 284 (285). **T**

(20) What the Court can look at when former judgments are admitted.

In a suit upon a deed of sale alleged to be void for fraud and want of consideration, a judgment in a previous suit declaring it to be fraudulent may be admissible to prove that years back, there was a dispute about the genuineness of the deed; but the Court cannot look at the issues in the judgment and the findings which the Judge came to upon them and then treat those findings as of any legal probative value in the suit. 31 B. 143 (159). *Per Beaman, J.* **U**

(21) Observations of Privy Council on laxity in admitting documents.

The Privy Council observed, with regard to the laxity in admitting documents obtaining in the Indian Courts, that, while it may not be desirable, in all cases, to apply strict and technical rules to the admissibility of evidence in the Courts in India, the substantial principles on which the authenticity and value of all evidence rest should be observed. 17 W. R. 553 (554) (P.C.) = 12 B.L.R. 396 = 14 M.I.A. 570. **Y**

(22) Instances of relevant documents other than judgments.

- (a) Deeds containing statements as to title must be regarded not as exceptions to the rule excluding hearsay, but as constituting the transactions they effect. When it is asserted that land belongs to A, the meaning is that A is entitled to it by a series of transactions of which his title-deeds are by law the exclusive evidence. The existence of the title deeds is thus the very fact to be proved. Steph. Dig. 7th Ed. pp. 165 & 166. **W**

- (b) Claims and assertions of a right made and submitted to the deeds proving these are admissible under this section. *Malcolmson v. O'Dea*, Phip. Ev., 4 Eth Ed. p. 96; Tay. Ev. 10th Ed. p. 467; Steph. Dig. 7th Ed. p. 165. **X**

- (c) In a suit for trespass to land alleged to be the plaintiff's freehold but over which the defendant claimed a right of common, the fact that the plaintiff's ancestors had granted leases of the land—though only counterparts signed by the lessees are produced—is admissible on the plaintiff's part. *Doe v. Pulman*, 3 Q.B. 622 (623-6) Phip. Ev. 4th Ed. p. 111; Steph. Dig. 7th Ed. p. 8. **Y**

- (d) In a suit for trespass to a fishery appurtenant to the plaintiff's manor, entries, in the Court Rolls, of ancient licences to fish, granted by the plaintiff's ancestors, without proof that the rents received had been paid, and modern leases with such proofs, are admissible for the plaintiff. *Royers v. Allen*, 1 Camp. 309, Phip. Ev. 4th Ed. p. 113. **Z**

- (e) The question in a suit—where J's sons and A were defendants—for the rent of a certain property being whether A was interested in the said

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property, and as such, liable to pay rent due under a lease executed to J, a judgment in a previous suit between A and J, declaring the property to be part of A and J's partnership property, was held to be relevant in the subsequent suit, as a transaction recognising the right of A in that property, within the meaning of S. 13 of the Act. 9 C.W. N. 402 (415); *per Ghose, J.* **A**

- (f) In a suit for a declaration of the plaintiff's title to certain land, certain documents, consisting of a conveyance in favour of the plaintiff's father, of a sale-certificate obtained by his father's vendor of certain execution proceedings containing a recital of his father's petition asserting his title, and of a judgment obtained by his father recognising his title, to none of which the defendants were parties, were held to be relevant, though not conclusive, as tending to show that the plaintiff's ancestors had dealt with the site as their own for a long term of years. 15 M. 12 (13). **B**

- (g) If the boundaries of a piece of land, as stated respectively in a sale certificate and in a plaint, identify the land with that regarding which a former decision was passed, that decision would, under S. 13, be evidence of some sort in favour of the plaintiff, though the present defendants may not be the legal representatives of the person against whom the decision was passed. 25 W. R. 180 (187). **C**

- (h) In a suit for a declaration that the plaintiffs were entitled to the exclusive management of a temple, a compromise of the rights of the parties, entered into in 1845 and 1874 was not allowed to be re-opened, as it was held that the usage which had existed for so long a period was the best exponent of the *Melkola* right vested in the defendants, a right twice acquiesced in by the plaintiffs or their predecessors. 18 M. 1 (12) (P.C.). **D**

- (i) In a suit by the plaintiff as reversioners, for possession of certain land belonging to a certain person, denying the validity of an adoption made by him, a document showing a compromise effected between the plaintiffs and the deceased person, was held to be relevant, though unregistered, as evidence, not of any transaction so far as it affected land, but as evidence that the plaintiffs had acquiesced in the adoption. 292 P. L. R. 1900. **E**

- (j) Inquisitions *post mortem* finding the existence of a right of fishery in the lords of a certain manor, are admissible to prove these facts. *Rogers v. Allen*, 1 Camp. 309, Phip. Ev. 4th Ed. p. 329; Steph. Dig. 7th Ed. p. 8. **F**

- (k) A series of family settlements were admitted to show that for more than a century no one had a legal right to dedicate a certain foot path to the public. *Brough v. Lord Searsdale* Steph. Dig. 7th Ed. p. 8. **G**

- (l) Documents containing recitals that a particular plot of land is included within a particular *howla* though not *inter partes* are admissible in evidence under S. 13 of the Evidence Act as transaction by which the right to hold those plots as part of the *howla* is recognised and particularly when the existence of that right is a question raised in the case and is a relevant fact. 5 C. L. J. 55 (58). *per Geidt J*; see, also, under S. 11 *supra*. **H**

- (m) On the question whether certain *Shrotriendars* were the owners of a village or were only entitled to the *melicaram* documents executed by

4. "Any Transaction by which...denied".—(Continued).

the predecessors in title of some of the defendants and by other tenants in the same village showing that the executants were not occupancy ryots and were *parakkudis* were held to be relevant evidence, under S. 13 as showing the tenure on which the village was held, though the defendants were not concluded by them. 16 M. 194 (196).

(n) In a suit for the recovery of possession of a certain land on the ground of ouster, certain road-pass papers and a deed of sale by which the plaintiffs came in possession of the property were held to be relevant, as transactions and instances in which the right of the plaintiffs and their predecessors were asserted and recognised. 22 W. R. 293 (296). **J**

(o) Where, in a suit for possession of a tank, the plaintiff tendered in evidence a copy of *solanamah*, to which the defendant was not a party, held, that, though no question of right or title could be decided adversely to his interest on the basis of that agreement, it would be evidence that, by an order of Court based on that *solanamah*, the plaintiff was put in possession of the tank. 15 W.R. 261 (262). **K**

(p) A survey map, on which a plaintiff, suing for certain lands as part of her village, relied, was held to be sufficient in the absence of other satisfactory proof of title or of long antecedent possession, to establish the plaintiff's right to the land, and to disturb the defendant's present possession. 12 W.R. 210 (212), *per Loch and Bayley, JJ*; *Jackeon, J. contra*. **L**

(q) A map prepared by an officer of Government while he was in charge of a khas mehal, the Government being in possession of that mehal as a private proprietor, is relevant, under S. 13 as evidence of possession or of assertion of a right. 5 C. 287 (291). **M**

(23) Instance of irrelevant document.

Where the question was whether a tenant held lands under the *nakdi* or *bhach* system of rent, and the Court based its decision on a statement contained in a *hebanama* executed by the deceased grandfather of the tenant, held that the *hebanama* was not admissible in evidence under S. 32 (7) read with S. 13 (a) of the Act. 11 C.W.N. 703 (704): see, also, under S. 32, *infra*. **N**

(24) An anomalous case.

Evidence of the receipt of illegal gratification by an accused person, a public servant, from a certain firm in 1877 and 1878 was held to be inadmissible to prove that he received the same in 1876, as the two sets of transactions were not so connected as to make them relevant to one another under Ss. 5 to 13 of the Act. 6 C. 655 (659, 662) — 8 C.L.R. 197.

(25) Instances of transactions relevant to prove custom.

(a) In a suit to recover possession of an estate, descendible by right of family custom on the eldest son, to the exclusion of other sons, certain previous transactions, consisting of a petition presented by the plaintiff's father and uncles to the Collector for registration of their names as joint proprietors, of an agreement to pay Government revenue, of joint suits against tenants and of various other acts, were taken into consideration, as a series of important acts of the parties, founded upon the footing that the ordinary rules of succession governed the descent. 1 C. 186 (193) (P.C.). **P**

4.—“Any Transaction by which...denied”.---(Continued).

- (b) Where, in a suit to establish the existence of a family custom, a deed containing a recital of the customs as alleged in the plaint and a covenant to do nothing contrary to it, were tendered in evidence by the plaintiff, they were held to be admissible in evidence on the plaintiffs' behalf, though they could themselves be called as witnesses; but the custom though admissible, must be proved *aliunde*. 10 B.L.R. 268. **Q**
- (c) An old deed, purporting to state the customs of a manor, and made between a former lord and certain of the copy-holders, but which omitted the alleged custom, is relevant to disprove a manorial custom. *Anglesey v. Hutherton*, 10 M & W. 218; Phip Ev. 4th Ed. p. 280. **R**
- (d) Declarations regarding matters of public and general interest may be made in:—
- (a) maps prepared by or by the direction of persons interested in the matter; *Hammond v. Bradstreet*, 10 Ex. 370 and *Pipe v. Fulcher*, 1 E & F. 111.
- (b) copies of Court rolls. *Crease v. Barrett*, 1 C. W. & R. 928;
- (c) deeds and leases between private persons, *Plaxton v. Dare*, 10 B. & C. 17.
- (d) verdicts, judgments, decrees, and orders of Courts and similar bodies, if final; *Duke of Newcastle v. Broxtowe*, 4 B. & Ad. 273, & *Pun v. Cuvell* 6 M. & W. 234, 266, Steph. Dig. 7th Ed. p. 43. **S**
- (e) On the question whether a certain custom existed in a part of a certain parish, certain entries in the parish books, signed by deceased church-wardens, were deemed to be relevant, *Stead v. Heaton* 4 T.R. 669, Steph. Dig. 7th Ed. p. 40. **T**
- (26) **Wajib-ul-arz, object of.**
- A *wajib-ul-arz* was never intended to be used as an indirect means of giving effect to the wishes of a sole proprietor with regard to the nature of his tenure or the mode of devolution of the property which should obtain after his death, its purpose being to furnish a trustworthy record of existing local customs. 15 A. 147; see, also, 5 A.L.J. 79. **U**
- (27) **Wajib-ul-arz need not be attested by the proprietors.**
- A *Wajib-ul-arz*, not being a mere contract, but a record of rights made by a public servant, is entitled to weight as evidence of a village custom, without attestation or execution by the proprietors of the mouzah. 2 N.W.P. 395; but see *infra*. **V**
- (28) **Wajib-ul-arz a transaction relevant to prove custom.**
- (a) A *Wajib-ul-arz*, prepared and attested according to law is *prima facie* evidence of the existence of any custom of pre-emption, which it records, such evidence being open to be rebutted by any one disputing the custom. 2 A. 876. See, also, 5 A. L. J. 79; (where a certain *wajib-ul-arz* was not held to prove the existence of a custom of pre-emption in certain mahals). **W**
- (b) A provision in the Record of Rights (*wajib-ul-arz*) that a non-proprietor could not build anything but a residence without the consent of proprietors, and when he left the residence and village, he could

4.—“*Any Transaction by which denied*”.—(Continued).

remove the materials, was held to represent the custom prevailing in the village, which was in accord with the general village custom. 145 P. L. R. 1900. **X**

- (c) Where the plaintiffs claimed to be paid for their labour in the customary manner described in the *wajib-ul-arz*, it was held that the claim was enforceable, as it could not be argued that such a custom was unreasonable or otherwise invalid. 198 P. L. R. 1900. **Y**

(29) **Instances where *Wajib-ul-arz* held to be of no value.**

- (a) A document purporting to be a *wajib-ul-arz* drawn up during the time when a *mahal* was owned by one single proprietor could not be any evidence of a custom of pre-emption obtaining in that *mahal*. 18 A. W. N. 89; 14 L.A 127, referred to. **Z**

- (b) On the question whether, under local custom, a tenant, ejected from his holding by a Revenue Court, lost his right in the trees on plots which did not form part of his cultivatory holding, by reason of his having lost it and having ceased to reside in his village, a *wajib-ul-arz* (record of existing local customs)—stating that the grove of a tenant running away from his village, because he owes his landlord rent, becomes the *talukdar's*—was held to be no evidence of the alleged custom. 2 O. C. 280 (285). **A**

- (c) On the question whether certain proprietors were entitled to eject the defendants from a house occupied by them in pursuance of an alleged customary agreement, certain entries in a *Wajib-ul-arz* to the effect that, in the event of ejection, the tenant shall be entitled to the materials of the house were held to afford no room for any reasonable inference of a custom that the village proprietors, the eventual owners of the site, have the power of ejection. 246 P. L. R. 1900. **B**

(30) ***Rewaj-i-am* relevancy and evidentiary value of.**

- (a) Particulars regarding customs recorded in a *musl-rewaj-i-am* duly prepared and attested are admissible in evidence as an official record of a custom (*e. g.*, exclusion of daughters and daughters' sons from inheritance). 7 O. C. 134 (136). **C**

- (b) But an entry in the *rewaj i-am* contrary to the general custom, when the *rewaj-i-am* is not supported by any instances and when no instances have been satisfactorily proved in Court, was held insufficient to shift the burden of proof on the collaterals to prove the general custom of the Pathans of Hoshiarpur, that collaterals succeed in default of male lineal descendants. 548 P. L. R. 1900. **D**

(31) **Relative value of *wajib-ul-arz* and *rewaj-i-am*.**

Where the question was whether or not a plaintiff could claim a right of pre-emption on the ground that he was more nearly related to the vendor than the vendee, an entry in the *rewaj-i-am* that, in respect of pre-emption regarding ancestral land, the right accrued to the collaterals, was held not to be an entry regarding the custom of pre-emption generally, and to have none of the force which an entry in the *Wajib-ul-arz* had under S. 44 of the Punjab Land Revenue Act. 182 P.L. R. 1900. **E**

4.—“Any Transaction by which...denied”.—(Concluded).

(32) Case where record of rights found to be a concoction.

A document that appeared to be an official record of a custom, and had been admitted in evidence as such, having been found to be the concoction of a person who was interested in proving that such a custom was in force, was held to be worse than useless, to be absolutely misleading. 15 C.20 (P.C.), referred to in 7 O.C.134 (135). F

(33) Instances of transactions not satisfying requirements of section.

(a) On the question whether certain holdings were transferable by the “law and custom prevailing in Behar,” the oral evidence, especially of a certain witness, whose knowledge was derived from what he had heard of such transactions, which was relied on as establishing the custom, was held to be such as did not satisfy the requirements of S. 13, which shows the character of evidence by which a right or custom may be proved. 23 C. 179 (184). G

(b) A Collector's letter and summary to the Board of Revenue, containing certain declarations alleged to have been made by certain zemindars on a question of succession was held to have been not properly admissible; it could not be safely relied on as affording clear and unambiguous proof of the existence of an ancient and invariable custom in the district. 17 W.R. 552 (553) (P.C.) = 12 B.L.R. 396 = 14 M.I.A. 570. H

(c) An acknowledgment, taken in troubled times from the guardian of an infant *mutant* of a zemindar's customary right to control and remove the *malant*, is entitled to little, if any, weight as evidence of the custom. 1 I.A. 209. I

*5.—“or which was inconsistent with its existence”.

Judgment relevant as showing transaction inconsistent with right claimed.

Where the question was whether or not certain properties were subject to a trust for charitable purposes under a will, a judgment in a previous suit, by third parties interested in the trust, which found the estate not bequeathed for charitable purposes and the will revoked, was held to be relevant against the defendant, though not conclusive against him. 19 A. 277 (289) (P.C.) = 1 C.W.N. 265 (268) = 24 I.A. 10. J

6.—“particular instances...departed from”.

1) Ownership proved by particular instances.

(a) Ownership may be proved by proof of possession, which can be shown by particular acts of enjoyment, these acts being fractions of that sum total of enjoyment which characterises *dominium*. A.A. and W. Ev. 4th Ed. p. 64, referring to *Jones v. Williams*, 2 M. and W. 326, and *Wylls' Ev.* p. 41. K

*(b) Acts of ownership on parts of a certain land etc., are admissible on questions of ownership generally, not on the ground of acquiescence of any party; they are admissible of themselves *proprio vigore*; for they tend to prove that he who does them is the owner of the soil; though if done in the absence of all persons interested to dispute them, they are of less weight. *Jones v. Williams*; 2 M. and D. 327; *Tay. Ev.* 10th Ed. p. 255; see also, *Stanley v. White*, 14 East. 332. L

(c) On questions of title, acts done with regard to other places connected with the *locus in quo* by such a common character of locality as to give rise

6.—“*particular instances ..departed from*”. —(Continued).

to the inference that the owner of one is likely to be the owner of the other are admissible in evidence. *Jones v. Williams*. 2 M and W. 326; *Per Parke*, B; Phip. Ev. 4th Ed. p. 144; Steph Dig. 7th Ed., p. 6; Tay. Ev., 10th Ed. p. 254. **M**

- (d) Repeated acts of ownership regarding the same property are relevant on questions of ownership. *Woodward v. Buchanan*. L.R. 5 Q.B. 285; Phip Ev. 4th Ed. p. 144. **N**

- (e) Where the Crown claimed the salmon fishing above the falls in a certain river against a certain person, evidence of occasionally fishing there, of having watchers during the spawning season, and of his binding his tenants in their leases to protect the fishing, and prevent all others from fishing was admitted on that person's behalf. *Lord Advocate v. Lord Lovat*, 5 App. Cas. 273; Field Ev. 6th Ed. p. 77. **O**

- (f) Acts of ownership, when submitted to, are analogous to admissions or declarations by the party submitting to them that the party exercising them has a right to do so, and that he is therefore the owner of the property upon which they are exercised. *Starkie Ev.* p. 470, note F, cited in 2 W.R. 210 (212). **P**

- (g) Where, in an action for trespass, the question was whether or not the word “village” occurring in an old lease included an adjacent mountain, evidence of acts of ownership by the plaintiff's predecessors on other parts of the mountain was deemed to be relevant. *Watter park v. Fenmel*, 7 H.L.C. 650, Phip. Ev. 4th Ed. p. 582; referred to in 7 B. 109 (116). **Q**

- (h) But on the question whether a manor was formerly part of another manor, the fact that the lord of the former manor had long paid rent to the lord of the latter was held to be no evidence. *Anglesey v. Hatherton*, 10 M. and W. 218, Phip. Ev. 4th Ed. p. 115. **R**

(2) **Prior decisions relevant as instances—English Law.**

- (a) The rule of English law regarding the relevancy of prior decisions is that, except in matters of general interest or public rights, a verdict in a previous suit, to be *admissible*, must be between the same parties or through whom the parties, actually in litigation, claim. *Per Markby, J.* 6 W.R. 232 (233). **S**

N. B. {The learned judge declined to apply the rule itself in all its strictness to the Courts of this Country}.

- (b) Judgments, convictions and awards *inter alios* are relevant as acts of ownership, even on matters of private right to explain ancient grants. *Brew v. Hgren*. I.R. 11 C.L. 29, Phip. Ev. 4th Ed. p. 96; Tay. Ev. 10th Ed. pp. 1222 and 1270. **T**

(3) **Relevancy of prior judgments as instances—Indian Law.**

- (a) A previous litigation, though not between the same parties, may be a particular instance within the meaning of S. 13 (b), in which the right or custom, in question in the subsequent litigation, “was claimed, recognised, or exercised, or in which its existence was disputed, asserted or departed from.” 12 A. 1 (14) (F.R.) *Per Edge, C.J.* **U**

- (b) The existence of a judgment must be relevant as a transaction by which the right was claimed, modified, etc., or as a particular instance in which the right was claimed etc., 31 B. 143 (158). *Per Beaman, J.* **Y**

6.—“*particular instances...departed from*”.—(Continued).

- (c) Where judgments are sought to be used to show the conduct of the parties, or show particular instances of the exercise of a right, or admissions made by ancestors, or how the property was dealt with previously, they may be used under S. 13 as exceptions recognised under S. 43 as relevant evidence. 24 B. 591 (598); *per Ranade, J.* See, also, under S. 11, *supra*. **W**
- (d) If evidence could be given of instances in which a purely local custom was recognised in suits not *inter partes*, there is no reason why a different rule should be applied when an incorporeal right or a right of ownership is in question; if the Legislature intended any such distinction, it would have been made patent in S. 13. 12 A. 1 (17) (F.B.) *Per Edge, C.J., referring to the case in Weekly Notes, 1888, p. 248.* **X**
- (e) Except where they are judgments *in rem*, or where they relate to public matters, judgments not *inter partes* have always been held not to be *res judicata*, but they cannot be wholly excluded for other purposes in so far as they explain the nature of possession, or throw light on the motives or conduct of parties or identify property; they may have very high value as evidence and may even shift the burden of proof. 24 B. 591 (599). *Per Ranade, J.* **Y**

(4) Cases of former judgments held inadmissible.

- (a) In a suit by the plaintiff to recover arrears of rent from the defendant both in cash and in kind, certain *ex parte* decrees obtained against the registered tenants of the tenure, ordering rent both in cash and in kind, were held to be inadmissible in evidence in the suit against the defendant, as he was neither a party to them nor derived his title from the parties against whom those decrees were passed, although he was bound as owner of the tenure by the *ex parte* decrees when passed. 11 C. 562 (566); 6 C. 171, *followed*. **Z**
- (b) Where the plaintiffs sued to recover their share of the rent of certain tenures held by them by right of purchase, a decree obtained in a former suit by another sharer in the same estate against the same defendants, offered in evidence to prove the defendants' possession of the tenures, was held inadmissible in evidence. 13 C. 352 (357) (F.B.). *Mitter, J., dissenting*; 6 C. 171 and 12 C. 580, *followed*; *referred to* in 12 A. 1 (15). **A**
- (c) Where, in a suit between P and D, the question was whether D was the son of H and his wife K, or whether one R was that son, a judgment of a criminal Court, in a case in which D was prosecuted as R and in which the criminal Court had found that R had died some years before the date of the alleged crime and expressed an opinion that P, who was not the prosecutor, had got up the case, was held to be inadmissible under S. 13. 12 A. 1 (19) (F.B.). *Per Edge, C.J., contra per Mahmood, J.* **B**
- (d) In a suit for a declaration that the plaintiff was the sole manager of a devasom, certain certified copies of judgments and decrees, which the defendants sought to make use of, not as constituting matters in dispute *res judicata*, but as containing summaries of statements made by parties concerned in the management of the plain devasom properties and as evidence of conduct, were held to be inadmissible. 11 M. 116 (123); *referring to* 5 C. 744 and 9 C. 586. **C**

6.—“particular instances...departed from”.—(Continued).

- (e) Where a previous suit was to recover a two thirds share of a property, for the remaining one third share of which a different plaintiff subsequently sued, the judgment in the former suit was held to be inadmissible in the later suit, the subject matter of the two suits not being identical. 25 C. 522 (530) = 2 C.W.N. 501 (507 & 508). See under S. 11, 413 (A) (b), *Supra*. **D**
- (f) In a suit for contribution for costs of a previous suit, decreed against the plaintiffs and the defendants, the finding of the Court in the former suit (as gathered from the grounds of appeal in the former suit) was held to be no evidence, in the suit for contribution, of the fact found, as the finding was arrived at in a case in which the present plaintiff and the defendants were all co-defendants and a third party was the plaintiff. 24 C. 330 (382); *following* 13 C. 352. **E**
- (g) Where the plaintiff sued for *khas* possession and mesne profits of certain land on the ground that the defendants refused to give up possession or pay rent for it, a decree, declaring the land in question liable for payment of rent, formerly obtained against them in a suit to which the plaintiff was no party, nor from the decree-holder in which the plaintiff derived his title, was held to be inadmissible in evidence. 12 C. 207 (209); 6 C. 171, *followed*; 11 C.L.R. 528, *distinguished and explained*. **F**
- (h) A bare expression of opinion in a former judgment as to the fact of possession which was not given effect to by the decree is not admissible in proof of possession either at the date of the judgment or at any other time, as not being a recognition of a right within the meaning of S. 13 of the Act. 7 O.C. 122 (125); 25 C. 522; 22 C. 533; and 25 C. 187 (**P.C.**) *distinguished*. **G**

(5) Effect of Privy Council decisions on the ruling in 6 C. 171 (F.B.).

The Full Bench decisions of 6 C. 171 and 13 C. 352 must be regarded as materially qualified by the Privy Council decisions in 22 C. 533 = 22 I. A. 60 and 1 C.W.N. 265 = 24 I.A. 10 and that, under certain circumstances, and in certain cases, the judgment in a previous suit to which one of the parties in the subsequent suit was not a party may be admissible in evidence for certain purposes, and with certain objects in the subsequent suit. 2 C.W.N. 501 (507) = 25 C. 522 (530) (**F.B.**); *referred to* in 7 O.C. 124. **H**

(6) Explanation of 6 C. 171 (F.B.)

- The sole object for which it was sought to use the former judgment in 6 C. 171 (**F.B.**) was to show that, in another suit against another defendant, the plaintiff had obtained an adjudication in his favour on the same right, and it was held that the opinion expressed in the former judgment was not a relevant fact within the meaning of the Evidence Act, 18 M. 73 (78). **I**

(7) Instances where former judgments were held relevant.

- (a) Decrees in old possessory suits brought by the plaintiff's ancestors against trespassers are admissible as assertions of ownership submitted to, though by strangers in title to the defendant. *Neill v. Devonshire*, 8 App. Cas. 135, Phip. Ev. 4th Ed. p. 114; *Steph Dig.* 7th Ed. p. 8. **J**

6.—“*particular instances.. departed from*”.—(Continued).

- (b) On the question whether certain maintenance grants were heritable and alienable, old judgments in which the pleadings were set out, were held to be admissible under S. 13 of the Act, as instances in which the right in question was claimed, disputed and disallowed. 3 C.L.J. 521. See also under S. 35 *infra*. **K**
- (c) Where the plaintiff sued the defendant for alienating certain land alleged to belong to a certain gaddi, a former judgment *inter partes* declaring the property to belong to the said gaddi, and not to be the defendant's by acquisition, was held to be relevant as showing that the question, once finally determined, could not be re-opened by the defendant. 70 P.R. 1875. **L**
- (d) On the question whether a person had acquired a certain land in question, a decision to that effect in a previous suit, in which the question was tried between all the parties to the later suit was held to be relevant under S. 13, though the plaintiffs and defendants in the later suit were in form co-defendants in the former. 22 W.R. 457. **M**
- (e) An *ex parte* decree obtained by the plaintiff is evidence *quantum valeat*, under the new Evidence Act, even though the defendant was no party to it; its having been *ex parte* does not in the least detract from its qualification as an admissible evidence. 24 W.R. 431 (432). **N**
- (f) In a suit where the plaintiff claimed to recover from the defendant *tahootee* rent in respect of certain mehals, whereof the defendant was *ijaradar*, it was held that, where his previous suit for the same was not decreed as having been framed inconsistently with his true situation, it was open to the plaintiff to adduce the proceedings of the former suit as evidence to be taken for what they were worth. 24 W.R. 265; (266). **O**
- (g) In a suit between zemindars and mirasdars as to the ownership of poramboke lands, a judgment in a previous suit between the zemindar and certain other mirasdars, wherein it was held that the waste lands were the property of the mirasdars is admissible as evidence, under S. 13 of the Evidence Act. 17 M.L.J. 518 = 2 M.L.T. 455 = 30 M. 510 (512); 26 M 371, *distinguished*. **P**
- (h) Where, in a suit for rent by one co-sharer against another, the defendants while admitting exclusive possession of the plots, claimed them as *lakhiraj*, certain decrees put in by the plaintiff, obtained by him against persons who were in possession of the lands alleged to be *lakhiraj*, were held to be relevant to show the character of the land and that, in respect of the lands in question, a claim for rent was successfully made on a former occasion. 11 C.L.R. 528 (530); *referred to and explained* in 12 C. 207 (209). **Q**
- (i) In a suit for *khas* possession of certain land, a judgment offered in evidence by the defendant, obtained by him in a previous suit to which the plaintiff or his predecessors in title were not parties, was held to be admissible in evidence as showing the nature of the possession of the defendant's predecessor in title. 11 C.745 (747). **R**
- (j) In a suit for partition of joint family property, certain previous judgments, produced, not in order to prove an adjudication between third parties, but in order to prove a statement made by a predecessor in title of the party against whom the documents were sought to be proved, were

6.—“*particular instances...departed from*”.—(Concluded).

held to be admissible in evidence. 18 M. 73 (77 and 78) See, also, under S. 35, *infra*. S

- (1) In a suit to recover the arrears of certain dues payable to a temple by certain owners of land, certain judgments in previous suits claiming, as of right, the payments in question, and in one case, from Christians, were held to be admissible in evidence, as evidence of particular instances in which the right was claimed, and in which its exercise was disputed, etc., and was further adjudicated upon, the right being a right of the character dealt with in S. 13. 12 M. 9 (13); 3 B. 3 and 6 C. 171, *referred to*. See, also, under S. 42, *infra*. T

- (4) Where the plaintiff claimed an “*utnamee*” right to land, the Court admitted, in evidence against the defendant, decrees in two suits in which the *utnamee* right had been successfully asserted against a former holder of the tenure that was said to have created the right claimed, but to which the defendant had not been a party. 22 W. R. 365, *referred to* in 10 B. 430 (411). U

- (m) Decrees in Chancery between other parties, concerning the same lands, were held to be admissible in evidence, to show the character in which the possessor enjoyed the lands. *Davies v. Lowndes*, 1 Bing N. C. 606. *referred to* in 11 C. 745 (747); Phip. Ev. 4th Ed. pp. 289 and 374. V

- (n) In a suit by a zemindar for possession of certain *mouzas* by setting aside an alleged *mohurari* tenure, certain former judgments and decrees, granted in proceedings relating to the *mouzas* in question, in favor of the predecessors of the defendant, to which the predecessors of the plaintiff were no parties, were held to be relevant as evidence showing ancient possession and assertion of rights and the rate of rent. 22 C. 533 (542) (P. C.) = 5 M. L. J. 7 (12) = 22 I. A. 60 *referred to* in 24 B. 591 (598) & 7 C. 124. W

- (o) Certain orders under S. 145 of the Crim. Pro. Code were held by the Privy Council to be evidence, under S. 13 of the Evidence Act, of the following facts, all of which appeared from the orders themselves, viz., who the parties to the dispute were, what the land in dispute was and who was declared entitled to retain possession, and to be relevant to the question of possession as at the date of those orders. 29 C. 187, (198) (P. C.): 15 M. L. J. 83 (85) = 6 C. W. N. 386 (391), *referred to* in 7 O. C. 124. X

- (p) Where, in a suit for rent at enhanced rates, the question was about the quantity of land held by the defendants, and the unit by which the measurement of the land should be made was in dispute, certain decrees obtained by the landlord against other tenants in the same pergunnah, in which a certain measurement (one of 18 inches length) was taken as the unit, were held to be relevant, as they furnished evidence of particular instances in which a custom was claimed. 15 C. 233, (237). Y

- (q) In a suit for resumption of certain lands, on the ground that they were granted as life grants, a number of judgments filed by the plaintiff showing that, in similar cases, similar grants were resumed by the grantor or his heirs, on the death of the grantees, were held to be admissible in evidence under the provisions of S. 13. 7 C. L. J. 90 (93). Z

6—"particular instances ..departed from."—(Continued).

- (r) In a suit for the recovery of possession of certain land on the ground of ouster, a decree to which the plaintiffs were no party was held to be admissible in evidence against them. 23 W.R. 293 (296). **A**
- (s) Where the question was as to a right to certain property, criminal proceedings not *inter partes* and agreements entered into between parties, not parties before the Court, were held to be admissible in evidence; the Privy Council observing, that the *razinamph* in the criminal proceedings, "though apparently made between tenants, seems to have been subsequently acted upon, and may be properly used to explain the character of the enjoyment of the water." 6 I.A. 33=4 C. 633 (640) (P.C.); referred to in 11 C. 715 (747), and 24 B. 591 (597). **B**
- (t) Speaking generally, though a judgment not *inter partes* may not be proof of facts therein stated, it is admissible for the purpose of explaining the character in which possession of an estate has been enjoyed and matters of that class. 5 Bom. L.R. 230 (232) per *Jenkins, C.J.* **C**
- (u) Where, in a suit between P and D, in which P claimed certain properties as the heir of H, the question was whether D was the son of H and his wife K, or whether one R was that son, it was held that, the record, and not the judgment alone, in a previous suit between P and K, in which K had defeated P by showing that she had had by H a son called D then living, might be admitted in evidence under S. 13 (b), quite independently of S. 43, as evidence of a particular instance in which the alleged right of the plaintiff to the suit property was at that time claimed and disputed. 12 A. 1 (14) (F.B.) per *Edge, C.J.* **D**
- (v) Where a plaintiff sued his brother and others to recover possession of certain properties alleged to have been purchased by him from his father, the *proceedings*, in a previous suit against him and his father, declaring the sale to be sham would come within the words "particular instances" in which the right was claimed, as the parties or their predecessors were parties to the former suit. 31 B. 143 (150, 151)=9 Bom. L.R. 65, following 10 B. 439 (442). **E**
- (w) Where the plaintiffs sought to recover arrears of a "*chirada hak*," the Court, adopting the view taken by *Couch, C.J.*, of S. 13 in 22 W. R. 365, held that decrees establishing the right in prior suits between the same persons were relevant for the purpose of showing that the right had not only been asserted, but recognised by the tribunals of the country, on several occasions. 3 B. 3, referred to in 10 B. 439 (441). and referring to 22 W. R. 457, 12 B.L.R. 304 (P.C.) and 2 I. A. 283. **F**
- (x) On the question whether a plaintiff, as the warden of certain temples, could claim actual possession and management of certain villages as the property of the temples, a judgment in a former suit, to which one of the defendants was no party, deciding that the cousins of a former manager could not claim a partition of certain villages, some of which were now under dispute and that the manager was, not owner, but manager, was held to be relevant as reputation against the defendant, being a decision upon a public right, though not conclusive as evidence. 7 M.H.C.R. 306 (308); *Kindersley J. doubting.* **G**
- (y) In a boundary dispute between two neighbouring Zemindars, a decree in a former suit, to which the plaintiff was no party but where the defendants were the same, relating to the boundary between these very estates,

6—"particular instances...departed from".—(Continued).

in a part contiguous to that now in litigation, was held to be admissible in evidence in support of the defendant's case, though not conclusive. 6 W. R. 232 (234). H

(z) A previous judgment against the same defendants regarding the same subject-matter is relevant, but not conclusive, against the defendants in a subsequent suit against the defendants by other parties. 6 B.L.R. 69. I

(da) In a suit by a Hindu against the widow of his deceased brother to recover possession of certain property by right of survivorship, the decree of a Munsif's Court, in a rent suit brought by the widow, that the brothers were separately in possession of their shares was held to be of some value, though not conclusive. 11 C. (301, 310) (P.C.) J

(bh) In a suit to recover money from partners in business, certain former judgments, not *inter partes*, but delivered in suits brought by other creditors against the same defendants, in which the existence of the partnership denied in the present suit was asserted with success, were held to be relevant, but not conclusive as to the existence of a partnership. 2 Bom. L.R. 651 (652). 2 Bom. L.R. 386, *followed*. K

(cc) Where, in a suit for land by the plaintiff, a decree obtained in a suit by one defendant against another, to which the plaintiff was no party, was tendered in evidence, *held*, it could not be considered as conclusive evidence against the title of the plaintiff. 24 W.R. 431 (433). L

(dd) A former decision in a suit to which the plaintiff was no party, though relevant, cannot be held conclusively binding on him. 24 W.R. 470 (471). M

(ee) In a suit to recover possession of certain plots of lands, a decree, in a former suit between the plaintiff and certain third parties, was considered to be not inadmissible, but the point was not decided as the objection to its admissibility was taken too late on appeal. 28 C. 142 (144). N

(8) **Case where former judgment was considered conclusive enough to shift burden of proof.**

Where the decree and judgments, adduced in evidence in a suit by the plaintiffs to recover a *chirada hak*, were either between the same parties as those in the suit, or between those under whom they respectively claimed, they were considered to be such as might be evidence so nearly conclusive as, when produced, to have shifted the burden of proof from the plaintiffs to the defendants. 3 B. 3 (6). O

(9) **Former judgments also relevant under other sections.**

"We do not, however, think that the exclusion of such judgments (judgments on material issues between the same parties or their representatives) is a necessary inference from the Evidence Act without calling in aid Ss. 11 & 13". 10 B 439 (443) per *Sargant, C. J.*: see, also, under S. 11, No. 4 (4) (g), *supra*. P

(9-a) **Oral evidence relevant as an instance.**

(n) The oral evidence of persons well able from their position to testify that certain lands were *mal* as known to them for a great many years, and that the defendant had been in the habit of paying rent for them should not be rejected as hearsay. 10 W.R. 443. Q

6—"particular instances...departed from."—(Continued).

(10) Cogent evidence of custom is by instances.

- (a) The most cogent evidence of custom is not that which is afforded by the expression of opinion as to the existence, but by the enumeration of instances in which the alleged custom has been acted upon, and by the proof afforded by judicial or revenue records or private accounts and receipts that the custom has been enforced. 1 A. 440 (441), referred to in 10 A. 585 (586). R
- (b) Instances of an enforcement of a custom were held to be good evidence. N. W.P.H.C. Rep. (1868), p. 138 referred to in 10 A. 585 (586). S
- (c) It is necessary to scrutinise the evidence of usage closely, and especially to demand special instances of the custom alleged. 10 Bom. H.C.R. 249 (261), referred to in 10 B. 528 (540). T

(11) Number of instances that cannot establish custom.

- (a) A custom cannot be established by a single instance. 2 Agra Rep. A.C. 120. U
- (b) Proof of only three instances could not be regarded as proof of an ancient, still less, of an immemorial custom. 10 B.H.C.R. 241; referred to in 21 B. 110 (116). Y

(12) Cases of instances held relevant to prove customs or usage of trade.

- (a) A plaintiff alleging a certain custom as that of a manor may show what the custom was in other adjoining manors, if he states the custom as a general custom of the whole county, not a general custom of the country. *Furneaux v. Hutchins*, Cowper p. 808, referred to in 15 W.R. 375 (388). W
- (b) Where a plaintiff alleged the custom of a manor, he would not in general be allowed to show what the custom was in other adjoining manors. *Duke of Somerset v. Francis*, 1 Strange 654; *Anglsey v. Hatherton* 10 M. & W. 219; referred to in 15 W.R. 375 (388). X
- (c) A custom allowing a tenant, not prohibited by his lease from doing so, to pick and sell surface flints may be proved by a series of particular instances in which flints were taken and sold. *Tucker v. Linger*, 8 App. Cas. 508; Phip. Ev. 4th Ed. p. 88; Steph. Dig. 7th Ed. p. 9; referred to in 25 M. 669 (671). Y
- (d) A *koolachar* or family custom of descent can be established either by a clear, distinct and positive tradition in the family that it exists, or by a long series of instances of anomalous inheritance leading to the inference of that custom. 9 B.L.R. 274. Z
- (e) For a case where, in proof of an alleged custom of inheritance, two lines of evidence, one consisting of instances of succession in kindred families, and the other of record of rights in *Wajib-ul-araz* were admitted; see 14 C. 296 (P.C.) = 14 I.A. 7. A
- (f) On the question whether, by the custom of borough-English as obtaining in a certain manor, A is heir to B, the fact that other persons, being tenants of the manor, inherited from ancestors standing in the same or similar relations to them as that in which A stood to B, is relevant evidence. *Muggleton v. Barnett*, H. & N. 282; Steph. Dig. 7th Ed. p. 9. B
- (g) On the question whether the devolution of a Rajput family, long settled in the District of Agra, was according to the ordinary Mitakshara Law, subject to the custom of primogeniture, various classes of evidence

6—"particular instances...departed from."—(Continued).

consisting of a pedigree, ceremonies of installation, a former decree on an unsuccessful claim for partition, subsequent enjoyment of the property by the head of the family as sole owner, and the belief of certain members of the family and of kinsfolks in the custom of primogeniture were, as a whole, considered to be conclusive proof of the primogeniture alleged, though no one of them would, standing alone, establish the family custom. 19 A. 1 (7 to 16) (P.C.). C

- (h) The existence of an alleged family custom of primogeniture being in question, evidence of the existence of the custom of gaddinashini in a certain Taluka and of the successive holders of the Taluka within living memory having sat in the gaddi and received the customary offerings, and evidence of tradition relating to the family learned by the witnesses from their deceased relatives and others were admitted. 23 A. 37 (50) (P.C.) = 27 I.A. 238. D
- (i) To ascertain whether a Hindu son can claim a partition of the ancestral property during his father's life-time, numerous instances showing that a son could enforce the partition were admitted in evidence. 10 B. 528. E
- (j) The custom of a father's right, amongst the *Alphals*, to make an uneven distribution of property among his sons was held to be established by a consideration of the instances cited, though the father was held incompetent to unduly prefer one son so as to practically disinherit his brethren. 1 P.L.R. 1900. F
- (k) On the question whether the adoption of a daughter's son was valid by the custom of the Jats of the Gtil Got, evidence of a large number of instances of such adoptions was considered, and it was held that custom did not establish the validity of such an adoption. P.L.R. 1900. p. 368. G
- (l) On the negative evidence of a *Wajib-ul-arz*, and also on the numerous instances established in support of the custom, it was held that, though the presumption was against the power of alienation, amongst the *Jirais* of Hoskiarpur, a sonless proprietor was fully competent to make a gift of his entire estate to his daughter's son. 37 P.R. 1878, referred to in 549 P.L.R. 1900. H
- (m) That the *Korreshis* of the Shahpur District in the Punjab, though they are agriculturists and adopt Punjab agricultural custom in certain matters, yet in the matter of the power, especially, of sonless male proprietors to make gift to daughters or their husbands in preference to first cousins, follow the Mahomedan Law more than agricultural custom, was held to be evidenced, *inter alia*, by the instances of gifts in contravention of agricultural custom in the *wajib-ul-arz* of the villagos in which the land in dispute was situate. 22 P.L.R. 1903. I
- (n) The existence of the custom that a sonless *Jat* proprietor may alienate his land to—indeed appoint as an heir—one out of his near collateral kinsmen, to the exclusion of others, in cases where alienations to a stranger would be entirely restricted, was held to be established by a great many cases among various tribes of the Central Punjab and by a long array of rulings quoted to prove its general prevalence. 50 P.L.R. 1901, (referring to 116 P.R. 1886, 85 P.R. 1889, 18 and 19 P.R. 1890, 113 P.R. 1891, 116 P.R. 1894, 101 P.R. 1892, 16 P.R. 1899). J

6.—“particular instances...departed from.”—(Continued).

- (o) Where, in a recognised sub-division of a town, some instances of the custom of pre-emption of houses on the score of vicinage are to be found, other instances in the neighbouring sub-divisions are relevant. 38 P. W. R. 1907 = 67 P. R 1907 = 51 P. L. R. 1907. **K**
- (p) Where a custom, regarding certain alleged manorial cesses due by tenants to zamindars, was in question, it was held (1) that the existence of the custom regarding each cess should be tried as a separate issue (2) and that the parol evidence given generally as to the existence of the custom must be tested by ascertaining on what grounds the opinion of each witness was based. 1 A. 440 (441). **L**
- (q) A usage of trade may be proved by multiplying instances of usage of different merchants, if it appears to be the same as that of other merchants. 11 M. 450 (465). **M**
- (r) Mercantile usage is provable by the multiplication or aggregation of a great number of particular instances showing a given course of business, and a general established understanding regarding it. *Mackenzie v. Dunlop*, 3 Macq. H. L. C. 22 : Field Ev. 6th Ed. p. 501. **N**
- (s) A given trade custom may be proved by evidence that the same custom existed in the same trade in other localities. *Plaice v. Allcock*, 4 F. & F. 1074, Phip. Ev. 4th Ed. p. 150. **O**
- (t) A custom of the fruit trade in London may be proved by a similar custom in the colonial trade. *Fleet v. Murton* L. R. 7 Q. B. 126. Phip. Ev. 4th Ed. p. 150. **P**
- (u) Evidence of the general opinion of merchants may be adduced to establish the custom of merchants. *Camden v. Cowley*, 1 W. B. 7, 417 : Field Ev. 6th Ed. p. 501. **Q**
- (v) A considerable amount of evidence as to the practice of Banks with regard to initialling pass-books was admitted on the authority of S. 13 and *Mackenzie v. Dunlop* (3 Macq. H. L. C. 22, 26). 25 B. 499 (513) *per Russel, J.* **R**
- (w) But an alleged custom of auction sale rooms implying an agreement by the bidder that, in consideration of the agreement by the auctioneers to submit the offer to their principals, the bidder promises not to retract his bid until it has been either accepted or refused was not held to be sufficiently proved by the evidence of an assistant in the sale room that such an arrangement had never been repudiated. 16 C. 702 (704). **S**

(13) Validity of inference of custom from its existence in one particular class of cases to another.

- (a) Evidence of a special family custom in one family is no evidence of a similar family custom in another, except when connection is shown between the families. 7 A. 1 (P. C.) = 11 I. A. 149. **T**
- (b) As the customs of the *Arain* tribe vary in different localities, it is unsafe, in adjudicating upon the customs of this tribe in one district, to rely on the customs of that tribe in another district. 549 P. L. R. 1900. **U**
- (c) As to the relevancy of judicial decisions recognising the existence of a disputed custom among the *Jains* of one place as evidence of the existence of the same custom among the *Jains* of another place, see 27 C. 379, referring to 4 C. 744 (P. C.) = 6 I. A. 15. **V**

6.—“*particular instances ..departed from.*”—(Continued).

(14) **Sufficiency of proof of custom by instances varies according to circumstances.**

The existence of the right of pre-emption in other neighbouring sub-divisions of a town is relevant evidence of more or less strength according to circumstances, of its existence in that sub-division in which the property is situate, but is not, of itself, sufficient proof of the custom.
39 P.W.R. 1907. H

(15) **Defect of proof of custom by instances.**

As long as the establishment of a custom is made dependent on its proof by instances, very few customs will ever be proved; instances will be met by instances; and almost every custom will fail for apparent want of uniformity. 10 B.528 (544); *per Scott, J.* X

(16) **Opinions of persons acquainted with custom relevant.**

(a) Where any question of right or custom is to be decided, opinions of persons who would be likely to know of its existence are, under S. 48 of the Evidence Act, admissible in evidence. 23 C.427 (430); see also. under S. 48, *infra*. Y

(b) It is admissible evidence for a living witness to state his opinion on the existence of a family custom and to state, as the grounds of that opinion, information derived from deceased persons; it must be the expression of independent opinion based on hearsay and not mere repetition of hearsay. 23 A. 37 (52) (P.C.) = 27 I.A. 238. See, also, under Ss. 32, 49 & 60, *infra*. Z

(c) The statements made by persons who were in a position to know of the existence of a custom or usage of the transferability of occupancy *jotes* in their locality were held to be admissible. 26 C. 184 (187); 23 C. 427, *followed*.

(d) Statements contained in petitions by members of a family, recognising the existence of a custom of primogeniture in the family, are relevant and admissible as evidence of particular instances in which the custom was recognised as affecting their own rights. 32 C. 6 (17). A

(16a) **Evidence of experts admissible.**

The evidence of expert witnesses must be accepted on the question whether, according to the French law prevailing in French territory, a testatrix, on the death of her husband, became by inheritance absolute owner of his property. 24 M. 650 (651). See, also, under S. 45, *infra*. B

(17) **Evidentiary value of such opinions.**

(a) Mere opinion evidence is entitled to no weight in matters of customary succession, and the custom must be proved by specific instances. 20 B. 53 (59), *referring to* 3 B. 34. C

(b) The opinion, even if it were unanimous, of all the leading members of the Khoja Community as to the existence of a custom, that the sister of a deceased, childless and intestate Khoja, should wholly exclude his widow from inheriting, and that the latter should, at the most, be entitled to maintenance, cannot give it the force of law, unless specific instances, in which the custom had been observed and followed, were proved. 3 B. 34 (39, 40). D

6.—“particular instances...departed from.”—(Continued).

(18) Relevancy of instances in which customs were recognised in suit not *inter partes*.

Under S. 13 (b), evidence could be given of instances in which a purely local custom was recognised in suit not *inter partes*. All. weekly Notes, 1888, p. 242 : referred to in 12 A.1. (17) (F.B.). E

(19) Intention of legislature regarding relevancy of former judgments to prove customs.

The intention of the Legislature, in framing S. 13, could not have been that a party to a suit could not give evidence of particular instances in which a custom, for example, was exercised or recognised, unless he showed that the other party to the suit had recognised or exercised or had had exercised against him that custom, or that such party could not give in evidence the record of a suit in which such custom had been claimed and recognised without showing that the former suit was *inter partes*. 12 A. 1. (16) (F.B.) *per Edge, C.J.* F

(20) English Law as to relevancy of former judgments to prove customs.

Under English law, verdicts, judgments, and other adjudications, although *inter alios*, have always been receivable in evidence to show the existence or non-existence of customs of a public nature. The admissibility of similar evidence in India for a similar purpose was recognised before the passing of the Evidence Act. Field Ev. 6th Ed. p. 76. G

(21) Cases where prior decisions were held as instances in which customs were claimed.

(a) Where the question was whether lineal primogeniture was the rule of succession to an impartible Raj, certain decrees, relating to disputes in families belonging to the same group, in which it was decided that the rule of succession was lineal primogeniture, were held to be relevant, as going a long way to show the prevalence of the custom among families having a common origin and settled in the same part of the country, though not binding on the parties. 29 C. 343 (354) (P.C.). H

(b) Judicial records in England, not between the same parties have been admitted as evidence of the existence of local customs. 10 A. 585 (586). *Per Edge, C. J., and Tyrrel, J.* I

(c) Where a custom alleged to be followed by any particular class of people is in dispute, judicial decisions, in which such custom has been recognised, as the custom of the class in question, are good evidence of the existence of such a custom. 16 A. 379 ; explaining 1 C. 744 (P.C.) ; see, also, 27 C. 379. J

(d) The decrees of competent Courts are good evidence in matters of public interest, such as the existence of customs of succession in particular communities ; and such decisions form an exception to the general rule which excludes *res inter alios actae*. 20 B. 53 (58), referring to 7 W. R. 210. K

(e) On the question whether, according to custom or usage, certain tenures were transferable, a judgment of the High Court, in a case where the transferability of tenures in an adjoining village of the same pergunnah was in question, was held to be admissible as evidence of the usage. 23 C. 427 (430) ; see, also, under S. 42, *infra*. L

(f) In a suit by a co-owner of village-lands to have them divided by virtue of a custom, once in twelve years, of re-distributing the village lands by

particular instances...departed from."—(Concluded).

lot among the villagers, a former judgment, to which some only of the present defendants were parties, decreeing the periodical allotment of the lands, as the adjudication of a competent tribunal, was most cogent evidence against them of the existence and validity of the custom. 2 M. H. C. R. 1 (6). **M**

(g) In a suit for pre-emption founded on custom, certain decrees, in suits relating to property in the town by which the right of pre-emption was recognised and enforced, were held to be the best evidence of instances in which the right was recognised, as being the results of decisions in cases where one party alleged, and the other denied it; the most satisfactory evidence of an enforcement of a custom being a final decree based on it. 10 A. 585 (586). **N**

(h) Judgments relating to property in the town by which the right of pre-emption was recognised and enforced were held to be admissible in evidence of the local custom. *Koodootoolah v. Mohinee Mohun Saha*, 5 Rev. Cir. & Cr. Rep. 290, referred to in 10 A. 585 (586). **O**

(i) On the question whether the right of pre-emption existed where one of two Mahomedan co-shares sold to a Hindu, the proceedings in two suits where, under similar circumstances, though the exercise of the right was disputed on other grounds, the right of pre-emption was admitted to exist, were held to be good evidence in such a matter of public interest, as the existence of a custom of pre-emption, forming an exception to the rule which excludes *res inter alios acta*. 7 W. R. 213. **P**

(j) To prove a matter of a public nature such as a custom of pre-emption, former judgments between other parties are relevant, though not conclusive. 2 Agra Rep. A. C. 120. **Q**

(k) In cases of the custom of pre-emption based on vicinage, confessions of judgment and admissions are, though of much less value than contested cases properly decided where the custom has been found to exist after due enquiry, not irrelevant and by no means valueless, as they may proceed from the consciousness of the existence of the right and the hopelessness of contesting it. 26 P. R. 1907. **R**

(l) In a suit for a declaration or confirmation of the title of the plaintiff to the office of *odhikaree* of the Disloo Sastur at Nowgong, held, that, in determining the right to the *odhikaree* and the custom or law of succession thereto, former judgments or decrees were held to be relevant, under S. 13, as they showed instances in which the right and the custom had been asserted and claimed. 20 W. R. 345 (347). **S**

(22) **But conflicting decisions will not establish custom.**

Conflicting decisions of the subordinate Courts cannot be held as establishing the prevalence among the Hindus of any particular district of the custom of the right of pre-emption under the Mahomedan Law. 1 W. R. 234 (235). **T**

14. Facts showing the existence of any state of mind—such as intention, knowledge, good faith, negligence, rashness, ill-will, or good will towards any particular person, (1) or showing the existence of any state of body or bodily feeling (2)—are relevant, (3) when the

Facts showing existence of state of mind, or of body, or bodily feeling.

existence of any such state of mind, or body, or bodily feeling, is in issue or relevant.

(4) *Explanation 1.*—A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question.*

(5) *Explanation 2.*—But where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of this section, the previous conviction of such person shall also be a relevant fact.*

Illustrations.

(a) A is accused of receiving stolen goods knowing them to be stolen. It is proved that he was in possession of a particular stolen article.

The fact that, at the same time, he was in possession of many other stolen articles, is relevant, as tending to show that he knew each and all of the articles of which he was in possession to be stolen.

(b) † A is accused of fraudulently delivering to another person a counterfeit coin which, at the time, when he delivered it, he knew to be counterfeit.

The fact that, at the time of its delivery, A was possessed of a number of other pieces of counterfeit coin, is relevant.

The fact that A had been previously convicted of delivering to another person as genuine a counterfeit coin knowing it to be counterfeit, is relevant.

¶ (c) A sues B for damage done by a dog of B's which B knew to be ferocious.

The facts that the dog had previously bitten X, Y, and Z, and that they had made complaints to B, are relevant.

(d) The question is, whether A, the acceptor of a bill of exchange, knew that the name of the payee was fictitious.

The fact that A had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee if the payee had been a real person, is relevant, as showing that A knew that the payee was a fictitious person.

(e) A is accused of defaming B by publishing an imputation intended to harm the reputation of B.

The fact of previous publications by A respecting B, showing ill-will on the part of A towards B, is relevant, as proving A's intention to harm B's reputation by the particular publication in question.

The facts that there was no previous quarrel between A and B, and that A repeated the matter complained of as he heard it, are relevant, as showing that A did not intend to harm the reputation of B.

(f) A is sued by B for fraudulently representing to B that C was solvent, whereby B, being induced to trust C, who was insolvent, suffered loss.

The fact that, at the time when A represented C to be solvent, C was supposed to be solvent by his neighbours and by persons dealing with him, is relevant, as showing that A made the representation in good faith.

(g) A is sued by B for the price of work done by B upon a house of which A is owner by the order of C, a contractor.

A's defence is that B's contract was with C.

The fact that A paid C for the work in question is relevant, as proving that A did, in good faith, make over to C the management of the work in question, so that C was in a position to contract with B on C's own account, and not as agent for A.

(h) A is accused of the dishonest misappropriation of property which he had found, and the question is whether, when he appropriated it, he believed in good faith that the real owner could not be found.

The fact that public notice of the loss of the property had been given in the place where A was, is relevant as showing that A did not, in good faith, believe that the real owner of the property could not be found.

The fact that A knew, or had reason to believe, that the notice was given fraudulently by C, who had heard of the loss of the property, and wished to set up a false claim to it, is relevant, as showing that the fact that A knew of the notice did not disprove A's good faith.

(i) A is charged with shooting at B with intent to kill him. In order to show A's intent, the fact of A's having previously shot at B may be proved.

(j) A is charged with sending threatening letters to B. Threatening letters previously sent by A to B may be proved, as showing the intention of the letters.

(k) The question is, whether A has been guilty of cruelty towards B, his wife.

Expressions of their feeling toward each other shortly before or after the alleged cruelty are relevant facts.

(l) The question is, whether A's death was caused by poison.

Statements made by A during his illness as to his symptoms are relevant facts.

(m) The question is, what was the state of A's health at the time when an assurance on his life was effected.

Statements made by A as to the state of his health at, or near the time in question are relevant facts.

(n) A sues B for negligence in providing him with a carriage for hire not reasonably fit for use, whereby A is injured.

The fact that B's attention was drawn on other occasions to the defect of that particular carriage is relevant.

The fact that B was habitually negligent about the carriages which he let to hire is irrelevant.

(o) A is tried for the murder of B by intentionally shooting him dead.

The fact that A, on other occasions, shot at B, is relevant, as showing his intention to shoot B.

The fact that A was in the habit of shooting at people with intent to murder them is irrelevant.

(p) A is tried for a crime.

The fact that he said something indicating an intention to commit that particular crime is relevant.

The fact that he said something indicating a general disposition to commit crimes of that class is irrelevant.

(Notes).

General.

(1) Scope of Section.

(a) S. 14 seems to apply to that class of cases where a particular act is more or less criminal or culpable according to the state of mind or feeling of the person who does it. G C. 355 (659). Per Garth, C. J. U

(b) The illustrations to S. 14 as well as the authorities cited in Taylor on Evidence, 6th edition, Ss. 318 to 322 show with sufficient clearness the

General.—(Continued).

sort of cases in which evidence of similar facts is receivable. 6 C. 655 (660) *per Garth, C. J.*

- (2) **Section not to be extended to cases where question depends, not on mental states, but on actual facts.**

The Courts must be very careful not to extend the operation of the section to other cases, where the question of guilt or innocence depends upon actual facts and not upon the state of a man's mind or feeling, and have no right to prove that a man committed theft or any other crime on one occasion, by showing that he committed similar crimes on other occasions. 6 C. 655 (660), *per Garth C. J.*

- (3) **References.**

Reference may be made to 11 B.H.C.R., 90, where *West, J.*, gives a full and lucid exposition of S. 14 of the Indian Evidence Act, to 6 C. 655, also fully argued, where that section was considered, and to 9 C. 371 where Lord Blackburn's reasoning is discussed. 15 B. 491 (502).

- (4) **English Law.**

(a) In the English law, rules, substantially identical with those embodied in S. 14 and its illustrations, have not been thought inconsistent with others corresponding to the limited construction which, it was held in this case, should be put on S. 11 of the Act. 11 B. H. C. R. 90 (93), See notes on S. 11, *supra*.

(b) The Courts are justified in looking to English decisions to elucidate the meaning of the Evidence Act, and evidence, which the Judges in England have admitted and juries have acted upon, must be held to be clearly within the terms of Ss. 11, 14 and 15. 16 B. 114 (433), referring to 7 B.H.C.R. (A. C. J.) 64.

- 5) "*Res inter alios acta etc.*," application of maxim.

*The application of the maxim "*Res inter alios acta alteri nocere non debet*" to the law of evidence is obscure, because it does not show how unconnected transactions should be supposed to be relevant to each other. Steph. Dig. 7th Ed. p. 171.

- 6) **Inferences from similar transactions not to be drawn.**

(a) Inferences from one transaction to another which is not specifically connected with it, should not be drawn merely because the two may resemble each other: they must be linked together by the chain of cause and effect in some assignable way, before the inference can be drawn. Steph. Dig. 7th Ed. p. 171.

(b) A fact which renders the existence or non-existence of any fact in issue probable by reason of its general resemblance thereto, and not because it is connected therewith in any of the ways hitherto specified, would not be relevant to such fact generally. Steph. Dig., 7th Ed. p. 15.

(c) To admit in evidence statements made by the accused, not having any real bearing on the case, showing at most only that the accused had been untruthful in other matters would be highly improper. 28 B. 533 (565).

General.—(Continued).**(7) Reason for rejecting evidence of similar facts.**

Similar facts, though often of cogent moral weight, *i.e.*, logically relevant, are rejected as legal evidence on grounds of convenience, since they tend to embarrass the inquiry with collateral issues, prejudice the parties with the jury, and encourage attacks without notice. *R. v. Odley*, 2 Dec. C.C. 265, 269; *Philp. Ev.* 4th Ed. p. 141.

(8) Instances of evidence of similar facts held inadmissible.

(a) It is inadmissible in evidence to show that a person, under trial for obtaining money on a false pretence that he had been authorised to do so, had, on a different occasion, obtained money from another by a similar false pretence, there being no connection between the two receivings. *R. v. Holt*, *Steph. Dig.* 7th Ed. p. 18; *Philp. Ev.* 4th Ed. p. 47.

(b) On the question whether a brewer sold good beer to a publican, the fact that he sold good beer to other publicans would not be relevant, unless it was shown that the beer sold to all the publicans was of the same brewing. *Holcombe v. Benson*, 2 Camp. 391. *Steph. Dig.* 7th Ed. p. 15; *Philp. Ev.* 4th Ed. p. 147.

(c) Evidence of the receipt of illegal gratification by an accused person, a public servant, from a certain firm in 1877 and 1878 is not admissible under S. 14, to prove that he received the same in 1876. *G. C. 655 (662)*. *Mitter, J. dissentient*. See, also, under Ss. 6, 8 and 11, *supra*.

(d) Where a person was charged with having forged a promissory note, evidence that a number of documents apparently forged, or held in readiness for the purpose of forgery were found in the prisoner's possession was held to be inadmissible. 11 B.H.C.R. 90 (97), per *Melville, J.*

(e) Where the defence was that the defendant's acceptance on a bill was a forgery, evidence that a collection of bills, on which the defendant's acceptance was forged, had been found in the plaintiff's possession, was offered and refused, *Lord Denman* observing, that such evidence would be clearly inadmissible in an indictment for forgery. *Griffiths v. Payne*, 11 A. & E. 131, cited in 11 B.H.C.R. 90 (97).

(f) On the trial of certain constables for having maltreated a person, his wife, and his son-in-law, in the course of a police investigation into a case of theft, evidence of the indecent assault on his daughter, called as eye-witness of the hurt said to have been inflicted on him, was held not to be relevant to the charges of hurt to his wife at a different time and place, and of wrongful confinement of his son-in-law at different times and places. 15 B. 491 (503).

(g) On the question whether the pupils were properly treated at a certain school, evidence of the comparative treatment of boys at any other particular school is irrelevant. *Boldron v. Widdows*, 1 C. & P. 65; *Philp. Ev.*, 4th Ed. p. 107; *Tay. Ev.* 10th Ed. p. 252.

(9) "Res inter alios etc.," failure of maxim.

The maxim "*Res inter alios acta alteri nocere non debet*", fails in its literal sense, because it is not true that a man cannot be affected by transactions to which he is not a party; illustrations to the contrary are obvious and innumerable; bankruptcy, marriage, indeed every transaction of life would supply them. *Steph. Dig.* 7th Ed. p. 171.

General.—(Continued).**(10) Principle on which evidence of similar facts is relevant.**

The principle on which evidence of similar acts is admissible is, not to show that, because the defendant has committed one crime, he would, therefore, be likely to commit another, but to establish the *animus* of the act and rebut, by anticipation, the defences of ignorance, accident, mistake or some innocent motive or intention. Phip. Ev. 4th Ed. p. 163.

(11) But facts antecedent to the actual event must exist for any such inference.

- The likelihood of the consequence of an act complained of must be determined by a deduction from facts antecedent to the actual event, and certainly a man cannot be held criminally liable for a consequence of which nothing had been shown to have occurred to shew the probability. 3 M.H.C.R. xxxiii (App).

(12) Relevancy of similar facts, conditions for.

- (a) Generally speaking it is not competent to a prosecution to prove a man guilty of one felony by proving him guilty of another unconnected felony, but where several felonies are connected together and form part of one entire transaction, the one is evidence to show the character of the other. *Rex v. Ellis*, 6 Barnard Cress. 145, Cited in 16 B. 414 (430) and referred to in 11 B.H.C.R. 90.
- (b) In cases of false pretence, subsequent similar acts are only receivable in evidence if they form part of the same general fraudulent scheme as those in question, not if they are isolated and disconnected. *R. v. Rhodes*, 1 Q.B. 77, Phip. Ev. 4th Ed. p. 155.
- (c) If several and distinct offences do so intermix and blend themselves with each other, the detail of the party's whole conduct must be pursued per Lord Ellenborough in *Reg. v. Whitley*, 2 Lea C. C. 983, cited in 16 B. 414 (431).
- (d) Where several offences are so connected that proof of one can be arrived at through evidence going to prove the others, the evidence is not on that account excluded. 11 B.H.C.R. 90, per West J; cited in 16 B. 414 (430).

(13) Doctrine of election closely connected with relevancy of collateral facts.

- (a) The doctrine of election is closely connected with that about the admissibility of collateral facts which, though not in issue, may be relevant under S. 6 of the Evidence Act, if they form part of the same transaction 15 B. 491 (502).
- (b) Where the evidence appears to refer to more than one distinct unconnected felony, it is usual for the Judge in his discretion to call on the prosecution to select one felony, and to confine the evidence to that particular charge. 11 B.H.C.R. 90 (93).

(14) Instances of evidence of similar facts held relevant.

- (a) On a trial in respect of certain specific fraudulent transfers, deliveries etc., under S. 206 of the Penal Code, evidence of other transfers or deliveries, also alleged to be similarly fraudulent, was, as a matter of law, held to be admissible, having regard to the English decisions and to Ss. 14 and 15 of the Evidence Act with the illustrations. 16 B. 414 (425).

General.—(Concluded).

- (b) Having regard to the character of the offence attributed to the accused—an offence under S. 400, I.P.C.—the previous commission of dacoity by them was held to be relevant under S. 14 of the Evidence Act. 1 C.W.N. 146 (150).
- (c) On the propriety of the treatment given to pupils at a certain school, evidence of the *general treatment* of boys, at schools of the same class, was held to be relevant, as affording a criterion of the treatment that ought to have been adopted at the school in question. *Boldron v. Widdows*, 1 C. & P. 65; Phip. Ev., 4th Ed. P. 107; Tay. Ev. 10th Ed. p. 242.

I.—“Facts showing the existence of any state of mind—person”.**(1) Collateral facts relevant to shew state of mind.**

Collateral facts specified in the section can be proved, if the question be as to the existence of any state of mind. *Per Mitter, J. dissentient* in 6 C. 655 (663).

(2) Instances of collateral facts held relevant to show mental states.

- (a) Where a woman, charged with the murder of her child, pleaded sudden mania, evidence of her voluntary confession as to how she had killed another child was held to be relevant as showing her state of mind and as rebutting her defence. *R. v. Wells*, 120. Sess. Pap. C.C.C. 1203; Phip. Ev. 4th Ed. p. 162.
- (b) The fact that a person, whose sanity was in question, acted upon a letter received by him being a part of the facts in issue, the contents of the letter so acted upon were deemed to be relevant, as statements explaining and accompanying his conduct. *Wright v. Doe d. Tatham*, 7 A & E, 324--5; Steph. Dig. 7th Ed. p. 12.
- (c) When persons are found within six hours of the commission of a dacoity, with portions of the plundered property in their possession, the presumption is, that they were participants in the dacoity, and not merely receivers. 3 W.R. (Cr), 10.
- (d) In an action for untrue representation, *re* the solvency of a person, which induced the plaintiffs to trust that person with goods, statements made by them, when the goods were supplied to him, that they trusted him on account of the representation, were held to be relevant on their behalf. *Fellows v. Williamson*, 1 M. & M. 306, Tay. Ev. 10th Ed. p. 414; Phip. Ev. 4th Ed. p. 59.
- (e) Where a house-agent sues a person for commission on the sale of the latter's house to a third party the purchaser's evidence, that he thought he should not have bought the house but for the house-agent's card to view, was held to be relevant. *Manell v. Clements*, L. R. 9 C.J.P. 130, Phip. Ev. 4th Ed., p. 68.
- (f) Where a person, charged with murder, pleaded insanity, the facts that he manifested symptoms of insanity, prior and subsequent to the time in question, and that a vein of insanity had been running in his family, are admissible in evidence. *R. v. Gason*, Times, November 25, 1905 Phip. Ev. 4th Ed. p. 146.

1. —“**Facts showing the existence of any state of mind—person**”.—(Contd.).

(3) **Instances of collateral facts held irrelevant.**

(a) On the question whether a plaintiff sold goods to the defendant by himself, or to him and another jointly, evidence may not be adduced that he dealt with the defendant, though he may state what was said or done at that time. *Bonfield v. Smith*, 12 M & W. 405; Phip. Ev. 4th Ed. p. 58 & Tay. Ev. 10th Ed. p. 1020.

(b) The possession, by an accused person, of a number of documents suspected to be forged, was held to be no evidence to prove that he had forged the particular document, with the forgery of which he was charged. 11 B.H.C.R. 90, *distinguished in* 8 B. 223 (225).

(c) Whether a contract by one person with another was subject to a certain qualification may not be proved by evidence that that person had made contracts with many others subject to the same qualification. *Hollingham v. Head*, 4 C.B.N.S. 388; Phip. Ev. 4th Ed. p. 148.

(4) **History of case guide in testing *animus*.**

The history of a case is to be looked to in testing the truth or falsity or *animus* of a statement. *Fidgington v. Fitzmaurice*. 29 Ch. D. 459; cited in 28 B. 548, per *Aston, J.*

(5) **Intention to be gathered from acts and declarations of parties, not of strangers.**

The intent is to be gathered from the acts and declarations of the parties, and not from those of strangers. *per Crompton, J. dissentient*, in *R. v. O'Connell*, 5 St. Tr. N. S. 533—6.

(6) **Intention may also be proved by similar acts of strangers.**

The intention of a party may sometimes be proved, even in his own favour, by similar acts of strangers, which will form a standard by which the intention of the act in question may be gauged. *R. v. O'Connell*; 5 St. Tr. N. S. 533—6; *Crompton, J. dissentient*; Phip. Ev. 4th Ed. pp. 157 and 16.

(7) **Principal responsible for agent's act—Other acts of same agent relevant.**

Though, generally, only the acts of the party, whose intent is in question, are relevant, yet where a principal is responsible for his agent's act, other acts of the same agent are admissible in evidence of the intent. *Blake v. Albion Society*, 4 C.P.D. 94; Phip. Ev. 4th Ed. pp. 155 and 146; Steph. Dig. 7th Ed. p. 21; Tay Ev. 10th Ed. p. 266.

(8) **Intention of contracting parties may be gathered from their words.**

The intention of the contracting parties is to be gathered from the words they have used, and a mistake by one ordinarily does not affect the rights, which are the legitimate consequences of the words, though it may affect the remedy that will be awarded against the party in error. 28 B. 420 (426).

(9) **Intention of parties may be judged of by event.**

- To some degree, of course, the intentions of parties to a wrongful act must be judged of by the event. 5 W.R. (Cr.) 33 (38); *per Phear, J.*

(10) **Evidence of conduct and circumstances relevant to show intention.**

- (a) Where certain persons were convicted, under S. 402, for the offence of having assembled for the purpose of committing dacoity, evidence of

I.—“Facts showing the existence of any state of mind—person”.—(Contd.).

the conduct of the accused and the circumstances under which they were arrested were held to be relevant, as rendering so probable the existence of an intent to commit dacoity that a prudent man, in the absence of any explanation, would act upon the supposition that such an intention did exist. 23 A. 124 (125).

- (b) A corrupt intention to give false evidence may be inferred from circumstances. 2 W.R. (Cr.) 63 (64).

(11) Intention to be judged of by whom in trials by Jury.

In a trial by jury, it was held that it was in the province of the jury to weigh the evidence as to the truth or falsity of the evidence, and to judge of the intention. 3 W.R. (Cr.) 58.

(12) Test of a correct presumption of guilt in prisoner.

- (a) The test of a correct presumption of guilt in a prisoner not being able to account for the property on his premises, is dependent on the fact whether the surrounding circumstances of the case really and properly raise such a presumption. 13 W.R. (Cr) 70 (71).

- (b) The hypothesis of the prisoner's guilt should follow naturally from the facts proved and be consistent with them all. 3 W.R. (Cr.) 23 (26).

(13) Presumption of innocence.

The prisoner must be presumed to be innocent where every one of the facts of a case is as consistent with his innocence as with his guilt. 8 W.R. (Cr.) 87 (91).

(14) Proof of intention not always necessary, though all criminal acts imply it.

A presumption of deliberate choice or intention attaches more or less to really all criminal Acts, but it would not therefore be held that intention is a necessary ingredient of such offences. 28 B. 129 (143), *Per Jacob J. dissenting*.

(15) Case where intention is superfluous.

Where the law is taken to impute knowledge, whether it, in fact, exists or not, the word ‘intentionally’ would be superfluous. 16 A. 212 (216).

(16) Accused's confession direct proof of existence of intention—Caution in inferring intention from it.

Though the confession of the accused no doubt affords the most direct evidence of the existence of an intention (*e.g.*, intention of using minors, purchased, for purposes of prostitution), the circumstances, under which the confession was made and subsequently retracted, must be considered before any inference as to the intention can be safely based on it. 22 C. 164 (172).

(17) Evidence of conduct and surrounding circumstances relevant to show intention.

- (a) In a prosecution for lurking house trespass by night, direct proof of the existence of the particular criminal intention, by the confession of the accused or by the evidence of witnesses proving an admission by him, need not be given, but it is enough if it be proved like any other fact (and the existence of intention is a fact) by the evidence of conduct and of surrounding circumstances. 22 C. 391 (406).

1.—“Facts showing the existence of any state of mind—person”.—(Contd.).

- (b) Where a prostitute was charged with the offence of purchasing minors with the intent of employing them for purposes of prostitution, held that the evidence to prove the existence of an intention need not be limited to statements made by the accused herself admitting the existence of such an intention in her own mind, or to the evidence of some person who can come forward and swear that he heard the accused say that that was her intention, but may be proved by evidence of conduct and circumstances. 22 C. 164 (174).
 - (c) Where it was inferred from a series of presumptions, that a certain prisoner had a premeditated deliberate intention of murdering a certain person, it was held that those presumptions were unfair, and that a Court must judge of the prisoner's intentions by his act, and by all the surrounding circumstances of the case. 3 W.R. (Cr.) 23 (24).
- (18) Presumption of intention, conditions that do and do not justify.**
- (a) From the fact of a man's doing an act with the knowledge that he is likely to cause death, it may be presumed that he did it with the intention of causing death if all the circumstances of the case justify such a presumption. 5 W.R. (Cr.) 45 (46).
 - (b) Where a prisoner could give no satisfactory information as to how he became possessed of a number of counterfeit seals, the instruments for making them, and certain forged documents, it might be reasonably inferred that he kept them with an intention to use them fraudulently. 2 W.R. (Cr.) 5 (6).
 - (c) The Courts should never presume an intention to cause death merely from the fact of furious driving in a crowded street, in which the driver might know that his act would be likely to cause death. 5 W.R. (Cr.) 45 (46).
- (19) Instances of facts held relevant as showing existence of intention.**
- (a) A person may give evidence as to his intention in residing in a particular place, when his domicile comes into question. *Wilson v. Wilson*, L. R. 2 P.D. 435, 444; Phip. Ev. 4th Ed. p. 67.
 - (b) On the question of intention as to whether a lease or gift made orally, and for indefinite duration, by a party to another was made for life, or was resumable at pleasure or upon notice, a will made by the donor within two years after the gift, and many years before the events that led to its revocation, containing a formal declaration as to the position of the donor and the donee with regard to the property, was held to be relevant. 10 C. 238 (243) (P.C.) = 10 I.A. 133 = 13 C.L.R. 401.
 - (c) Voluntary drunkenness does not, of course, palliate any offence but it is generally taken into account as throwing light on the question of intention. (Case of murder committed in a drunken brawl). W.R. (1864), 24 (25).
 - (d) The drunkenness of a person charged with murder may be adduced in evidence to show that he was incapable of the intent. *R v. Doherty*, 16 Cox, 306; Phip. Ev. 4th Ed. p. 134.
 - (e) Where a woman was charged with the murder of her husband by poison, it being proved that she had insured his life, evidence that other members of his family to whom she had access had died—some previously, and others subsequently, to his death

1.—“Facts showing the existence of any state of mind—person”.—(Contd.).

—from the same poison, was held to be relevant to show that her poisoning was intentional and not accidental. *R. v. Geering*, 18 L.J. (M.C.), 215; and *R. v. Garner*, 3 F. & F. 681, referred to in B. 414 (432), and Phip. Ev. 4th Ed. p. 161.

- (f) Where a person, charged with the murder of an infant, contended that the infant in question was the only one she ever took into her house and that she parted with it lawfully, evidence that she took charge of other infants at low prices and that their remains were found buried in houses occupied by her, were held to be relevant to show *animus* or malicious intent and rebut accident. *Makin v. Attorney-General for New South Wales*, (1894) A.C. 57; Phip. Ev. 4th Ed. p. 162; Tay. Ev. 10th Ed. p. 270; Steph. Dig. 7th Ed. p. 19.
- (g) Where a person was tried for malicious shooting, evidence that the prisoner intentionally shot, at another time, at the same person is relevant on the question whether the shooting was intentional or accidental. *R. v. Voke*, R. & R. 531, Tay. Ev. 10th Ed. p. 271. See, also, *R. v. Mogg*, 4 C. & P. 364. *Ibid.*
- (h) Where a person was convicted of the offence of lurking house-trespass by night, held on appeal, that, judging from the time, the place, and the manner in which the trespass was committed, and the conduct of the accused when he was found out, it was impossible to suppose that the trespass could have been committed either unintentionally or with no intention, and that the intention must have been to insult the modesty of the complainant's wife or of committing some offence. 22 C. 391 (404).
- (i) The user of a place or the keeping of it for a particular purpose necessarily connotes the existence of a state of mind; they imply a purpose showing intention or knowledge, intention to use the place for that purpose and knowledge that it is so used (*e.g.*) to keep a common gaming house and manage it with the intention of using it as such habitually. 28 B. 129 (135, & 136), per *Chandavarkar, J.*
- (j) If, in the trial of a person for the offence of keeping a common gaming house, under S. 4 of the Bombay Gambling Act, the prosecution had been in a position to prove that he had habitually, on many occasions, used a particular room in his occupation as a common gaming house, by the direct evidence of persons who had gambled there, such a fact would make the existence of the guilty intention or knowledge imputed in the charge highly probable, and would be admissible in evidence under Ss. 5, 11 and 14 (with which S. 54 must be read) of the Evidence Act. 28 B. 129 (151) = 5 Bom. L.R. 805.
- (k) From the circumstance of certain prisoners having a large number of forged seals in their possession, accompanied by papers some relating to the affairs of the prisoners, some to other people, and some on which the writing was partially or entirely erased, a fair and reasonable inference may be drawn that they must have had them with intent to commit forgery. 13 W.R. (Cr.) 16.
- (l) The confession of the accused and the testimony of certain witnesses to the effect that the accused was herself a prostitute were tendered in evidence and considered by the Court in a case where the guilty knowledge or intention of the woman, who bought minor girls for the purpose of prostitution was in question. 22 C. 164 (168).

I.—“Facts showing the existence of any state of mind—person”.—(Contd.).

- (m) Where a dancing girl was charged, under S. 373, I.P.C., with having bought a girl with the intent of employing her for purposes of prostitution, the facts that she gave a large sum of money for the girl, that it was the practice among the dancing girls to acquire minor girls for such purposes, and that there was no case of a girl so acquired being married, were held to be sufficient evidence of an intent to support a conviction under that section. 28 M. 159 (163).
- (n) On the question of the intent of a person, charged with falsely accusing another with intent to, extort money from him, declarations made by the prisoner on a previous occasion that he had extorted money from a third person by threatening to accuse him of a similar crime, was held to be relevant, after proof of the fact of his having given the complainant into custody. *R. v. Cooper*, 3 Cox. 547; Phip. Ev. 1th Ed. p. 165.
- (o) The intent with which a person prosecuted another being in issue, an affidavit filed by the clerk of that person's solicitor, and used for the purpose of preventing persons from becoming bail for the person prosecuted was held to be relevant, as showing malice on the prosecutor's part. *Taylor v. Willans*. 2 B. & Ad. 845; Phip. Ev. 4th Ed. p. 138.
- (p) Where the prisoner was tried for arson with intent to defraud an Insurance Company, evidence that the prisoner had made claims on two other insurance companies, in respect of fires which had occurred in two other houses which he had occupied previously and in succession, was admitted to show that the fire, which was the subject of trial, was the result of design. *Ileg. v. Gray*, 1 F. & F. 1102. cited in 16 B. 114 (432) & Phip. Ev. 1th Ed. p. 165.
- (q) Where on the trial of a clerk, charged with embezzlement of certain sums by means of false entries in a ledger, evidence that, on a series of occasions before and after those mentioned in the indictment, precisely similar errors were made and advantage taken of them by the prisoner, was admitted to explain motive or intention, though not otherwise bearing on the issue to be tried. *R. v. Richardson*, 2 F. & F. 343; referred to in 16 B. 111 (431 & 432) & Phip. Ev. 1th Ed. p. 158.
- (r) Where a mine owner was charged with the stealing of coal from an adjoining owner, the fact that he had stolen coal intermittently for a number of years from that owner and from other adjoining owners by the same means was held to be relevant to show the intent of the accused, as one continuous transaction, all the coal being raised at one shaft. *R. v. Bleasdale*, 2 C. & K. 765; Phip. Ev. 1th Ed. p. 56. Rat. Unrep. C.C.P. 666.
- (s) If the receipt of illegal gratification by an accused person, a public servant, from a certain firm in 1876, for which he was charged, he proved to the satisfaction of the Court by other evidence, and if it be necessary to ascertain whether the accused received it as a motive for showing favour in the exercise of his official functions, evidence of the receipt by him of illegal gratification in 1877 and 1878 may be relevant under this section, but not for the purpose of establishing the fact of payment in the year 1876. 6 C. 655 (665); per *Millet, J. dissentient*.

1. —“Facts showing the existence of any state of mind—person”. —(Contd.).

- (f) Fraudulent intent being in issue in actions for false representation, mis-statements, other than those alleged in the statement of claim, will be relevant to show that the defendant was inspired by dishonest motives. *Huntingford v. Massey*, 1 F. & F. 690. Tay. Ev. 10th Ed. p. 266.
- (g) The statement of a witness that the motive of a person, in instituting criminal proceedings against another, ‘was solely to further the ends of justice’ is relevant on the question of the motive of that person. *Hardwicke v. Coleman*, 1 F. & F. 537; Philp. Ev. 4th Ed. p. 67.
- (h) Where the fact of certain things being stolen property was proved, and their receipt admitted, it was held to be a fair inference that the receipt was a dishonest one unless the accused’s conduct in the matter was satisfactorily explained. 25 W. R. (Cr.), 16.
- (i) Where a prisoner was tried for sending a threatening letter, other letters written by the prisoner, both before and after the one in question, have been held to be relevant to explain its meaning. *R. v. Robinson*, 2 Lea C. C. 755 (765); Tay. Ev. 10th. Ed. p. 271.
- (j) In cases of adultery, specific acts on which the petitioner relies for relief should be stated in the petition, but similar acts, both previous and subsequent thereto, between the respondent and the co-respondent may be proved as presumptive evidence of the acts charged. *Cantello v. Cantello*, Times, Feb. 1, 1896; Philp. Ev. 4th Ed. p. 113.

(20) Instances of facts held irrelevant to show intention.

- (a) Where a person was charged with assaulting a woman with intent to ravish, the fact that, on former occasions, he took liberties with her was held to be inadmissible in proof of such intent. *R. v. Lloyd*, 7 C. & P. 318, Philp. Ev. 4th Ed. p. 166.
- (b) On the trial of an accused person for an offence under S. 175 of the Penal Code, in respect of certain papers found in his possession, the discovery, a few days before his trial, of certain suspicious documents in the possession of a person, whose only connection with the accused was that he was called as his witness and was alleged to belong to the same faction, was held not to be relevant against the accused on the question of guilty knowledge and intention. 15 A. 189 (193).
- (c) Where a priest was charged with blasphemously burning certain bibles, sermons preached by him several days before, and on occasions unconnected with, the burning, were held to be inadmissible to show that he meant immoral books merely, and not bibles, to be burnt on the particular occasion in question. *R. v. Petchum*, 7 Cox, 79. Philp. Ev. 4th Ed. p. 135.
- (d) If a man, who cannot read, has a contract falsely read over to him, and the contract written differs from that pretended to be read, the signature of the document is of no force, because he never intended to sign, and, therefore, in contemplation of law did not sign the document on which the signature is. *Foster v. Mackinnon*, L.R. 4 C. P. 711, cited in 28 B. 420 (427).
- (e) On the question whether a certain person had passed off his own goods as those of another, evidence that he had committed a fraud by advertising such goods as being patented, while they were not so actually, was held to be irrelevant. *Lever v. Goodwin*, C. A., 1887, W.N. 107 Philp. Ev. 4th Ed. p. 101.

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(21) Fraud, proof of.

- (a) Fraud is not generally capable of being established by positive and express proofs; it is, by its nature, secret in its movements; if direct proof of fraud were to be insisted upon in every case, the ends of justice would be constantly, if not invariably, defeated. 11 W. R. 482 (483 & 484) = 3 B.L.E. (A.C.) 108.
- (b) But fraud cannot be established by any less proof, or by any different kind of proof, from what is required to establish any other disputed question of fact. 11 W. R. 482(484).
- (c) And fraud and dishonesty are not to be assumed upon conjecture, however probable. 3 M.L.A.1(18) = 6 W.R.(P.C.) 24(27).
- (d) In the generality of cases, circumstantial evidence is the only resource in dealing with questions of fraud; if this evidence is sufficient to overcome the presumption of honesty and fair dealing, and to satisfy a reasonable mind of the existence of fraud by raising a counter-presumption, there is no reason why it should not be acted upon. 11 W.R. 482(484), per *Millet, J.*
- (e) Fraud is proved when it is shown that a false representation has been made,
 - (1) knowingly, or
 - (2) without belief in its truth, or
 - (3) recklessly, careless whether it be true or false.*Derry v. Peek*, L.R. 14 App. Cas. 337, Phip. Ev. 4th Ed. p. 132 & Nel. Contr. p. 170.
- (f) Facts may be evidence of fraud without malice being sufficient to constitute or establish it. *Derry v. Peek*, 14 App. Cas. 369; Phip. Ev. 1th Ed. p. 131.
- (g) The proposition that the mere omission to hand over the deeds is in all cases to be deemed a proof of fraud is without authority. Per *Lord Langdale* in *Farrow v. Rees*, 4 Beav. 18, cited in 2 C.W.N. 750 (753).

(22) Motive or intention immaterial where fraud is proved.

If fraud is proved, the motive of the person guilty of it is immaterial; it matters not that there was no intention to cheat or injure the person to whom this statement was made. *Derry v. Peek*, 14 App. Cas. 337. Nel. Contr. p. 190.

(23) Evidence of similar prior frauds relevant on particular fraud.

- (a) To prove that a given transaction was fraudulent, similar frauds by the same party prior to it may be shown. *Blake v. Albion Society*, 4 C.P.D. 94, Phip. Ev. 4th Ed. pp. 156 & 164; Steph. Dig. 7th Ed. p. 21; Tay. Ev. 10th Ed. p. 266.
- (b) Where, on the trial of two persons charged with conspiring to defraud a third person by falsely representing that the first of the two owned certain property, the defence of the second accused was that he honestly believed those representations but was duped by the first, letters between the two accused regarding the transaction written prior, but not subsequent to it, were held admissible for the second. *R. v. Whitehead*, 1 Dowd. & Ry. M.C. 367, & 868; Phip. Ev. 4th Ed. pp. 85 & 187.

(24) Unusual procedure. — Evidence of fraudulent intention.

Where a transaction, carried out in a most unusual way, and in the only way in which secrecy could be maintained, enabled the settlor and the

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trustee of certain properties to raise from time to time large sums of money by inducing the persons who advanced the money to them to believe that the whole title lay in the settlor and the trustee, held, that a fair inference of an intention to defraud the lenders could be drawn from the unusual procedure. 22 C. 185 (214).

(25) Silence held evidence of fraud.

If a person, who proposes to make an advance on a property, informs a mortgagee of his intention in such a manner as to show that he intended to be guided by what he might hear from the mortgagee, and the mortgagee remains silent, still more if a direct inquiry is made of the mortgagee and he remains silent, then, in either of these cases, the mortgagee will be held guilty of constructive fraud. 1 A. 303 (306).

(26) Whether passive acquiescence of parties in mistakes of each other evidence of fraud.

Where there is no obligation, as between vendors and purchasers, to divulge facts known to them, which would affect the value of a thing under sale, the passive acquiescence of either in the other's mistake is not evidence of fraud. *Smith v. Hughes*, L.R. 6 Q.B. 597. Phip. Ev. 4th Ed. p. 131.

(27) Omission to use ordinary care relevant on questions of fraud.

The omission to use ordinary care in inquiry after, or keeping, title-deeds may be, and, in some cases has been, held to be sufficient evidence, where such conduct cannot otherwise be explained, of the assistance or connivance, by the owner of the legal estate, of the fraud which has led to the creation of a subsequent equitable estate without notice of the prior legal estate. *Northern Counties of England Fire Insurance Co. v. Whipp*, 26 Ch. D. 482, cited in 13 M. 383 (386).

(28) Habit, proof of—

(a) In order to prove an offence under S. 401, I.P.C., there must be proof (1) of association (2) and of the association being for the purpose of habitual theft; and the habit is to be proved by an aggregate of acts. 6 M.H.C. 120, cited in 27 C. 199 (142)—4 C.W.N. 97.

(b) The habit of an animal is in the nature of a continuous fact to be shown by proof of successive acts of a similar kind. *Todd v. Rowley*, Ev. Mass. 51; Phip. Ev. 4th Ed. p. 146.

(c) A man cannot be said to be habitually receiving stolen goods who may receive the proceeds of a dozen different robberies from a dozen different thieves on the same day; but, in addition to the receipt from different persons, there must be a receipt on different occasions and on different dates, in order to constitute an offence under S. 413 of the Penal Code. 19 C. 190 (192).

(d) It would be very dangerous to hold that the single fact of an ordinary Indian pony actually kicking any evidence of probable danger to human life or of grievous hurt. 3 M.H.C. R. xxxiii (app.).

(29) Propensities of animal or its species relevant on animal actions.

(a) Where animal actions are in issue, the propensities of the species of the particular animal and the doings of the same animal on other occasions are relevant. *Osborne v. Chocquet*, 2 Q.B. 109. Phip. Ev. 4th Ed. p.

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(b) A tendency in an animal to bite animals of one species is evidence of a tendency to bite those of another. *Quin v. Quin*, 39 Ir. L.T.R. 163. Phip. Ev. 4th Ed. p. 145.

(c) But the propensity of an animal to bite other animals is no evidence of a similar tendency in it to bite human beings. *Hartley v. Harriman*, L.B. & Ald. 620; Phip. Ev. 4th Ed. p. 145.

(30) Guilty knowledge, evidence and proof of.

(a) A guilty knowledge is not necessarily a thing on which direct evidence can be afforded; it is a matter of conscience, and connected with the secret motives of a man's conduct; and it must be inferred from facts. 13 W.R. (Cr.) 26.

(b) If a property, sufficiently identified to be the property of one person, is found to be in the possession of another person, without leave or license, or any legal permission of the owner, a jury might fairly infer, in the absence of a satisfactory explanation, that the prisoner took that which he knew not to be his own with a guilty knowledge. 13 W.R. (Cr.) 26.

(c) The guilty knowledge, in the case of a person charged with instituting a criminal proceeding with intent to injure, is the most difficult to prove; but that it should be proved substantively by the prosecution, is absolutely essential. 8 W.R. (Cr.) 87 (89).

(31) General effect of ill. (a) to S. 14.

The preliminary set forth, in S. 14, ill. (a), to the admission of testimony as to an accused person's being in possession of other stolen articles that, "it is proved that he was in possession of the particular stolen article" (in question), does not allow the receipt and possession of the particular stolen property to be proved by other apparently similar instances, but only the guilty knowledge. 11 R.H.C.R. 90 (92); per *West, J.*

(32) Operation of maxim, "every man must be presumed to know the law," extent of.

(a) Though every man must, in a certain sense, be presumed to know the law, it does not follow that a criminal intent or knowledge is necessarily to be imputed to every man who acts contrary to the provisions of the law. 8 W.R. (Cr.) 87 (92).

(b) The maxim that 'every man must be presumed to know the law' is limited to the determination of the Civil or Criminal liability of the person whose knowledge is in question, and cannot be legitimately made use of in a case, where the parties are entirely different and distinct from him. 26 Cl. 465 (490); per *O'Kinealy, J.*

(c) The maxim "*ignorantia juris non excusat*" does not apply to the case of a declaration made under S. 18 of Act XV of 1872, though false; for the section imposes a declaration only of the belief of the person making it, and, to become penal, according to S. 66 of that Act, it must be made "intentionally". 16 A. 212 (216).

(33) Relevancy of prisoner's conduct on one occasion to show his knowledge on another.

The Judges, in a case reserved, held that the jury were at liberty to infer, from the prisoner's conduct on one occasion, his knowledge in another. *R. v. Tattersall*, 2 Lea. 984 A.A. & W. Ev. 4th Ed. p. 96.

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(34) Presumptions in cases of receiving stolen property.

(a) The possession, after recent theft, of stolen property raises ordinarily a presumption either that the person in possession is the thief or had dishonestly received the property, knowing it to be stolen. 9 Bom. L.R. 27.

(b) A direction to the jury that, if a prisoner could not prove how he became possessed of certain articles—though they might have been small in value and in common use—it was their duty to convict him, for the presumption, in such a case, was legally valid that he knew that the property had been unlawfully acquired, was held not to be a misdirection. 5 W.R. (Cr.) 3.

(35) Rule of S. 14 —Receiving stolen property.

On an indictment for receiving several articles, knowing the same to be stolen, if it appear that they were received at different times, the prosecutor may be put to his election to confine the evidence to the particular charge selected by him, and after the election has been made, evidence may be given of all the receipts for the purpose of proving guilty knowledge. Russell on Crimes, quoted in 16 B. 414 (430).

This is the rule of S. 14 standing side by side with the rule of S. 11, narrowly construed. 11 B.H.C.R. 90 (93) per West, J.

(35 a) Circumstances to be borne in mind in estimating probability of guilty knowledge.

The possession of the property stolen from two different owners is a circumstance which under S. 14, ill. (a) of the Evidence Act must be borne in mind in estimating the probability of guilty knowledge in the accused. 9 Bom. L.R. 27—5 Cr. L.J. 63.

(35-b) Instances of relevant facts in cases of receipt of stolen property.

(a) To prove the guilty knowledge of a person charged with receiving certain stolen property, knowing the same to have been stolen from another, the facts that she received many other articles, stolen from the same person in the course of several months and that she pledged or disposed of, or had in her possession, all of them were deemed to be relevant. *R. v. Dunn*, 1 Moo. C.P. 146; Steph Dig. 7th Ed. p. 17; Philp. Ev. 4th Ed. p. 159.

(b) Where an accused person was charged with having dishonestly received property, stolen at different thefts and probably at different times, it was held that a *scienter* was sufficiently established to justify the setting aside of the order of his acquittal. 9 Bom. L.R. 27 (29).

(c) Where a prisoner was apprehended eight days after a dacoity with part of the plunder in his possession, held, there was as good a ground for charging him with the dacoity, as with having received or retained it with guilty knowledge. 5 W.R. (Cr.) 67.

(36) Relevancy of similar previous transactions to show guilty knowledge in a case of false pretence.

On the trial of a prisoner for attempting to obtain money on a false pretence that a certain ring was a diamond ring, evidence proving that he had previously attempted to obtain money from other persons by false representations as to the genuineness of other rings and jewellery was admitted to show his knowledge that the ring in question was not

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genuine. *R. v. Francis*, L.R. 2 C.C.R. 128, cited in 16 B. 414 (132) and Phip. Ev. 4th Ed. p. 162.

(37) Instances of relevant facts in cases of uttering counterfeit coins and notes.

(a) On an indictment for uttering counterfeit coins or banknotes, knowing them to be counterfeit, evidence that, shortly before the transaction in question, the accused had uttered another, similar, counterfeit thing is relevant to prove guilty knowledge or intent. *R. v. Green*, 3 C. & K. 209; Tay. Ev. 10th Ed. p. 270; Best Ev. 9th Ed. p. 265.

(b) Where a person was charged with uttering counterfeit coin, knowing it to be counterfeit, the fact that he had previously or subsequently uttered counterfeit coins of a similar or different kind was held to be admissible in evidence of his knowledge, though these utterings may be the subject of separate charges. *R. v. Foster*, 21 L.J.M.C. 131; Phip. Ev. 4th Ed. p. 158; Tay. Ev. 10th Ed. p. 270; and Steph Dig. 7th Ed. p. 17 (under the name of *R. v. Forster*, 1 Dears. 456); see, also, *R. v. Hicks*, L. & C. 18. *Ibid.*

(c) Where a person was charged with uttering counterfeit coins knowing them to be such, the fact that he gave a false name and address at various other utterings, prior and subsequent to the particular one in question, was held to be admissible on the question of his knowledge. *R. v. Whaley*, 2 Lea. C.C. 983; Phip. Ev. 4th Ed. p. 158.

(d) On a charge of uttering counterfeit coin, evidence is admissible to show that the prisoner knew the coin to be counterfeit, because he had other similar coin in his possession or had passed such coin before or after the particular occasion which formed the subject of the charge. 6 C. 655 (660), per *Garth. C. J.*

(e) The fact that a number of coins of an unusual kind were in the possession of an accused person and that he attempted to dispose of them, are relevant on a charge of uttering such coins immediately afterwards when the fact of the fraudulent delivery of the coins is denied. 8 B. 223 (226), *distinguishing*, 11 B.H.C.R. 90.

(f) To prove the guilty knowledge of an utterer of a forged banknote, evidence may be given of his having previously uttered other forged notes, knowing them to be forged, and the fact of the prior utterings being distant would not render the evidence inadmissible. *Rex v. Whaley*, 2 Leach's C.C. 983, cited in 16 B. 414(431) & Phip. Ev. 4th Ed. p. 154.

(g) On a charge of uttering a forged Polish note, the testimony of a detective that the defendant had agreed to forge him a large number of spurious Austrian notes for a certain sum was held to be admissible, though no notes were actually made in pursuance of the agreement. *R. v. Balls* 1 MOO.P.C.C. 470. Phip. Ev. 4th Ed. p. 158.

(31) Case where confession held relevant to show knowledge.

When two persons are accused of an offence of the same definition arising out of a single transaction, the confession of the one may be used against the other, though it inculpates himself through acts separable from those ascribed to his accomplice, and capable, therefore, of constituting a separable offence from that of the accomplice. * 8 B. 223(226).

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(39) Knowledge, an important question in civil cases also.

In civil cases also, it is often an important question whether an act was knowingly done. *May v. Burdett*, 9 Q.B. 101, and *Hudson v. Roberts*, 6 Exch. 697; Best, Ev. 4th Ed. p. 80.

(40) Relevancy of declarations of person or of others to show his knowledge.

A person's knowledge of a fact, when its existence is proved *aliunde*, may be shown either by his declarations manifesting it, or by those of others conveying notice or information to him. *Thomas v. Connell*, 4 M. & W. 267; Phip. Ev. 4th Ed. p. 52.

(41) Facts relevant as raising presumption of knowledge.

(a) Where a person refused a letter forwarded to him by post duly registered, the presumption is that it was tendered to him, and he cannot afterwards take advantage of his refusal to plead ignorance of its contents. 16 W.R. 223 (224).

(b) Execution of documents (e. g., of a deed) will imply knowledge of their contents. *In re Cooper*, 20 Ch. D. 611; Phip. Ev. 4th Ed. p. 127.

(c) Where a purchaser's attention was drawn, by the sale deed executed to him, to a deed of partition giving the plaintiff a right of pre-emption with regard to the property sold, that purchaser's omission to ascertain its contents must be construed as wilful abstention from an enquiry which he ought to have made. 16 M. 301 (303).

(d) Knowledge of the contents of a document will be implied where it is a party's duty to know. *Hallmark's case*, L.R. 9 Ch. D. 329; Phip. Ev. 4th Ed. p. 128.

(e) Underwriters are presumed to know the contents of Lloyd's shipping list. *Mackintosh v. Marshall*, 11 M & W, 116; Phip. Ev. 4th Ed. p. 128.

(f) Although the act of exposing for sale, in a market, animals destined for human food, does not imply a warranty that they are free from disease, so as to make the seller responsible, if they should turn out to be infected, whether he knew of their condition or not; it does amount to a representation that, to his knowledge, they are not so infected. *Ward v. Hobbs*, 2 Q.B.D. 331; *Overruled on appeal* in 3 Q.B.D. 150, 4 App. Cas. 13; Shop. & Com. Contr. 6th Ed. p. 276.

(g) A party has been held bound, not only by an auctioneer's receipt, but by conditions elsewhere exhibited, to which the receipt referred and was subject. *Watkins v. Rywall*, 10 Q.B.D. 178, referred to in 5 Bom. L.R. 853 (864), & 23 M. 183--11 M.L.J. 329 & Phip. Ev. 4th Ed. p. 130; Tay. Ev. 10th Ed. p. 93.

(h) In a case where a servant, appointed as an agent for a particular business by his master, enters into an agreement in connection with that business, making the master responsible for such of his acts as are within the scope of his employment, the master's express knowledge of, or consent to, the act is not necessary, because from the very fact of the appointment of the servant as an agent in such a business, the master's knowledge of, or consent to, every act done by the servant or agent within the scope of his employment is implied by law. 32 B. 10 (13).

(42) Instances of facts held relevant as showing knowledge.

(a) To prove that a person knew of his own insolvency at the time when he paid a creditor, his own statements at that time implying a conscious-

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ness of the fact and letters found with him after the bankruptcy, but bearing postmarks before it, containing refusals to lend him money, are relevant, after proof of his insolvency has been given *aliunde*, “as verbal acts indicating a present purpose and intention.” *Vacher v. Cocks*, 1 M. & M., 353. Phip. Ev. 4th Ed. p. 71; Tay. Ev. 10th Ed. p. 413.

- (b) On the question whether a captain of a ship knew the blockade of a port, a notification in the gazette to the effect that it was blockaded was held to be relevant. *Harra v. Wise*, 9 B. & C. 712. Steph. Dig. 7th Ed. p. 20.
- (c) The fact that the acceptor of a bill of exchange had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee, should the latter have been a real person, would be admissible, on the question whether the acceptor knew that the payee's name was fictitious, as showing that he did know it. *Gibson v. Hunter*, 2 H. B.L., 288, Steph. Dig. 7th Ed. p. 18.
- (d) Where the question was whether a person, at the time of entering into a contract with another, knew of the latter's insanity, evidence of the latter's conduct both prior and subsequent to the transaction was held to be admissible, as showing his lunacy to be of such a character as must have been apparent to that person. *Beavan v. Mc. Donnell*, 10 Ex. 181; *Loratt v. Tribe*, 3 F. & F. 9; Phip. Ev. 4th Ed. pp. 133 & 134.
- (e) In a suit for damages against a person whose dog had bitten the plaintiff, the facts that the dog had previously bitten others and that they had complained to the defendant are relevant as proving knowledge on the part of the defendant of the ferocity of the dog. Steph. Dig. 7th Ed. p. 14.
- (f) The knowledge of an owner, of the mischievous propensities of his dog, may be proved by evidence that he warned another person to beware of it. *Judge v. Cox*, 1 Stark, 285; Phip. Ev. 4th Ed. p. 134.
- (g) On the question whether the owner of a mischievous dog knew its vicious tendency, the fact that he offered compensation for its biting certain cattle, on proof of it, was held relevant. *Thomas v. Morgan*, 2 Cr. M. & R., 496; Phip. Ev. 4th Ed. p. 134; Tay. Ev. 10th Ed. p. 562.

(43) Notice, definition of.

- (a) A person is said to have “notice” of a fact when he actually knows that fact, or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it, or when information of the fact is given to, or obtained by, his agent under the circumstances mentioned in the Indian Contract Act, 1872, S. 229. S. 4, Transfer of Property Act (IV of 1882).
- (b) The definition of the word ‘notice’ in S. 3 of the Transfer of Property Act, 1882, correctly codifies the law as to notice which existed prior to the passing of that Act. 3 A. 591 (599).

(44) Constructive notice, definition of.

Constructive or implied notice may be defined to be knowledge, which the Courts impute to a person from the circumstances of the case, upon a legal presumption, so strong that it cannot be allowed to be rebutted,

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that the knowledge must exist, though it may not have been formally communicated. *Hewitt v. Loosemore*, 9 Hare. 449; Gour T.P.A. 2nd Ed. p. 59.

(45) Constructive notice in English Law, two kinds of.

In English Law constructive notice is said to be of two kinds, the one being the notice to an agent called “imputed notice;” the other, more properly called “constructive notice”, being confined only to the notice which the Courts have raised against a person from his wilfully abstaining from making inquiries or inspecting documents. In this country one distinguishing nomenclature has been sanctioned by the Act, and the term “notice” without qualifying words, includes all species of notice, whether actual or constructive. Gour T.P.A. 2nd Ed. p. 60, referring to *Kettlewell v. Watson*, 21 Ch. D. 704.

(46) Cases where relevancy of facts on constructive notice considered.

(a) Constructive notice of a deed is constructive notice of its contents, provided the deed is a deed relating to the title and forming part of the chain of title. *Putman v. Harland*, 17 Ch. D. 353, cited in 16 M. 301 (303), and 27 B. 452 (467); Phip. Ev. 4th Ed. p. 128.

(b) A policy of insurance being a contract entered into between the insurers and the assured, and the terms of such contract resting entirely upon the contract itself, and not, in the main or even in part, upon the common law or upon the statute, the assured, who makes the proposal, enters into the contract and signs the policy, has, in the very nature of things notice that the policy contains all the terms and conditions of the contract. *Watkins v. Rymill*, L.R. 10 Q.B.D. 178, cited in 25 M. 183 (205) 17 M.L.J. 379 (389).

(c) For a purchaser to be affected with constructive notice through his solicitor, the latter himself must have actual notice, and cannot be treated as possessing the latent knowledge of his client, the mortgagor. 4 C. 897 (910), referring to *Corser v. Cartwright*, L.R. 7 Eng. & Ir. App. 731.

(d) The notice of the existence and preparation of a draft deed will not amount to notice of its execution. *Williams v. Williams*, 17 Ch. D. 443; Phip. Ev. 4th Ed. p. 127; see, also, 27. B. 452 (483 and 484); per *Aston, J.*

(47) Absurdity of extending doctrine of constructive notice.

How the doctrine of constructive notice may be attempted to be pushed to an almost absurd extent is shown by, *Hunter v. Walters*, L.R. 7 Ch. App. 85; followed in 7 C. 199 (206); per *Poultifer, J.*

(48) Registration, whether amounts to notice.

(a) It was declared that, in Bombay, the Courts had adopted the rule which prevails in America, and it was held that registration does amount to notice to all subsequent purchasers and mortgagees of the same property. 6 R. 168 (F.B.); not followed in 15 M. 268 (277); see *infra*.

(b) It has not as yet been held in the Madras High Court that registration is notice. 8 M. 246, per *Turner, C.J.*; referred to in 15 M. 268 (277); see, also, 31 M. 7 (10).

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(c) Mere registration cannot amount to notice to subsequent purchasers. 13 M. 383 (388), distinguishing *Kettlewell v. Watson*, 21 Ch. D. 685. •

(d) It was held, following the English and Irish decisions, that registration is not of itself notice to subsequent purchasers and mortgagees. 15 M. 268 (277 & 278).

(49) Belief, ground of, relevant test of its validity.

The ground upon which an alleged belief was founded is a most important test of its validity. *Derry v. Peek*, 14 App. Cas. 373; Nel. Contr. p. 170. •

(50) Instances of facts held not relevant to show knowledge.

(a) It is an error in law to consider the fact of a prisoner leaving his defence to his counsel as in any way whatever indicating any guilty knowledge. 13 W.R. Cr. 70(71).

(b) Evidence of the possession by a prisoner of stolen property other than that to which the charge applied was held to be inadmissible to show his guilty knowledge on the ground that the other stolen property was not found in his possession at or about the time of finding the particular stolen property in question, but had been disposed of before such finding. *R. v. Drage*, 14 Cox, 85, and *R. v. Carter*, 12 Q.B.D. 522; Phip. Ev. 4th Ed. pp. 156 & 160, and Steph. Dig. 5th Ed. p. 7.

(c) There must be something more than the mere fact of stolen articles of trifling value being found in a man's house to establish the fact that he knew them to have been transferred by dacoity, or had acquired them from one whom he knew or believed to be a dacoit. 18 W.R. (Cr.), 26.

(d) Where a man finds lost goods and keeps them, no presumption of larceny will arise, unless it is satisfactorily proved that the finder believed that the owner of the goods could be found. *R. v. Thurborn*, 18 L. J.M.C. 140; Tay. Ev. 10th Ed. p. 118.

(e) The circumstance that a person, charged with uttering a certain forged note, had returned the money for other notes when they were objected to, and let the word “forged” be endorsed thereon, was held not to be relevant, unless those notes were produced, or their absence accounted for. *R. v. Phillips*, 1 Lew. C.C. 105; Phip. Ev. 4th Ed. p. 158; Tay. Ev. 10th Ed. p. 270. •

(f) Where, on a charge of forging one promissory note, evidence that another one found in the prisoner's pocket-book was forged, was admitted by the Judge at the assizes, but, the prisoner was afterwards released on a case submitted to the twelve Judges, it was understood that they thought the evidence inadmissible. 11 B.H.C.R. 90 (94).

(g) Where a person, who contemplated marriage with the sister of his deceased wife, was charged, under S. 193, I.P.C., with making a false declaration, knowing it, at the same time, to be untrue, the silences and concealments on the part of the accused, upon which the prosecution relied as proof of guilty knowledge, were held to be fairly and naturally explainable, by his desire to escape obstruction by the ecclesiastical authorities, conscientiously acting for the enforcement of Church Law, and not to constrain the Court to impute to him guilty

I.—“Facts showing the existence of any state of mind—person”.—(Contd.).

knowledge that his proposed marriage was in violation of the law of the land. 16 A. 212 (217).

- (h) Where a trustee, charged with fraud, pleaded that he had first disclosed the offence on his compulsory examination in bankruptcy, the testimony of a witness, adduced to rebut this plea and to show that the trustee's guilt was known to his solicitor before that date, that the trustee's solicitor had stated to the witness that the trustee had committed the offence, was held inadmissible to prove the solicitor's previous knowledge of the trustee's guilt. *H. v. Gunnell*, 16 Cox, 154, Phip. Ev. 4th Ed. p. 71.
- (i) A person's bare assertion out of Court that he knew a fact was held inadmissible in evidence of his knowledge. *H. v. Gunner*, 16 Cox, 154; Phip. Ev. 4th Ed. p. 52.
- (j) The mere fact of a person attesting a deed is no evidence in itself that he consented to it, or knew its contents. 3 B.L.R. (P.C.) 57, referred to in 9 C. 463 (468).
- (k) Where a remote reversioner to the estate of a Hindu widow attested her deed of ratification of certain conveyances made by her son, to which she had not been a party, the son dying during his mother's lifetime, the reversioner's ratification was held not to amount to any consent on his part. 9 C. 463 (468).
- (l) Mere attestation of documents will not imply a knowledge of their contents. *Harding v. Crethorn*, 1 Esp. 58; Phip. Ev. 4th Ed. p. 127.
- (m) Where the question was whether a person knew, at a particular time, of another's insanity, evidence of general repute, in the neighbourhood in which both lived at the time, as to the latter's insanity was held not to be relevant. *Greenslade v. Dare*, 20 Beav. 284; Phip. Ev. 4th Ed. p. 133.
- (n) Though access to documents may raise a presumption of knowledge, this presumption will not apply in the case of directors. *Hallmark's case*, L.R. 9 Ch. D. 329, Phip. Ev. 4th Ed. pp. 128 & 133.

(51) Instances of facts held relevant on good faith.

- (a) Where a person was charged with having libelled another by calling him a swindler, a report to the same effect by the French Police, upon which the accused based his statement, was held to be relevant to show the *bona fides* of his defence, though not to justify the libel or prove its truth. *R. v. Labouchere*, 14 Cox, 419; Phip. Ev. 4th Ed. p. 116.
- (b) The state of a party's knowledge as to any matter and the fact that he had reasonable grounds for such belief may be adduced in evidence of the *bona fides* of his belief regarding it. *Derry v. Peek*, 14 App. Ca. 337; Phip. Ev. 4th Ed. p. 131.
- (c) Where the defence, in an action against a defendant for work done by the order of a contractor, was that the contract was with the contractor, the fact that the defendant paid the contractor for the work in question was held to be relevant, as showing the *bona fides* of the defence, and disproving any attempt to escape liability. *Gerish v. Chartier*, 1 C.B.13; Steph. Dig. 7th Ed. p. 19; Phip. Ev. 4th Ed. p. 116.

1.—“Facts showing the existence of any state of mind—person”.—(Contd.).

- (d) On the question whether the defendant acted *bona fide* in representing a tradesman to be solvent, in consequence of which the plaintiff trusted the trader and suffered loss, the fact that, at the time of the representation, the tradesman was, to the defendant's knowledge, supposed to be solvent by his neighbours and by others dealing with him, was deemed to be relevant, as showing that the defendant made the representation in good faith. *Sheen v. Bumpstead*, 2 H. & C. 198, Phip. Ev. 4th Ed. p. 136; Steph. Dig. 7th Ed. p. 19.
- (e) On the question whether the directors of a mining company acted *bona fide* in misrepresenting its value to a purchaser, conversations, in the purchaser's absence, between the directors recommending the mine to one of them, and representations made to the directors by their vendor, and the fact that they, notwithstanding that the shares went to a premium for a time, did not sell any, but purchased more, are admissible in evidence on the part of the directors. *Shrewsbury v. Blount*, 2 M. & Gr. 475; Phip. Ev. 4th Ed. p. 136.
- (f) To show that a person, charged with obtaining eggs under the false pretence that he was a *bona fide* dealer in them, evidence that he subsequently took eggs from other persons under the same pretence is admissible. *R. v. Rhodes*, 1 Q.B. 77; Steph. Dig. 7th Ed. p. 18; Phip. Ev. 4th Ed. p. 156.
- (g) On the question whether the defendant acted *bona fide* in representing a tradesman to be solvent, with the result that the plaintiff trusted the trader and suffered damage, the fact that the trader sold goods to the defendant under cost price is relevant to negative the *bona fides* of the latter. *Sheen v. Bumpstead*, 2 H. & C. 198, Phip. Ev. 4th Ed. p. 136.
- (h) In an action against the directors of a mining company for misrepresenting its value to a purchaser, books maintained at their mine by the agent, in the course of his duty, showing that they had the means of knowing the inferior quality of the mine, were held to be relevant against the directors, as negating good faith on their part. *Shrewsbury v. Blount*, 2 M. & Gr. 475. Phip. Ev. 4th Ed. p. 136.
- (i) The absence of reasonable grounds of belief in the existence of a fact, (e.g., means of knowing the opposite) is relevant evidence of the want of honest belief. *Derry v. Peek*, 14 App. Cas. 337, Phip. Ev. 4th Ed. p. 131.
- (j) Where a person was charged with having dishonestly obtained credit for board and lodging, the facts that, shortly before, he had elsewhere hired lodgings and left without paying, and that that money was still due by him, were held to be relevant as showing a methodical course of conduct, disproving any reasonable or honest motive. *R. v. Wyatt*, 1 K.B. 188; Phip. Ev. 4th Ed. p. 163.
- (k) The exercise of undue influence, where no such specific relations exist between the parties as those of guardian and ward, father and son, patient and medical adviser, solicitor and client, trustee and cestui que trust and the like, and the parties are at arm's length may be proved by the nature of the benefit, the age, capacity, or health, of the party on whom the undue influence is alleged to have been exerted.

1. —“Facts showing the existence of any state of mind—person”.—(Contd.).

32 B. 37 (44); referring to *Rhodes v. Bate*, L.R. 1 Ch. 252 (257),
Baken v. Monk, 4 D. F. & S. 388, *Clark v. Malpas*, 4 D. F. & J. 401.

(52) Facts held inadmissible to show good faith.

(a) On the question whether a person intended to deceive another, by pretending to cast his fortune by means of the stars, evidence that he and others *bona fide* believed in his ability to foretell fortunes thereby was held not to be admissible. *Penny v. Hanson*, 18 Q.B.D. 478; Phil. Ev. 4th Ed. pp. 107 & 136.

(b) Where a person was charged with having deceived another by pretending to predict his fortunes by means of palmistry, evidence that palmistry was a recognised science, whose practitioners enjoyed a professional status, was held inadmissible. *R. v. Stephenson*, 68 J.P. Rep. 524; Phil. Ev. 4th Ed. pp. 107 & 136.

(53) Facts relevant to show negligence, mistake etc.

(a) A fire in a tram, resulting from an explosion of a large quantity of fire works, being an extraordinary occurrence, is one which raises, at least, a presumption of possible negligence on the part of the company. 26 C. 465 (501), *per Maclean C. J.*

(b) The Court will not impute fraud or gross or wilful negligence to the legal mortgagee if he has *bona fide* inquired for the title deeds and a reasonable excuse is given for their non delivery to him; but it will impute fraud or gross or wilful negligence to him if he omits all inquiry as to the deeds. *Herwit v. Loosemore*, 9 Hare. 449, cited in 13 M. 383 (387), and 15 M. 268 (276), referred to in 31 M. 7 (10).

(c) A violation of the duty—of taking due and reasonable care for the safety of the passengers carried—imposed upon a carrying company, an omission on their part to take such due and reasonable care to insure the safety of their passengers whom they invite to travel by their carriages, is considered as negligence. 26 C. 465 (509), *per Amir Ali, J.*, referring to *Foulkes v. Metropolitan Ry. Co.*, L.R. 5 C.P.D. 157.

(d) The existence of gross negligence within the meaning of S. 78, Transfer of Property Act, must be determined according to the circumstances of each case, and one of the circumstances to be taken into consideration is that in this country a universal system of organisation exists. 2 C.W.N. 750 (754); cited in 31 M. 7 (10).

(e) *Ex post facto* evidence has no bearing on the question whether due or reasonable care was or was not taken, but when it is contended that no precaution was possible, the fact that subsequent to the accident steps have been taken, which have, in a great measure obviated the risk, becomes highly relevant. 26 C. 465 (512) *per Amir Ali, J.*

(f) Where a person was convicted under S. 289, I.P.C., for neglecting to take such order with his pony as was sufficient to guard against any probable danger to human life, held, that, if the pony had been proved to be vicious and the defendant to be cognisant of the fact, there would have been evidence of the commission of the offence defined in the section, and that his conviction must be quashed, as, even assuming the negligent keeping of the pony, there was no evidence

1.—“Facts showing the existence of any state of mind—person”.—(Contd.)

that such insecure keeping would probably lead to danger to human life. 3 M.H.C.R. XXXIII (App.)

- (g) For the purpose of determining the existence of *mistake* in a written document, oral evidence is admissible when the circumstances are appropriate. 28 B. 420 (127); see, also, proviso (1) to S. 92, *infra*.
- (h) The oral evidence, admissible to determine the existence of a mistake in a written document, must be clear, and the Court, in weighing it, will be entitled to take into consideration the capacity of the executant and all the circumstances as they existed at the date of sale. 28 B. 420 (127).

(54) Cases where negligence will and will not be presumed.

- (a) Where the injury is traceable to an act which is forbidden by law, or which, though not forbidden by law, is in its nature mischievous and liable to cause injury, negligence need not be proved. 5 M.H.C.R. 139 (145), *per Innes, J.*
- (b) The keeping of a vicious monkey, however carefully, was indictable as a nuisance and was therefore an act forbidden by law. *May & Wife v. Burdett*, 16 L.J.Q.B. 64, cited in 5 M.H.C.R. 139 (145).
- (c) Where it was not the duty of a certain Railway Company to assume that certain contractors employed to execute some repair works, would be negligent, or to take precautions against their possible negligence, the occurrence of an accident was held not to raise any presumption of negligence on the part of the Company. *Daniel v. Metropolitan Ry. Co.*, L.R. 5 B. & I Ap. p. 15, cited in 26 C. 465 (513).
- (d) Although, according to the view taken in this Court, registration does not amount to notice to subsequent incumbrancers, it does put them in a position, with the exercise of reasonable care, to find out whether there is any registered prior incumbrance or not, and this consideration goes far to show that failure on the part of the prior mortgagee to get possession of the title deed is not, in the absence of reasonable explanation, necessarily to be imputed to him as gross negligence. 31 M. 7 (10); referring to *The Agra Bank v. Barry*, L.R., 7 H.L. 135, and *Hewitt v. Loosemore*, 9 Hare, 449.

(55) Instances of facts held no evidence of negligence.

- (a) A very strong Court was unanimous that the facts (the kicking by a pony of a child on the highway) constituted no evidence of negligence conducing to that result. *Cox v. Burbridge*, 13 C.B.N. S. 430, referred to in 3 M.H.C.R. XXXIII (App.)
- (b) The mere omission on the part of a mortgagee to take and keep the title deeds is not of itself gross negligence, or to express it otherwise by its results, does not operate to postpone the mortgagee. 2 C.W.N. 750 (753); cited in 31 M. 7 (10).

(56) Facts relevant to show ill-will.

- (a) All the cases, in which evidence of former conduct has been admitted, have been cases of malice; there is none in which such evidence has been admitted to show a lustful intent. *per Patterson, B. in R. v. Lloyd*, 7 C. & P. 318; *Philp. Ev.* 4th Ed. p. 166, but, also, see the author's note.

1.—“Facts showing the existence of any state of mind—person”.—(Contd.).

- (b) In a suit for a malicious libel, defamatory statements made by the defendant with reference to the plaintiff, for a number of years before those regarding which the suit is brought, are admissible to prove malice. *Barret v. Long*, 3 H.L.C. 395 (414). Steph. Dig. 7th Ed. p. 19.
- (c) Proof that a copy of the paper containing a libel was sold after action brought was admitted as evidence of deliberate publication. *Plunkett v. Cobbett*, 5 Esp. 136; Tay. Ev. 10th Ed. p. 267.
- (d) Libels previously written against the plaintiff by the defendants many years before, or those written by him subsequent to the commencement of the action, with the circumstances attending their publication, are relevant as showing actual malice or deliberate publication, and it is immaterial whether they were addressed to the plaintiff or others, or were equivocal or not, or were actionable *per se* or not. *Pearson v. Lemaitre*, 5 M. & Gr. 700; Phip. Ev. 4th Ed. p. 156.
- (e) In actions for malicious prosecution, the defendants' recklessness as to whether the charge was true or not or a corrupt motive in launching it, notwithstanding an honest belief in its truth, will constitute malice. *Brown v. Hawkes*, 2 Q.B. 718, Phip. Ev. 4th Ed. p. 132.
- (f) In actions of slander or false imprisonment or malicious prosecution, where malice is one of the main ingredients in the wrong which is charged, evidence is admissible to show that the defendant was actuated by spite or enmity against the plaintiff. 6 C. 655 (660). Per *Girrh, C. J.*
- (g) In a suit for damages on the ground that a certain article in a newspaper was a libel on the plaintiff, it was held that, reading the article as a whole and in its natural sense, and taking it in connection with the previous articles appearing in the same paper with reference to the plaintiff, and considering also the animosity between the plaintiff and the defendants, the publication was defamatory of the plaintiff. 14 B. 532 (539).
- (h) Evidence tending to prove the spirit and intention of a party publishing a libel cannot be excluded simply because it may disclose another and different cause of action. *Pearson v. Lemaitre*, 12 L.J.Q.B. 253; Tay. Ev. 10th Ed. p. 267.
- (i) On the construction of a libel in question, other libels are admissible. *Holton v. O'Brien*, 16 L. R. Ir., 97; Tay. Ev. 10th Ed. p. 267; Phip. Ev. 4th Ed. p. 157.
- (j) Evidence of the plaintiff's general bad character is admissible in cases of libel in mitigation of damages. *Scott v. Sampson*, 8 Q.B.D. 491, Best Ev. 9th Ed. p. 236.
- (k) The defendant in an action of assault, was allowed to prove, in mitigation of damages, a series of libellous articles published respecting him by the plaintiff, one of which appeared on the day of assault. *Judge v. Berkeley*, 7 C. & P., 371, per *Burrough, J.* Tay. Ev. 10th Ed. p. 269.
- (l) In America, the defendant is allowed to give evidence, not only in mitigation of damages in a civil suit, but of punishment in criminal proceedings, that the plaintiff has libelled him previously to the publication by the defendant of the libel complained of. Tay. Ev. 10th Ed. p. 269, referring to *Decamp v. Archibald*, 40 Am. St. R. 622.

2.—“Or showing the existence of any state of body or bodily feeling”.

(1) Facts held relevant on existence of state of body or bodily feeling.

- (a) To prove the state of health of patients, replies given by them to the inquiries made by their medical attendants and others are admissible in evidence of their state of health, provided they are confined to contemporaneous symptoms, and are not veiled narratives as to the cause of those symptoms. *R. v. Nicholas*, 2 C. & K. 246; *Phip. Ev.* 4th Ed. p. 50.
- (b) In actions or indictments for assault, to prove the sufferings of a person due to an assault made on him, the statements made by him to his surgeon are relevant. *R. v. Cuttridge*, 9 C. & P. 473; *Tay. Ev.* 10th Ed. p. 410.
- (c) In a case of murder by poisoning, the facts that the deceased, shortly before he took the poison, expressed himself as being in good health, and that, subsequent to taking it, used expressions indicative of present suffering, were held to be admissible in evidence, *R. v. Johnson*, 2 C. & K. 354, *Tay. Ev.* 10th Ed. p. 410; *Phip. Ev.* 4th Ed. p. 68.
- (d) The state of a person's health, at the time, when an insurance on her life was effected by another, may be proved by statements made by her regarding her health at or near the time in question. *Aveson v. Lord Kinnaird*, 6 Ea. 188; *Steph. Dig.* 7th Ed. p. 20.
- (e) Statements made by a person before his illness regarding the state of his health, and statements made by him during his illness as to his symptoms are admissible in evidence on the question whether his death was due to poison. *R. v. Palmer*, *Steph. Dig.* 7th Ed. p. 20.

(2) Facts held not relevant on bodily states of feelings.

- (a) A statement made by a person to the effect that he had received a wound would be admissible in evidence of his bodily state or feeling, but a statement that he had met another, who had a sword in his hand, and ran him through the body with it would not be relevant. *R. v. Nicholas*, 2 C. & K. 246; *Phip. Ev.* 4th Ed. p. 68.
- (b) Where a person was charged with having caused a woman's death by an illegal operation, statements made by her to her doctor, during her illness that that person operated upon her and that her illness was due to it, were held to be inadmissible. *R. v. Glover*, 16 Cox. 471; *Phip. Ev.* 4th Ed. p. 68.

3.—“Relevant.”

Admissibility of evidence exclusively to be decided by the Judge.

The question of admissibility must be exclusively decided by the Judge, however complicated the circumstances may be, and though it may be necessary to weigh the conflicting testimony of numerous witnesses in order to arrive at a just conclusion. 27 B. 452 (463), citing from Taylor on Evidence.

4.—Explanation I.—“A fact....question.”

(1) Disinclination of Courts to admit evidence leading to general and vague results.

- (a) In criminal cases, the Courts are always disinclined to run the risk of prejudicing the prisoner by permitting matters to be proved which

4.—“Explanation I—“A fact.....question.”—(Continued).

tend to show in general that he is a bad man, and so likely to commit a crime. Steph. Dig. 7th Ed. p. 172.

- (b) Circumstances which lead to no certain result should not be taken as sufficient proof of fraud; fraud should not be presumed against anybody in any case. 11 W. R. 482 (484).

(2) Necessity of strictly confining evidence to points in issue in criminal proceedings stronger than in civil.

- (a) In criminal proceedings the necessity is stronger, if possible, than in civil, of strictly enforcing the rule that the evidence is to be confined to the point in issue; for, where a prisoner is charged with an offence, it is of the utmost importance to him that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment, which alone he can be expected to come prepared to answer. Russell on Crimes '270, cited in 11 B. H. C. R. 90 (93).

- (b) The standard of proof in a criminal trial is not the same as in an ordinary civil case; no conviction should be arrived at unless upon clear, cogent evidence which leaves upon the mind no substantial doubt. 16 A. 212 (216).

(3) Evidence of general disposition, habit and tendencies not relevant.

- (a) Proof of a general malignity of disposition by evidence that a person was in the habit of shooting at people, with intent to murder them, is excluded even as proof of that person's intention, either as too remotely connected with the particular intention in issue, or as raising collateral questions which could not properly be resolved in the case. 11 B.H.C.R. 90 (92). Per West, J.

- (b) In actions for libel, evidence of rumours before the publication of the libel that the plaintiff had committed the offences charged in it and that the plaintiff was in the habit of committing offences of a like kind, is inadmissible. *Scott v. Sampson*, 8 Q.B.D. 491, Best. Ev. 9th Ed. p. 236.

- (c) On the question whether a person committed a particular crime, his having formerly committed another crime of the same sort and a tendency to commit such crimes is inadmissible in evidence. *E. v. Cole*, Steph. Dig. 7th Ed. p. 15; Phip. Ev. 4th Ed. p. 140.

- (d) On the trial of a prisoner charged with having taken usurious interest from a certain person in a transaction which occurred in 1870, the question would be, not whether he had a mind prone to the commission of usury, or whether he was in the habit of making usurious contracts, but whether, in the particular instance he had, in point of fact, been guilty of usury; in such a case, for the purpose of proving the nature of the transaction in 1870, evidence could not be given of some other usurious transaction having taken place between the same parties in 1871. 6 C. 655 (660), per Garth, C. J.

(4) Presumptions of intention.

- (a)—must depend upon the facts of each particular case. 5 W. R. (Cr.), 45 (46).

4.—“Explanation 1—“A fact.....question.”—(Concluded).

- (b) The Courts are not to presume that a man intended or knew the consequences of his acts, unless, looking to the whole evidence, they believe that he actually did know them. 5 W. R. (Cr.) 33 (39), per *Campbell, J.*

(5) Relevance of previous conviction excluded by terms of explanation 1.

The relevance of previous convictions for offences under S. 4 of the Bombay Gambling Act (IV of 1887) on a trial for a particular offence of the same sort would be excluded by the terms of explanation 1. of S. 14, read, for instance with ill. (p) appended to that section. 28 B. 129 (143), per *Jacob, J.*, *dissentient*.

5.—“Explanation 2.—“But where.....fact”.

(1) Scope of Explanation. 2.

Expl. 2 of S. 14 applies to S. 15 also. U. B. R. Cr. (97-01), 141 (145).

(2) English and Indian Law as to evidence of similar facts.

The Indian Evidence Act does not go beyond the English Law in regard to the admission of evidence of similar facts, except in so far as it renders a previous conviction relevant. 11 B. H. C. R. 90 (97), per *Melville, J.*

(3) Previous conviction, when relevant.

- (a) Explanation 2 distinctly states that, where the previous commission of an offence is relevant, the previous conviction of such person should also be a relevant fact. 1 C. W. N. 146 (149).

- (b) According to explanation 2 to S. 14 of the Evidence Act, previous convictions become relevant *within* the meaning of that section, when the existence of any state of mind, or body, or bodily feeling is in issue or relevant. 28 B. 129 (135), per *Chandavarkar, J.*

- (c) On the conviction of certain persons for an offence under S. 400, I.P.C. if their convictions in certain dacoities were previous to the time specified in the charge or previous to the framing of the charge in the case, they should be relevant under expl. 2, but not when they are subsequent to the time specified in the charge and to the framing of the charge itself. 1 C.W.N. 146 (150).

(4) Previous attempt to commit offence relevant as evidence of intention.

Illustration (o) to the section makes a previous attempt by the accused to shoot the person murdered, evidence of the accused's intention, but not of the act that caused the death. 11 B.H.C.R. 90 (92).

(5) Instances of previous convictions being held relevant.

- (a) Where a person was charged with the offence of belonging to a gang of persons associated for the purpose of habitually committing dacoity, it was held that proof of previous conviction was admissible under S. 14 of the Evidence Act, having regard to the character of the offence attributed to the accused. 1 C.W.N. 146; referred to in 28 B. 129 (135), per *Chandavarkar, J.*

- (b) Certain previous convictions of a person, convicted of the offence of keeping a common gaming house, under S. 4 of the Bombay Gambling Act, were held to be rightly admitted under S. 14 of the Act to show

5.---“Explanation 2.---But where.....fact.”---(Continued).

guilty knowledge or intention. 28 B. 129 (136 & 151) = 5 Bom. L. R. 805; Jacob, J, *dissenting*.

(6) Previous conviction inadmissible as evidence of character, not in issue.

Where the character of the accused was not in issue, as in the case of an offence under S. 401, I.P.C., evidence of such character or reputation—consisting of convictions of theft against only a few of them—was held to be inadmissible. 27 C. 139 (143).

(7) Previous conviction, though not relevant on guilt or innocence, relevant to affect punishment.

Evidence of an accused² person having been previously convicted of assaults could not be relevant for the purpose of affecting the opinion of the Court as to the guilt or innocence of the accused, but it might be recorded for the purpose of affecting his punishment. U.B.R. (92—96) p. 82.

15. When there is a question whether an act was accidental or

Facts bearing on question whether act was accidental or intentional, or done with a particular knowledge or intention.

intentional, (1) or done with a particular knowledge or intention, (2) the fact that such act formed part of a series of similar occurrences, (3) in each of which the person doing the act was concerned, (4) is relevant.

Illustrations.

(a) A is accused of burning down his house in order to obtain money for which it is insured.

The facts that A lived in several houses successively, each of which he insured, in each of which a fire occurred, and after each of which fires A received payment from a different insurance-office, are relevant, as tending to show that the fires were not accidental.

(b) A is employed to receive money from the debtors of B. It is A's duty to make entries in a book showing the amounts received by him. He makes an entry showing that, on a particular occasion, he received less than he really did receive.

The question is, whether this false entry was accidental or intentional.

The facts that other entries made by A in the same book are false, and that the false entry in each case is in favour of A, are relevant.

(c) A is accused of fraudulently delivering to B a counterfeit rupee.

The question is, whether the delivery of the rupee was accidental.

The facts that, soon before or soon after the delivery⁶ to B, A delivered counterfeit rupees to C, D, and E, are relevant, as showing that the delivery to B was not accidental.

(Notes)

General.

(1) Scope and meaning of section.

(a) This section is little more than a particular application of the general rule laid down in S. 14; it admits evidence to prove intention and bears chiefly upon criminal cases; such evidence is valuable to rebut

General.—(Continued).

defences setting up accident in poisoning or child murder cases. Field's Ev., 6th Ed., p. 81.

- (b) It is to be borne in mind that S. 15 of the Evidence Act invites consideration of the question of intention, only as opposed to accident, and, in connection with an offence under S. 4 of Bombay Act IV of 1887, no question of accident can arise. 28 B. 129 (143), per *Jacob, J.*, *dissentient*.

(2) Evidence acted upon in English decisions within terms of section.

The Courts are justified in looking to English decisions to elucidate the meaning of the Evidence Act, and evidence, which the Judges in England have admitted and juries have acted upon, must be held to be clearly within the terms of Ss. 11, 14 & 15. 16 B. 414 (433), referring to 7 B. H. C. R. (A. C. J.), 64; 11 B. H. C. R. 90 and 8 B. 223 (225-226).

1.—When there is a question whether an act was accidental or intentional**(1) Whether section deals with intention only as opposed to accident.**

The words, "or done with a particular knowledge or intention" appear to have been overlooked in 28 B. 129 = 5 Bom. L.R. 805 where *Jacob, J.* states that this section invites consideration of the question of intention only as opposed to accident. A.A. & W. Ev., p. 101.

(2) Facts relevant to show whether act was accidental or intentional.

- (a) Where the question was whether the administration of poison by a woman to her husband was intentional or accidental, the facts that his sons had the same poison administered to them and that she prepared the meals of all of them, were held to be relevant to show that such poison was intentional, and not accidental. *R. v. Geering*, 18 L.J.M. C. 215; Phip. Ev., 7th Ed., p. 161 & Step. Dig., 7th Ed., p. 20; referred to in 16 B. 414 (432). See, also, *R. v. Francis*, 12 Cox. C.C. 615, 2 C. C. R. 128, under S. 14, *supra*.
- (b) In a case of arson with intent to defraud an insurance company, evidence of previous attempt to set fire to the same premises, not shown to have been by the prisoner, were held to be relevant to rebut the defence of accident. *R. v. Bailey*, 2 Cox, 311, Phip. Ev., 1th Ed., p. 165.
- (c) When a person, charged with setting fire to his house, pleaded accident, evidence of previous abortive attempts (not shown to have been by him) to set fire to the same premises was held to be admissible to rebut his defence. *R. v. Bailey*, 2 Cox, 311; Phip. Ev., 4th Ed., p. 165.
- (d) The question being whether a false entry, made by a person employed to pay the wages of the labourers of another person, was accidental or intentional, the fact that the employee made other similar false entries in the same book for a couple of years was held to be relevant. *R. v. Richardson*, 2 F. & F. 343, Step. Dig., 7th Ed., p. 21; Phip. Ev., 4th Ed., 159 & 16 B. 414 (432).
- (e) Illustration (b) to S. 15 is, in principal, identical with the case of *Reg. v. Richardson*, 2 F. and F., 343, the only difference being that the latter was a case of swelling debits, and the illustration is a case of reducing credits. 16 B. 414 (433), per *Telange J.*

1.—When there is a question whether an act was accidental or intentional.
—(Concluded).

- (f) Where the prisoner was tried for arson with intent to defraud an Insurance Company, evidence that the prisoner had made claims on two other insurance companies in respect of fires which had occurred in two other houses which he had occupied previously and in succession, was admitted to show that the fire, which was the subject of the trial, was the result of design. *R. v. Gray*, 4 F. & F. 1102, cited in 16 B. 414 (432); Phip. Ev., 4th Ed., p. 165; Steph. Dig., 7th Ed., p. 20.
- (3) *R. v. Gray*, 4 F. & F. 1102, observations on.
- (a) With reference to *R. v. Gray*, 4 F. & F., 1102, Sir J. Stephen remarks, "I acted on this case in *R. v. Stanley*, Liv. Sum. Ass., 1882, but I greatly doubt its authority. The objection to the admission of such evidence is that it may practically involve the trial of several distinct charges at once, as it would be hard to exclude evidence to show that other fires were accidental." Steph. Dig., 7th Ed., p. 165; doubted also by Taylor; see Tay. Ev., 8th Ed., p. 326 n., 4; stated in 16 B. 414 (433), per Telang, J.
- (b) With reference to *R. v. Gray*, 4 F. & F., 1102, Telang, J., observes "It is true that one of those cases has been doubted by Mr. Taylor. But not only is the decision there the decision of a very eminent Judge, the authority relied on by Mr. Taylor in support of the contrary opinion—*Reg. v. Holt*, 8 Cox, 411—is shown, by the remarks of Blackburn, J., in the course of the argument in *Reg. v. Francis*, L. R. 2 C.C. P. 128, not to warrant the broad rule sought to be deduced from it." 16 B. 414 (433).
- R. v. Gray* was also approved in *Makin v. Att.-Gen.*, A.C. 57; see Phip. Ev., 4th Ed., p. 165 & Steph. Dig., 7th Ed., p. 21.
- (c) In India we have what may be called a legislative approval of the decision of Willes, J., for illustration (a) to S. 15 of the Evidence Act is really a statement of the case of *Reg. v. Gray*, 4 F. & F. 1102, 16 B. 414 (133), per Telang, J.

2.—or done with a particular knowledge or intention.

Facts relevant to show intention.

- (a) Where a person was charged with having made three transfers on a certain day with the intention of evading execution of a decree, evidence of other such transfers made on the same day was held to be admissible under Ss. 11 & 15 of the Evidence Act to show that all the transfers were in one and the same transaction in question and were made with a fraudulent intent. 16 B. 414 (424, 425).
- (b) Where a person was charged with using certain instruments on a woman with the intention of procuring an abortion, the facts that the prisoner had performed a similar, though unsuccessful, operation on another woman, with an avowed intention of the sort, and that he had told her that he was in the habit of making such operations, were held to be relevant as showing his intention. *R. v. Dale*, 16 Cox., 703, Phip. Ev., 4th Ed., p. 166.
- (c) Where two persons were charged with having fraudulently delivered to a third person counterfeit coins knowing, at the time they became possessed of them, that they were counterfeit, the confession of one of the persons that he had received the coins from the other and had

2.—“or done with a particular knowledge or intention.”—(Concluded).

passed them on, at that other's request, to several others, was held to be admissible against that other, though its value was but little. 8 B. 223 (224, 225).

3.—the fact that such act formed part of a series of similar occurrences.

Relevancy of similar facts.

- (a) Where a prisoner was indicted for poisoning one person, evidence that the accused had previously poisoned other persons, was held to be admissible. *R. v. Garner* 3 F. & F. 687; Best Ev. 9th Ed. p. 234; Phip. Ev. 9th Ed. p. 161; Tay. Ev. 10th. p. 259; Steph. Dig. 7th Ed. p. 21; 16 B. 414 (432).
- (b) Whether a mother was charged with poisoning her child, the fact that other children had died by the same poison was held to be relevant. *R. v. Cotton*, 12 Cox. C.C. 400, Tay. Ev. 10th Ed. p. 259; Phip. Ev. 4th Ed. p. 161.
- (c) Where a woman was charged with the murder, by poison, of her husband, whose life she had insured, evidence that the lives of other members of her husband's family, to whom she had access, and who had died from the same poison, had been insured by her, was held to be relevant to show her motive in murdering her husband. *R. v. Heeson*, 14 Cox. 40, Phip. Ev. 4th Ed. p. 161; Tay. Ev. 10th Ed. p. 260.
- (d) On a charge against a mother for murdering her child by suffocation in bed, evidence that other children of the same mother had died early for reasons unknown was held to be admissible. *R. v. Roden*, 12 Cox, 630; Phip. Ev. 4th Ed. p. 162; Tay. Ev. 10th Ed. p. 259; following *R. v. Cotton*, cited and Supra.
- (e) On the trial of a doctor, charged with the murder of a woman by administering strychnine to her, evidence of subsequent administrations of the poison by the accused to persons other than, and unconnected with, that woman was admitted in evidence. *R. v. Neill (or Cream)*, 116 Sess. Pap. C.C.C.p. 1417; Steph. Dig. 7th Ed. p. 21; Tay. Ev. 10th Ed. p. 260; Phip. Ev. 4th Ed. p. 161 (and see, also, the remarks there made).
- (f) Where the question was whether an insurance company acted fraudulently in receiving a premium from a certain person, through their agent, who had falsely promised to obtain from the company a loan for that person on condition of his insuring, evidence of the complicity of the agent and the insurance company in similar transactions was held to be relevant to show that the receipt of the money by the company was fraudulent. *Blake v. Abkion Society*, 4 C.P.D. 94; Tay. Ev. 10th Ed. p. 266; Phip. Ev. 4th Ed. p. 164; Steph. Dig. 7th Ed. p. 21.

4.—in each of which the person doing the act was concerned, is relevant.

Common link between facts adduced and facts to be proved necessary to form series.

- , If there is no common link between the fact to be proved and the evidentiary fact, they cannot form a series, and this is the gist of the section. A. A. & W. Ev. 4th Ed. p. 102, referring to Norton, Ev. 140. See, also, Art. 12, Steph. Dig. 7th Ed. p. 20.

16. When there is a question whether a particular act was done, the existence of any course of business (1) according to which it naturally would have been done is a relevant fact.

Existence of course of business when relevant.

Illustrations.

(a) The question is, whether a particular letter was despatched.

The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that that particular letter was put in that place, are relevant.

(b) The question is, whether a particular letter reached A. The facts that it was posted in due course, and was not returned through the Dead Letter Office, are relevant.

(Notes)

I.—‘Course of business.’

(1) What the section enacts.

Where there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact. 23 B. 63 (65).

(2) Expression ‘course of business’ occurs in more than one place.

The—in the Evidence Act. 23 B. 63 (65); see, also, Ss. 32 (2), 34, 47, & 114, *infra*.

(3) Course of business, meaning of.

The expression “course of business” must mean the ordinary course of a professional avocation or mercantile transactions or trade or business. 23 B. 63 (66).

(4) English Law, how matter of section dealt with in.

In English Law the matter of this section has usually been dealt with as a presumption,—i. e., the ordinary course of business is proved and the Court is asked to presume that, on the particular occasion in question, there was no departure from the ordinary and general rule. Field, Ev. 6th Ed. p. 82.

(5) Scope of section.

The section relates to private as well as public offices. Illustration (a) relates to the former; illustration (b) relates to the latter, viz., the Post Office itself. A. A. & W. Ev. 4th Ed. p. 104.

(6) Usage in private house, weight of.

A usage in a private house, however methodical, cannot carry the same weight as the ordinary routine of an office. 23 B. 63 (66).

(7) Principle of section.

(a) It would seem to be axiomatic that a man is likely to do, or not to do a thing, or to do it, or not to do it, in a particular way, according as he is in the habit of doing or not doing it. *State v. Railroad*, 52 N. H., 528 (532) (Amer.) cited in A. A. & W. Ev. 4th Ed. P. 104.

1.—‘Course of business.’—(Continued).

(b) Whenever it is established that one act is the usual concomitant of another the latter being proved, the former will be presumed; for this is in accord with the experience of common life. It is simply the process of ascertaining one act from the existence of another, and every one is presumed to govern himself by the rules of right reason and to acquit himself of his engagement and duty. *Mathias v. O'Neill*, 94 M.O., 527; 6 S.W., 253 (Amer.). A.A. & W. Ev., 4th Ed., p. 105. **A**

(8) Customs also relevant on course of business.

• Customs may, like any other facts or circumstances, be shown when their existence will increase or diminish the probabilities of an act having been done or not done, which act is the subject of dispute. *Walker v. Barron*, 6 Minn., 508, 512 (Amer.). A.A. & W. Ev., 4th Ed., p. 104. **B**

(9) Certain presumptions regarding letters.

(a) A letter forwarded to a person by post duly registered, must be presumed to have been duly tendered to him, and he cannot avail himself of his refusal to take it to plead ignorance of its contents. 16 W.R. 223 (224). **C**

(b) Where a letter is shown to have been either put into the post office or delivered to the postman, the presumption is that it reached its destination at the regular time and was received by the addressee. *Saunders v. Judge*, 2 H.Bl. 509, *Woodcock v. Houldsworth*, 16 L.J. Ex. 49, Tay. Ev., 10th Ed., p. 173. **D**

(10) Relevant instances of course of business.

(a) A notice sent by a registered letter, the posting of which was proved, and which was produced in Court in the cover in which it was despatched—that cover containing the notice, with an endorsement, upon it, purporting to be by an officer of the post office, stating the refusal by the defendant to receive the document—was held, having regard to S. 16, ill. (b) of the Act, to have been sufficiently served. 15 C. 681 (683); 16 W.R. 223 & *Pappillon v. Brunton*, 5 H.S.N. 518, referred to. **E**

(b) On the question whether a particular letter was despatched to the post, the facts that it was the ordinary course of business for all letters put in a particular place to be carried to the post and that the letter in question was put in that place are relevant. *Hetherington v. Kemp*, 4 Camp. 193; *Trotter v. Maclean*, 13 Ch. D. 576; Phip. Ev., 4th Ed., p. 103; Steph. Dig., 7th Ed., p. 22. **F**

[Illustration (a) to S. 16 is evidently the case of *Hetherington v. Kemp*, Supra; the usage there put forward was a usage of the plaintiff's counting house. 23 B. 63 (65)]. **G**

(c) The posting of a letter may be proved by showing that it was handed to, or left with, the clerk, whose duty it was, in the ordinary course of business, to carry it to the post, and who, though he had no recollection of the particular letter, habitually and invariably took all the letters delivered to him to the post office. *Skilbeck v. Garbett*, 14 L.J.Q.B. 888; Tay. Ev., 10th Ed., p. 178; Phip. Ev., 4th Ed., p. 103; Steph. Dig., 7th Ed., p. 22. **H**

(d) On the question whether a particular letter reached a certain person, evidence that it was posted in due course properly addressed and was

1. -- 'Course of business.' -- (Continued).

not returned through the Dead Letter Office is relevant. *Warren v. Warren*, 1 G.M. & R. 250; Steph. Dig., 7th Ed., p. 22; Phip. Ev., 4th Ed. p. 103; Tay. Ev., 10th Ed., p. 173; see, also, *British and American Telegraph Co. v. Colson*, L.R. 6 Exch. 108; see, also, illustration (b) to the section.

(c) The postmark on a letter is *prima facie* evidence that the letter was in the post at the time and place therein specified. *Fletcher v. Braddyl*, 3 Stark. R. 64; Tay. Ev., 10th Ed., p. 173.

(f) The postmarks on letters are considered as evidence of the dates and places mentioned thereon. *R. v. Johnson*, 7 East 65; Phip. Ev., 4th Ed., p. 103; Tay. Ev., 10th Ed., p. 173.

(g) On the question whether a letter was sent on a given day, the postal mark on it was held to be a relevant fact. *R. v. Canning*, 198 T. 370; Steph. Dig., 7th Ed., p. 22.

(h) If a letter is put into a post office, that is *prima facie* evidence, till rebutted, that the addressee received it in due course. *Kufli v. West*, 3 Esp. 54; *Warren v. Warren*, 1 C. M. & R. 250; *Stocken v. Collin*, 7 M. & W. 515; Best Ev., 9th Ed., p. 339.

(i) The possession by a person of a letter with the address torn off *prima facie* shows that it was addressed to him. *Curtis v. Richards*, 1 M. & G. 47; Phip. Ev., 4th Ed., p. 103.

(11) 'Legislative provisions.'

(a) By S. 94 of Act XXVI of 1881, if a notice is duly directed and sent by post and miscarries, such miscarriage does not render the notice invalid.

(b) By S. 90, Act VI of 1882 (Indian Companies), in proving service of any document to be served by post on a Company, it shall be sufficient to prove that such document was properly directed, and that it was put as a registered letter into the post office.

(12) 'Instance of course of business held irrelevant.'

(a) To prove the delivery of a letter posted to B at Bristol, evidence that it was addressed to him at "Bristol" was held to be insufficient. *Walter v. Haynes*, Ry. & M. 149, (*aliter* if this was the only address given by B. *Jimmester v. Barron*, 17 Q. B. 828) Phip. Ev., 4th Ed., p. 103; Tay. Ev., 10th Ed., p. 173.

(b) Mere possession of a letter by a clerk for the purpose of posting was held to be sufficient proof of it, where it was proved that the clerk, deceased, had left for the post office with the particular letter together with several others. *Rowland v. Delecchi*, 1 C. & E., 10; Phip. Ev. 4th Ed. p. 103.

(c) Where a plaintiff's clerk merely stated that a letter containing a notice in question was sent by post on a certain morning, but that he had no recollection whether he or another clerk put it in, *held*, there was no sufficient evidence of the letter being put into the post. *Hawkes v. Satter*, 4 Bing. 715; A. A & V., 4th Ed., p. 105; Best Ev., 9th Ed. p. 340.

(d) Where the question was whether a letter written by A to B was posted, evidence of one of A's clerks that he habitually copied all letters written by A, then returned them to A to seal, and that afterwards,

1. -- 'Course of business.'—(Continued).

when A gave them back, the witness or another clerk posted them, was held, in the absence of evidence to show that A had returned that particular letter to the clerk, to be no proof of posting. *Toosey v. Williams*, Moo. & M. 129; Phip. Ev., 4th Ed., p. 103. **T**

- (e) Where, with reference to Ss. 16 & 114 of the Evidence Act, it was contended that, in the ordinary course of the business of a Company, certain letters in question would have been posted, and that the Court should infer that they had been posted properly addressed, the Court declined to draw the inference that they were properly addressed. 9 A. 366 (384). **U**

(13) Courses of business customs and usages--admissible.

- (a) On the question whether a certain endorsement was made on a lost license entered at the custom house, it is relevant to show that the course of business at the custom house was not to allow an entry of goods without such endorsements on the license. *Butler v. Allnutt*, 1 Stark. R. 222; Phip. Ev., 4th Ed., p. 102; Tay. Ev., 10th Ed., p. 176. **Y**

- (b) Where a manufacturer contracted to supply certain iron plates to a person, evidence of a custom that the plates were to be of his own make was held to be admissible. *Johnson v. Haylton*, 7 Q. B. D. 438. Phip. Ev., 4th Ed., p. 105. **W**

- (c) Where a veterinary surgeon claimed money, on an oral contract, for medicine and attendance, evidence of a usage among veterinaries to charge for both was held to be admissible. *Sevall v. Corp*, 1 C. & P. 392, Phip. Ev., 4th Ed., p. 104. **X**

- (d) On the question whether a broker was personally liable on a written contract made by him for an undisclosed principal, evidence of usage that brokers, who do not disclose the names of their principals, are personally liable was held to be relevant. *Pike v. Ongley*, 18 Q.B.D. 708 cited, Phip. Ev., 4th Ed., p. 104. **Y**

- (e) On the question whether a person paid another his wages, the fact that that person used to pay all his workmen regularly on every Saturday night, and that the particular workman was seen with the rest waiting for payment and had not afterwards been heard to complain was held to be relevant. *Lucas v. Novosilvski*, 1 Esp. 296, Phip. Ev., 4th Ed., p. 104; Best Ev., 9th Ed., p. 342; see also *Sellen v. Norman*, 1 C. & B. 80 & *Evans v. Birch*, 3 Camp. 10, *Ibid.* **Z**

- (f) Where, under the repealed Bankruptcy Act, 1861, a composition deed bore on its face the memo that it had been duly registered, pursuant to the provisions of the Act, it was held to be evidence that the affidavit, required to be filed with it, had been also filed. *Waddington v. Roberts*, L.R., 3 Q.B. 579; Phip. Ev., 4th Ed., p. 103; Best Ev., 9th Ed., p. 311. **A**

(14) Inadmissible.

- (a) Where a person employed a broker to buy and sell certain securities for him, evidence of a usage, unknown to that person, by which the broker was authorised to sell as principal to his employer was held to be inadmissible. *Robinson v. Mockett*, 7 H.L. 802; Phip. Ev., 4th Ed. p. 104. **B**

- (b) A certificate, stamped on a bill of sale required by a statute to be filed along with its accompanying affidavit, to the effect that a copy thereof

1.—‘Course of business.’—(Concluded).

was duly registered was held to be no evidence that the affidavit had also been filed, since the Act did not state that the one could not be filed without the other. *Mason v. Wood*, 1 C.P.D. 63; Phip. Ev., 4th Ed., p. 102. C

(15) Certain presumptions on course of business.

(a) In a suit by one banking firm against another firm for the recovery of the balance of an account between them, it was held, with reference to the keeping of the firm's account books and their periodical transmission to the principals, that it was reasonable to presume that that which was the ordinary course was pursued in that case. C.M.J.A. 88 (90). D

(b) On a demand for the proceeds of milk sold daily to customers by a person as the agent of another, the course of dealing, by which the agent paid her master every day the money received by her everyday, was held to give rise to the presumption that the agent had rendered an account of the monies received. *Evans v. Birch*, 3 Camp. 10. E

(c) Where evidence is adduced that goods, that cannot be exported without license, were entered at the custom house for exportation, a license to export them will be presumed. *Van Omeron v. Downick*, 2 Camp. 44; Phip. Ev., 4th Ed., p. 102; Tay. Ev., 10th Ed., p. 176. F

17. An admission is a statement, oral or documentary ⁽¹⁾, which suggests any inference as to any fact in issue of relevant fact, and which is made by any of the persons and under the circumstances hereinafter mentioned.

Admission defined.

(Notes).**1.—“An admission is a statement oral or documentary****(1) Place of ‘admissions’ proper.**

(a) Admissions, properly so called, are properly the subject of a treatise upon practice. Tay. Ev., 10th Ed., p. 517. G

(b) These subjects (admission by pleadings, and those made for the purposes of a cause) are usually treated of by writers on evidence (under admissions), but they appear to me to belong to other departments of law. Steph. Dig., 7th Ed., p. 176. H

(2) ‘Admission’ definition of.

An ‘admission’ is a statement, oral or written, suggesting any inference as to any fact in issue, or relevant or deemed to be relevant to any such fact, made by, or on behalf of, any party to any proceeding. Steph. Dig., 7th Ed., Art. 15, p. 24. I

(3) Purpose of this definition.

This definition (of admission) is intended to exclude admissions by pleading, admissions, which, if so pleaded, amount to estoppels, and admissions made for the purpose of a cause by the parties, or their solicitors. Steph. Dig., 7th Ed., p. 176. J

I.—“An admission is a statement oral or documentary”.—(Continued).

(4) ‘Admission,’ ordinarily so called, implication of.

Admission, ordinarily so called—‘Quasi-Admission,’ as designated by Prof. Wigmore—implies the receipt of any statement by an opponent, as evidence in contradiction and impeachment of his present claim. Wigm. Ev., ‘05 Ed., S. 1057, p. 1226. **K**

(5) ‘Admission’ in the correct sense.

An ‘admission’ in the correct sense is a formal act, done in the course of judicial proceedings, which waives or dispenses with the production of evidence by conceding for the purposes of litigation that the proposition of fact claimed by the opponent is true. Wigm. Ev., ‘05 Ed., S. 1057, p. 1226. **L**

(6) ‘Admission’ and ‘quasi-admission,’ distinction between.

The true ‘admission,’ in the fullest sense of the term, involves a totally distinct principle. It concerns a method of escaping from the necessity of offering any evidence at all. What is commonly called an ‘admission’—designated ‘Quasi-Admission’ by Prof. Wigmore—is an item in the mass of evidence, the true ‘admission’ is a *waiver relieving the opposite party from the need of any evidence.* Wigm. Ev., ‘05 Ed., S. 1057, p. 1226. **M**

(7) English Law, use of the term “admission” in.

In the English Law, the term *admission* is usually applied to civil transactions, and to those matters of fact, in criminal cases, which do not involve criminal intent. *Lord Melville’s Trial*, 29 How. St. Tr. 707; Tay. Ev., 10th Ed., p. 516. **N**

(8) Admissions and confessions but different aspects of self-harming statements.

Self-harming statements, in civil cases, are usually called “admissions”, and those, in criminal cases, “confessions”. The civilians and canonists express all kinds under the term ‘*confessio*’. Best. Ev. 9th Ed., p. 438. **O**

(9) Scope of term “admissions” --Applicability to civil and criminal proceedings.

It is impossible to hold that admissions only mean statements made by parties to civil proceedings, and that they do not include statements of accused persons in criminal proceedings. 16 P.R. 1886 (Cr.). **P**

(10) Conduct of itself whether to be treated as admission.

Admissions are statements, i.e., assertions in words, and it is their inconsistency with the parties’ other assertions that discredits the latter; hence, conduct cannot of itself be treated as an admission; yet the various sorts of conduct, which indicate a guilty consciousness and are undoubtedly admissible in evidence, are spoken of as ‘admissions’. Wigm. Ev., ‘05 Ed., S. 1052, p. 1221. **Q**

(11) Condition precedent to treating conduct as admission.

Before a man can be held to have given by his conduct an implied assent to a transaction, especially one which operates as a conveyance of a valuable estate, it must be shown that he was fully aware of what the transaction was, and what effect it would have on his interests at the time he so conducted himself as to indicate his assent. 22 W.R. 341 (345). **R**

1.—"An admission is a statement oral or documentary". (Continued).

(12) **Purpose for which admissions used.**

Admissions are sometimes used as merely discrediting a party's statement, by showing that he has on other occasions made statements inconsistent with the case afterwards set up. Their effect in such a case is merely destructive. Wigm. Ev., '05 Ed., S. 1018, pp. 1217 & 1218. S

(13) **Logical force of admissions derived for their inconsistency with party's present claim.**

It is from their inconsistency with a party's present claim that admissions derive their logical force, and not from their testimonial credit, in such cases, the truth of the admissions not being relied upon, they cannot be said to be repugnant to the rule excluding hearsay. Wigm. Ev., '05 Ed., S. 1053, p. 1222. T

(14) **Admission, legal and popular.**

An admission, in the legal, is not always an admission in the popular sense, i.e., a statement which, at the time it was made, was against the real or apparent interest of the party. A. A. & W. Ev., 4th Ed., p. 107. U

(15) **A division of admissions.**

Admissions are generally of two kinds, viz.,

(a) Admissions of documents, and

(b) Admissions of facts. Tay. Ev., 10th Ed., p. 517. Y

(16) **Confessions, not defined in Act.**

The expression 'confession' occurs under the category of admissions, it has not been defined in the Evidence Act. 6 A. 509 (539), *per Mahmood, J.* W

(17) **Admissions and confessions in English Law—Whether Act adopts the distinction.** X

(a) In English Law the term "admission" is usually applied to civil transactions and employed in *civil cases*; while the term "confession" is confined to acknowledgments of guilt and to *criminal cases*. This distinction has not been adopted in this Code; for the provisions of Ss. 17--22 are applicable to criminal as well as civil cases; but the term "confession" is in practice confined to those special admissions from which an inference of guilt can be deduced. Field Ev., 6th Ed., p. 83. Y

(b) The Evidence Act draws a distinction between an admission and a confession of guilt. 6 C. 530 (532).

(c) Where, on the trial of a person for theft and dishonestly receiving stolen property, evidence of a statement made by him to the constable who arrested him was adduced, the Court, in admitting it, remarked that there was a distinction in the Evidence Act between an "admission" and a "confession." 10 B.L.R. (App.), 2. Z

(18) **Confession, definition and scope of.**

(a) A confession is an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed the crime. 51 P.L.R. 1905-2 Cr. L.J. 230; 6 A. 509 (539) (F.B.), *per Mahmood, J.*; referring to Steph. Dig., Art. 21. A

1.—"An admission is a statement oral or documentary".—(Continued).

(This definition of 'confession', given by Sir James Stephen in his Digest of the Law of Evidence, has been generally accepted by the Indian Courts. 51 P.L.R. 1905, per *Chatterje, J.*)

- (b) Confession would include an admission of criminalizing circumstances. 2 C.W.N. 702 (707), referring to 6 B. 34. **B**
- (c) A confession is only an admission of guilt. 4 A.L.J. 174, Journal. **C**
- (d) An incriminating statement, which falls short of an absolute confession, but from which the inference of guilt follows, is a confession. 51 P.L.R. 1905 = 2 Cr. L.J. 230. **D**
- (e) A confession is also an admission of facts as well as an admission of guilt. 4 Cr. L.J. 471 (475). **E**
- (f) The word 'confession', as used in the Evidence Act cannot be construed as including a mere inculpatory admission which falls short of being an admission of guilt. 7 A. 646 (648). **F**

(19) Confession a species of admission.

A confession is one species of admission, viz., an admission consisting of a direct assertion, by the accused in a criminal case, of the main fact charged against him, or of some fact essential to the charge. Wigm. Ev., 1905 Ed. S. 1050, p. 1219. **G**

(20)—English Law, meaning of term in.

Under the English Law, the term 'confession' is generally used in criminal law, as connoting an acknowledgment of guilt. Tay. Ev. 10th Ed. p. 516. **H**

(21) Confessions, peculiarity of.

The peculiarity of confessions in evidence is that they are subjected to an additional limitation when offered in criminal cases,—the limitation that they must have been made without any inducement calculated to destroy their trustworthiness. Wigm. Ev. 1905, Ed., S. 150, p. 1219. **I**

(22) Extra-judicial confessions, meaning and scope of.

Extra-judicial confessions are those which are made by the party elsewhere than before a Magistrate or in Court, this term embracing not only express confessions of crime, but all those admissions and acts of the accused from which guilt may be implied. All voluntary confessions of this kind are admissible in evidence, on being proved like other facts. 6 A. 509 (517), per *Brodhurst, J.* citing from Tay. Ev. **J**

(23) All admissions by accused whether confessions.

All the admissions of an accused person are not, in the eye of the law, confessions. 16 P.R. 1886 (Cr). **K**

(24) Test whether statement is admission or confession.

To ascertain whether a certain statement, made by an accused person, is an admission only, or, amounts to a confession, a reference must always be made to the terms of that statement. 16 P.R. 1886 (Cr). **L**

(25) Admissions implied from various sorts of facts and conduct.

(A)—ACQUIESCENCE.

Admissions may also be implied from the acquiescence of a party. Tay. Ev. 10th Ed. p. 570. **M**

1.—“An admission is a statement oral or documentary”.—(Continued).

(26) Acquiescence, meaning of.

Acquiescence is quiescence under such circumstances as that assent may be reasonably inferred from it and is no more than an instance of the law of estoppel by words or conduct; in other words, acquiescence does not mean simply an active, intelligent, consent, but may be implied, if a person is content not to oppose irregular acts which, he knows, are being done. 4 C.L.J. 198. N

(27) When acquiescence will amount to admission.

- (a) Acquiescence, to have the effect of an admission, must exhibit some act of the mind and amount to voluntary demeanour or conduct of the party. *Allen v. Mc Keen*, 1 Summ. 314 (Am); Tay. Ev. 10th Ed. p. 570. O
- (b) Acquiescence, in order to be sufficient to deprive a man of his legal rights, must amount to an act of fraud on his part to set up those rights. *Willmott v. Barber*, 15 Ch. D. 96, Per Fry, J; referred to in 4 C. L.J. 198 (208). P

(28) Conditions under which party will be fixed with acquiescence.

- (a) Where a party is fixed with acquiescence, the circumstances must be not only such as afforded him an opportunity to act or to speak, but such also as would properly and naturally call for some action or reply from men similarly situated. *R. v. Mitchell*, 17 Cox, C. C. 503; Tay. Ev. 10th Ed. p. 570, Phip. Ev. 4th Ed. p. 236. Q
- (b) Whether it be acquiescence in the conduct or in the language of others, it must be clearly shown that such conduct was fully known or understood by the person before any inferences can be made from his passiveness or silence. *Smith v. Hayes*, 1r. R. 1 C.L. 333; Tay. Ev., 10th. Ed. p. 570. R

(29) Acquiescence whether or not a question of fact.

- (a) The question of acquiescence or waiver is a question of fact, and the finding of the Lower Appellate Court on such a question is final and cannot be interfered with in second appeal. 4 C.L.J. 198; *per Ramprini, J.* S
- (b) Acquiescence is *not* a question of fact, but of legal inference from facts found, and it is open to the appellant in a second appeal to invite the High Court to consider whether the question of acquiescence has been properly decided by the Lower Courts. 4 C.L.J. 198; *per Mookerjee, J.* T

(B) ACKNOWLEDGMENT.

- (30) There cannot really be an acknowledgment without knowledge that the party is admitting something. 8 B. 99 (102). U

(C) WAIVER.

(31) Its meaning.

A waiver is an intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. 11 C.W.N. 848. Y

(32) Waiver, when will be implied.

- (a) Waiver is implied when a person, entitled to anything, does or acquiesces in something else, which is inconsistent with that to which he is entitled. 4 A.L.J. 336=29 A. 431. W

I.—“*An admission is a statement oral or documentary*”.—(Continued).

- (b) There can be no waiver, unless the person against whom the waiver is claimed had full knowledge of his rights and of the facts which would enable him to take effectual action for the enforcement of such rights. 11 C.W.N. 848—6 C.L.J. 62. X

(D) SILENCE.

(33)—*Its effect—Considerations in drawing inference from silence.*

- (a) When, by a party's silence, an assent is given to the assertion of a third person, that assertion is thereby adopted by the party, and, therefore, may be used against him as his own statement and admission. It is the statement, however, that constitutes the admission; the conduct merely effects its adoption. Such admissions form one variety of ‘*vicarious admissions*’. Wigm. Ev., 1905 Ed., S. 1052, p. 1222. Y
- (b) The mere fact that statements have been made in a party's presence, or documents found in his possession, though it may render them admissible against him as original evidence—*e. g.*, as showing knowledge or complicity—will afford no proof *per se* of the truth of their contents; the ground of reception for the latter purpose is that the party has, by his conduct or silence, admitted the accuracy of the assertions made. *R. v. Smith*, 18 Cox. 470; Philp. Ev. 4th Ed. 235, Tay Ev. 10th Ed. p. 574. Z
- (c) In resting on silence as to a particular matter as a legitimate ground of inference, regard must be had to the circumstances; it must be considered whether there was any occasion for words, and any reasonable explanation of the silence. 6 Bom. L.R. 557 (576). A
- (d) Admissions are sometimes inferred from acquiescence in the oral statements of others. But nothing can be more dangerous than this kind of evidence. It should always be received with caution; and never ought to be received at all, unless the evidence is of direct declarations of that kind which naturally calls for contradictions—some assertions made to the party with respect to his right, which by his silence he acquiesces in. *Moore v. Smith*, 14 Serg. & R. 393 (Am.), *per Duncan*, J. Tay. Ev. 10th Ed. p. 574; Wigm. Ev., '05 Ed. S. 1071, p. 1254. B

(E) LACHES.

(34)—*Its meaning—When effective.*

Laches means a neglect to do something which, by law, a man is obliged to do. To bar a remedy, it must amount either to waiver, abandonment or acquiescence. To raise the presumption of any of these, the evidence of conduct must be plain and unambiguous. 7 Bom. L.R. 200—29 B. 234. C

(F) PLEADINGS.

(35)—*Their nature and scope.*

- (a) Where in a suit issues have been settled, averments upon which no issue is framed should be taken to be admitted, as the Court, before proceeding to frame and record the issues, is directed to inquire and ascertain upon what question of law or fact the parties are at issue. 18 W.R. 287. D
- (b) The pleadings in a cause are, for the purposes of use in that suit, not mere admissions or quasi-admissions, but judicial admissions, *i. e.*, they are not a means of evidence, but a waiver of all controversy (so far as the

I.—“An admission is a statement oral or documentary.”—(Continued).

opponent may desire to take advantage of them), and, therefore, a limitation of issues. Wigm. Ev. 1905 Ed. S. 1064, p. 1240. **E**

(36) Certain limitations in construing ‘pleadings’ as admissions.

(a) In the English Common Law Courts, and, *a fortiori*, in the Courts of Law in India, where the pleadings are less technical, an admission of a fact on the pleadings by implication, is not an admission for any other purpose than that of the particular issue and is not tantamount to proof of a fact. Cun. Ev. 10th Ed. p. 126. **F**

(b) The strict rule that averments, not traversed, must be taken to be admitted was held to be inapplicable to the pleadings in Indian Courts. 2 W. R. 19 (21) (P.C.) 5 M.L.A. 287. **G**

(c) It would be quite incorrect to look at a plaint in Indian Courts in the same manner as a declaration in an English Court. 21 W.R. 59 (60), referred to in 6 A. 406 (413). **H**

(d) The effect given in the English Common Law Courts to admissions on the pleadings has always been greater than that given to admissions in the less technical pleadings in the Courts in India. 23 W.R. 214 (217) (P.C.). **I**

(e) Pleadings in Indian Courts must not be construed with the same strictness as they are in English Courts. 6 A. 406 (413). **J**

(f) The doctrine that non-traverse amounts to an admission is inapplicable to a written statement filed under Act X of 1859. 9 W. R. 83. **K**

(G) PLEA OF GUILTY.

(37)– Meaning and effect of.

(a) A plea of guilty, as an extreme instance, is an admission of the facts on which the charge is founded, as well as an admission of guilt in respect of them. 4 Cl. L.J. 471 (475). **L**

(b) A plea of guilty amounts only to an admission of the offence charged, and not of the truth of the depositions. *It. v. Riley*, 18 Cox. 285; Phip. Ev. 4th Ed. p. 11. **M**

(38) Statements of accused construed as not being admissions of guilt.

(a) Where a prisoner pleaded guilty, but went on to say that he did not commit the offence with which he stood charged, the plea was held to be really one of not guilty. 11 W.R. 53 (Cr). **N**

(b) In cases where an accused person, called upon to plead to a charge before a Court of Session, instead of pleading guilty, makes a long rambling statement, more or less, admitting guilt, it would be much safer if the Judge recorded a formal plea of “not guilty” and proceeded to try the case in the ordinary way, recording the evidence. A.W. N. (1908), 54. **O**

(39) Form of admission immaterial.

The form of an admission is, in general, immaterial; “any statement made by a man on oath may be used against him as an admission”. per Jessel, M.R., in *Ex parte Hall*, 19 Ch. D. 583; Phip. Ev. 4th Ed. p. 213. **P**

EXAMPLES.

(40) —(1) Admissions contained in documents.

(a) A return made to a Collector signed by the occupant of a certain land and by the *ticcadar*, in which the amount of the rent was stated, was

1. — “An admission is a statement oral or documentary.”—(Continued)

I.—Admissions contained in documents.—(Continued).

held to be an admission by the occupant of the land of the amount of the rent. 18 W.R. 105 (106). **Q**

- (b) The Privy Council upheld the concurrent findings of the lower Courts, based on admissions made in written documents that property which had been originally self acquired had come into a common stock and become joint property. 15 W.R. (P.C.),¹. **R**

- (c) A *dowl feluist*, which, it was contended, was a contract requiring to be stamped or registered, was held to require neither, as it was merely a memorandum or record by a zemindar's agents of the rent settled between the zemindar and the ryots, to which the various ryots affixed their signatures in testimony of their admission of the correctness of the jumma therein recited as having been imposed on them. 3 C. 322, (323, & 324). **S**

- (d) An entry in a book belonging to a zemindar and showing the extent of a tenant's holding and the rate of rent, which, it was contended, amounted to a lease or agreement requiring stamp or registration, was held to amount to no more than an admission on the part of the defendant that the particulars contained in the entry were true. 5 C. 864 (865). 6 C.L.R. 286, relying on 3 C. 322. **T**

- (e) In a suit, by certain bankers against the son of a deceased customer, for a balance due at the time of the customer's death, evidence of certain admissions contained in a *rookah* (or acknowledgment), and in certain letters written by the deceased, and parol evidence of the admissions were admitted in evidence and their weight considered. 5 M.I.A. 432 (443). **U**

- (f) As against a contractor or his partners, accounts proved to have been kept by a servant or agent of the firm, appointed for that purpose, though not proved to have been regularly kept in the course of business, are clearly relevant as admissions under Ss. 17, 18 and 21 of the Evidence Act. 1 B. 610 (617). **Y**

- (g) Where the contention was that the horoscope of a plaintiff, which was a record from a period *ante litem motam*, produced on the defendant's behalf, was inadmissible in evidence, held, that it, not being put in as evidence admissible under S. 32, but more as an 'admission' under Ss. 17 and 18, of the Evidence Act, was relevant. 17 M. 131 (139); *distinguishing*, 9 C. 613 and 17 C. 949. **W**

- (h) A petition, in which the judgment-debtor agreed to pay a certain sum to the person, who attached the decree and took out execution, constitutes an acknowledgment of liability to the decree-holder's representative. 6 C.L.J. 141. **X**

- (i) A *khata* (account stated), without any promise in writing, and with an one anna stamp affixed to it, was held to be nothing more than an acknowledgment in writing sufficiently stamped, and not to be a contract, within the meaning of S. 25, cl. 3 of the Contract Act. 8 B. 194 (195). **Y**

- (j) Admissions contained in affidavits or answers to interrogatories in the same or former proceedings, without proving the signature or filing the questions, are relevant. *Fleet v. Ferrins*, L.R. 3 Q.B. 536; *Phip. Ev.* 4th Ed. p. 213. **Z**

1.—“An admission is a statement oral or documentary.”—(Continued).

I.—Admissions contained in documents.—(Concluded).

- (k) The omission of a debt in the sworn schedule of a bankrupt is an admission that such debt is not due. *Nicholls v. Downes*, 1 M. & Rob. 13; Tay. Ev. 10th Ed. p. 567; Phip. Ev. 4th Ed. p. 214; Wigm. Ev. 1005 Ed. S. 1072, p. 1257. **A**
- (l) In an action by an owner of lost goods against a carrier for goods delivered to the latter, a judgment in an action of trover, previously bought by the carrier against a person to whom he had misdelivered such goods, was held to be an admission by the carrier that he had received the goods. *Tiley v. Cowling*, 1 Ld. Raym. 714; Phip. Ev. 4th Ed. p. 400; Tay Ev. 10th Ed. p. 1222, Wigm. Ev. '05 Ed. S. 607 p. 735. **B**
- (m) In a suit by the plaintiffs to recover certain immoveable properties, with mesuq profits, as their father's heirs, where a sale-deed, by one of the plaintiffs alone, describing himself as the guardian of his minor brother, executed previously to the suit, in which the disputed property was described as having been enjoyed by the plaintiffs' father and as belonging to the plaintiffs after his death, was relied on by the High Court in decreeing the suit in the plaintiff's favour, as containing an important admission of the plaintiff's title to the property, the Privy Council held, that the High Court was right in so using the document. 9 C. W.N. 89 (95) (P.C.). **C**
- (n) A statement made in a mortgage-deed, as to the extent of *debutter* land comprised in certain mouzabs, was held to be a deliberate admission made by the mortgagors, imposing on them the burden of proving that it was untrue or that they were not bound by it. Such an admission was entitled to great weight and should be met by satisfactory evidence. 18 C. 224 (229 & 230) (P.C.). **D**
- (o) When, in a petition for postponement of sale, the judgment debtor said that, if the sale be stayed as prayed, he would raise no objection on the ground of irregularities in the publication of the sale proclamation, and the Court granted the adjournment, as prayed for, on a condition, and directed that the sale should take place on the adjourned date without fresh proclamation, and the judgment-debtor accepted all these terms, held that, by the express terms of the petition, the judgment-debtor waived all irregularities in the publication of the sale proclamations already issued, and that it must be inferred that he, having raised no objection to the order passed, waived the issue of a fresh proclamation. 2 C.L.J. 594. **E**
- (p) In a suit for rent, where the plaintiff relied on an entry in the defendant's own account as *naib* of a village as to the rate of rent payable by him, held that, unless the defendant's signature was forged, and the leaf not genuine, the entry was an admission that the rent therein mentioned was the rent paid. 17 W.R. 218. **F**
- (q) All statements, made by an accused person, whether oral or documentary, suggesting any inference as to any fact in issue or relevant fact, are admissions under Ss. 17 and 18 of the Evidence Act 16 P.R. 1886 (Cr.). **G**

(41)—(II) Admissions implied in statements, depositions and evidence.

- (a) Where there was no proof against a prisoner, charged with killing her daughter, except her own statement, it was held that it did not

1.—“An admission is a statement oral or documentary.”—(Continued).

II.—Admissions implied in statements, depositions and evidence.—(Concluded).

amount to more than an admission of having voluntarily caused hurt and that it must be taken in its entirety. 18 W.R. (Cr.) 29. **H**

- (b) The deposition of a witness in a former suit, when the witness is himself a defendant in the subsequent suit, the deposition being sought to be used against him, not as evidence given between the parties, one of whom called him as a witness, but as a statement made by him, i.e., an admission, which would be evidence against him whether he made it as a witness or on any other occasion, comes, not under S. 34 of the Evidence Act, but under the sections relating to admissions. 14 B.L.R. (App.) 3—21 W.R. 414 (415). **I**

- (c) Testimony given by a party, as a witness or in answer to interrogatories, is an admission obtained under legal compulsion, relevant against him in subsequent proceedings, though the questions put to him might have been objected to.—*Smith v. Beadnell*, 1 Camp. 30; Phip. Ev. 4th Ed. p. 212; and, see, also, the other cases there cited: *Tay. Ev.* 10th Ed. p. 563. **J**

- (d) Evidence given by a party, as a witness or in answer to interrogatories, are admissions obtained under legal compulsion, admissible against him in subsequent proceedings, though the parties may be different. *Ashmore v. Hardy*, 7 C. & P. 501; Phip. Ev. 4th Ed. p. 212; *Tay. Ev.* 10th Ed. p. 563. **K**

(42) (III) Admissions implied from various sorts of conduct.

- (a) Where a person, claiming the estate of a deceased Hindu, as his heir-at-law, was opposed on the ground that he was disqualified by a grievous leprosy, the fact that he volunteered to state that he had performed the expiatory penance was held to be an admission that his leprosy was of that grievous nature as to demand expiation, before he could succeed to the inheritance. 11 W.R. 535 (536). **L**

- (b) Where a person represented to certain witnesses that a certain petition was his, and asked them to verify his signature, or to identify him as one of the petitioners, it was held to amount as completely as can be, to a statement on his part that he made the statements contained in the petition and to be as effective an evidence against him, as if the petition itself had been filed. 21 W.R. 34 (35). **M**

- (c) In a case where a plaintiff sued to recover his maternal grandfather's property, a petition filed by two sisters of his mother, acknowledging the plaintiff to be the rightful heir and assenting to his suit, was held not to amount to a conveyance or to a disclaimer of title, but merely to an admission made, after the commencement of the suit, that the plaintiff was the real heir, and that they had no defence to offer. 23 W.R. 214 (219) (P.C.). **N**

- (d) With regard to the authority of vakils to bind their clients, there is no valid ground for a distinction between making admissions as to relevant facts and abandoning an issue, which is only another form of admission. 22 M. 538 (547—8), per *O'Farrell, J.* **O**

- (e) In a suit by a plaintiff for a declaration that the lands held by him were not liable to enhancement of rent, certain statements, made by the defendants in a previous petition presented by them, with reference to

I.—“An admission is a statement oral or documentary.”—(Continued).

II.—Admissions implied from various sorts of conduct.—(Continued).

the tenure held by the plaintiff's mother, and their suing his mother, after the plaintiff's coming of age, for rent, due partly before and partly after that time, were held to amount only to admissions, not conclusive, by the defendants that the plaintiff's mother was the tenant. **5**
C. 8 (15 & 16) (P C.). **P**

(f) Acts of ownership, when submitted to, are analogous to admissions or declarations, by the party submitting to them, that the party exercising them has a right to do so and is the owner of the property on which the right is exercised. Starkie Ev. p. 470, note F; cited in 2 W.R. 210 (212). **Q**

(g) The fact that no objection was raised by the representatives of the present plaintiffs against pottahs, put forward in suits to which they were parties, was held to be conduct amounting to an admission of the bona fides of the pottahs. 10 W. R. 103 (405). **R**

(h) A defence, founded, for instance, upon the right of self defence, must logically be based upon the admission of the accused that he committed an act, which was, *prima facie*, a crime. 4 Cr. 1. J. 171 (475). **S**

(p) The acceptance by the defendants in a former suit of a map as correct was held to be legal, though not conclusive, evidence against them in a boundary suit and tantamount to an admission. 8 W.R. 291. **T**

(j) Certain villages were usufructually mortgaged to the defendants for 5 years. The day after the execution of the mortgage, the mortgagor executed a lease deed in favour of the mortgagee and agreed to pay a fixed rent annually, making the rent a charge upon the property. One of the mortgaged properties, which was the subject of a suit for pre-emption at the date of the mortgage was lost; the mortgagees took no steps to obtain an equivalent of that village and remained satisfied with the rest of the security. In a suit for redemption by the representatives of the mortgagor, it was held, *inter alia*, that the defendants were disentitled to claim anything for the loss of the village, as they had acquiesced in the loss of that security and remained content with the other villages in their possession. 27 A. 313. **U**

(k) Where certain defendants merely took an objection in their written statement that the Court trying the suit had no jurisdiction, but made no application under S. 20 of the Civ. Pro. Code, held that, as no application was made under S. 20, the defendants must be deemed to have acquiesced in the institution of the suit, and that the suit could not be said to have been improperly instituted against them in that Court. 7 Bom. L.R. 289 30 B. 81. **Y**

(i) If a person stands by and allows another, to wit, a sharer, to build a pukka building on his land, he must be considered to have acquiesced in the act, and cannot sue for the demolition of the buildings but only for damages or for rent of the land. W.R. (1864) 166 (167). **W**

(m) Where a proprietor was aware of the erection of a privy upon his land and allowed it to be completed and to remain standing for many years, say seven years at least, held that the Court below was perfectly justified in inferring the consent of the proprietor. 17 W.R. 466 (468). **X**

(n) Where a landlord passively allows a tenant to spend money in making alterations and improvements on the premises, his conduct is evidence

I.—“An admission is a statement oral or documentary.”—(Continued).

III.—Admissions implied from various sorts of conduct.—(Continued).

of his consent to the alterations. *Doe v. Allen*, 3 Taunt. 28; Tay. Ev. 10th Ed. p. 570. **Y**

- (o) Determination of the relationship of landlord and tenant which has previously been brought about by forfeiture under the terms of the holding or by notice to quit is waived by the landlord's suing. *Roe v. Munshul*, 1759, cited Buller, N.P. 96, Tay. Ev. 10th Ed. p. 568. **Z**
- (p) A defendant, who is a ruling chief but who does not take objection as to the Court's jurisdiction, at the proper time, waives his privilege thereby and cannot raise it for the first time on further appeal before the Chief Court. 69 P.L.R. 1903—40 P.R. 1903. **A**
- (q) Where a mortgagee accepts irregular payments as payments made in satisfaction of a covenant in a mortgage-deed, which provided for payment by certain instalments, he must be taken to have waived his rights to enforce the penalty provided for the breach of the covenant, which he had an option to enforce under the deed. 3 A.L.J. 469—28 A. 622. **B**
- (r) In order to determine whether the judgment-debtor waived all irregularities in the service of the previous sale proclamation as also the issue of a fresh sale proclamation, the Court must look, not merely to the petition of the judgment-debtor waiving such irregularities, but to the whole proceeding, in the case, and, particularly, to the order made by the Court upon that petition. 2 C.L.J. 584. **C**
- (s) Where a plaintiff subpoenaed a Rajah to prove the authenticity of a *samud* in virtue of which he claimed to recover possession of land, it was held that the testimony of the plaintiff was strengthened by the Rajah's refusal to come into Court, it lying with the Rajah to rebut the plaintiff's evidence or prove minority or some other personal disqualification. 8 W.R. 453 (451). **D**
- (t) When a Zemindar comes in and gives notice of enhancement to a tenant on the first of the grounds stated in S. 17, Act X of 1859, he treats him as a ryot having a right of occupancy, per *Marlby, J.* 14 W.R. 4 (6). **E**
- (u) The fact that a son of the deceased mortgagor signed the mortgage bond as a witness does not render him liable as if he were one of the mortgagors. 7 C.L.J. 195. **F**
- (v) Where a party is questioned by means of an interpreter, and answers through the same medium, the interpreter's language is assimilated to that of the party, and may be testified to by any person who heard it, without summoning the interpreter himself. *Abiraj v. Mostyn*, 20 How. St. Tr. 122, 123; Tay. Ev. 10th Ed. p. 545; Wigm. Ev. 1905 Ed. S. 1362, p. 1676. **G**
- (w) Relief given at various times to a pauper, while residing in another parish, was held to be cogent evidence, though not conclusive, that he was settled in the parish giving the relief. *R. v. Bainsley*, 1 M. & Selw. 377; Tay. Ev. 10th Ed. p. 567. **H**
- (x) Where the defendants stood by and did not raise a single question as to the rates claimed by the plaintiff either by his written statement or the oral one of his agent, a fair presumption of admission of the plaintiff's claim by the defendants was held to arise from the pleadings and conduct of the defendants. 14 W.R. 4 (6). **I**

I.—“An admission is a statement oral or documentary.”—(Continued).

III.—Admissions implied from various sorts of conduct. —(Concluded).

- (y) Where the payment of rent is not a matter directly in issue, and the ryot produces *dakhilas* to show his right to the presumption, mentioned in S. 4 of Act X of 1859, if the landlord should not deny the receipts, admission is legally presumed by the non-denial. 5 W.R. (Act X) 53 (54). **J**
- (z) Where an auction purchaser merely withstood a claim to a *mokurari* tenure advanced by a tenant without taking any steps to legally question the tenant's title, a presumption was held to arise in favour of the title. 25 W.R. 231 (232). **K**
- (aa) Payment by a tenant under the landlord's directions to another, or for a specific purpose is tantamount to a payment to the landlord himself, and is a sufficient answer to a suit for rent by the landlord. W.R. (1864) Act X 112 (112). **L**
- (bb) Held, in a case under Act VIII of 1885 (Bengal Tenancy), that whether there is abandonment or not in any individual case, is a question of intention to be determined upon the facts of the particular case. 7 C.L.J. 72. **M**

(43) Principle on which admissions by Conduct are rendered relevant.

- (a) A party's admissions by conduct as to the existence or non-existence of any material fact are generally relevant against him (*Mourty v. L.C. & D. Ry.*, 1 L.R. 5 Q.B. 314); and evidence to explain or rebut such admissions is relevant in his favour (*Melhuish v. Collier*, 15 Q.B. 878). Such admissions are properly original evidence, relevant either as constituting, totally or partially, facts in issue or relevant facts from which the occurrence or non-occurrence of a fact in issue may be inferred. Phip. Ev. 4th Ed. p. 598. **N**
- (b) The various sorts of conduct which are received against a party are not on principle to be classed as admissions, but as conduct affording circumstantial inferences. Wigm. Ev. 1905 Ed. S. 1052, p. 1222. **O**

(44) Instances where various sorts of conduct were held not to be admissions.

- (a) Where a plaintiff contributed his share of profit and affixed his signature in the patwari's diary as *lambardar*, held that his acts did not constitute an admission of the defendant's title as purchaser. 1 Agra 223. **P**
- (b) Where, in a former suit, the plaintiff, under a usufructuary mortgage, claimed recovery of the mortgaged property on the allegation of satisfaction of the principal, by reason of the profits exceeding twelve per cent. interest, but having failed to prove that allegation, his suit was dismissed, held that the case then put forward did not amount to an admission that there was an agreement to pay twelve per cent. 18 W.R. 62. **Q**
- (c) Where the defendant's claim to the property of G depended upon her establishing her mother K's divorce from a certain person and her subsequent marriage to G, a document, being a certified copy of a statement by the defendant's mother in a criminal case bearing the heading that it was the deposition of K, wife of E—not of G—was held not to be an admission by her that she was E's wife, the heading being no part of her deposition proper, and it being a wrong description. 26 A. 108 (117 & 118) (P.C.). **R**

1.—“An admission is a statement oral or documentary.”—(Continued).

Instances where various sorts of conduct were held not to be admissions.—(Contd.).

- (d) Where the question was whether a woman was the wife of E or G, and much depended on its being established that she was divorced from E and was married by G, a statement, in a deposition made by her, that she was living for 14 years with G, was held not to be necessarily, or even probably, an admission by her that she was living in adultery with G, giving rise to the inference that she was still the wife of E. 26 A. 108 (118) (P.C.) = 8 C.W.N. 241 = 31 I.A. 38. **S**
- (e) Statements recorded, in a suit for rent in kind, under S. 60 of Act X of 1859, not conforming to the requirements of S. 60, were held to be no admissions, being insufficient to be taken as such. 24 W.R. 114. **T**
- (f) The introduction (wholly unnecessary, no doubt, and very unusual) of the words “*assignee as aforesaid*” in the pleadings of the defendant, used with reference to the plaintiff in the suit, was held not to constitute an admission by the defendant that the plaintiff was entitled to sue as assignee, but only to be a reference to the description, which the plaintiff had given of himself. 2 M.I.A. 263 (289). **U**
- (g) A mere allegation that a person “is informed,” without the addition of his belief in the information will not amount to an admission. *Trimblestown v. Kemmex*, 9 C. & F. 780; Phip. Ev. 4th Ed. pp. 212 and 260; Tay. Ev. 10th Ed. p. 530. **Y**
- (h) A report made by an agent to a principal is not an admission provable by a third party. *Re Devala Co.*, 22 Ch. D. 593; Steph. Dig. 7th Ed. p. 26; Phip. Ev. 4th Ed. p. 227. **W**
- (i) The system of our procedure in this country is not such that, if a defendant fails to dispute or contest any point, he thereby admits it; on the contrary, if he fails altogether to appear and allows judgment to go by default, the plaintiff is bound to prove his case, just as much as if the defendant had appeared and denied the claim. 14 W.R. 55 (57). **X**
- (j) A *mokurureedar* who, according to his pottah, is entitled to possession at once and never gets possession, may be bound by limitation, and statements, made by the zemindar in petitions filed in Court, are not admissions, under Act XIV of 1859, to take a case out of the ordinary rule of limitation. 17 W.R. 271. **Y**
- (k) Where a second adoption was made during the existence of the first adopted son, the acquiescence of the first adopted son, after he came of age, in the division of property, made by the adopting father between his two adopted sons, was held not to be equivalent to a previous consent binding on the first adopted son to the disposition of the ancestral property by the father, but binding on him, with regard to other property of which the father had the power of disposing by an act *inter vivos* without the consent of the first. 7 W.R. (P.C.), 57. **Z**
- (l) Sending an agent to settle with the landlord as to the rent is not to be deemed an acquiescence in the rate demanded. W.R. (1864) Act X 115 (116). **A**
- (m) Where the appointment of a *muttsaddi* by the managing agent of a company was never submitted to the meeting of the shareholders of the Company, the mere fact that the person appointed was allowed to work as *muttsaddi* for some time could not be held to be either a ratification

J.—“An admission is a statement oral or documentary.”—(Continued).

stances where various sorts of conduct were held not to be admissions.—(Contd).

- of, or acquiescence in, such appointment by the Company. 10 P.R. 1905 = 100 P.L.R. 1905. **B**
- (n) The fact that a landlord makes a delay of 15 months in bringing a suit for cancelling a transfer, made in contravention of the provisions of the Tenancy Act, cannot raise a presumption that the landlord had acquiesced in the transfer. 3 P.R. (1907) (Rev.) = 4 P.W.R. 1907 = 44 P.L.R. 1908. **C**
- (o) Mere silence or delay in suing, without any overt act or omission calculated to mislead an alienee, creates no estoppel, and, in the absence of clear and tangible ground, the period of limitation cannot be shortened. 5 P.W.R. 1908. **D**
- (p) In a suit for specific performance of an agreement to sell certain premises to the plaintiff, delay on the plaintiff's part in the institution of the suit was held to be no evidence of abandonment by the plaintiff of his admitted rights under the agreement, it being immaterial so long as matters remained in *statu quo*, and neither to have prejudiced the defendant nor to have amounted to a waiver of the plaintiff's right by acquiescence. 33 C. 633. **E**
- (q) A pre-emptor cannot be deemed to have waived his right of pre-emption by simply receiving from the vendee mortgage-money due to him on the security of the property subject of the sale. 39 P.L.R. 1908. **F**
- (r) Mere abstinence from suing cannot amount to waiver, nor can there be any waiver, so as to affect limitation, save by payment and acceptance of an overdue instalment. 21 C. 542 (547). **G**
- (s) The mere omission to claim interest for some years from a tenant at the rate stipulated in the lease does not amount to a waiver of the landlord's right to claim interest at such rate. 26 C. 160. **H**
- (t) Mere inaction or delay or even the receipt of an overdue instalment does not, *per se*, amount to a waiver. There must be either an agreement between the parties, or such conduct as will itself afford clear evidence of a legal waiver. 20 B. 109 (113). **I**
- (u) The receipt, by a pre-emptor, from the vendor of the sale money due to the former as mortgagee of the vendor, cannot operate as a waiver of his (pre-emptor's) pre-emptive rights. 2 A.L.J. 145. **J**
- (v) A presumption of waiver cannot be rested on a presumption that the right alleged to have been waived was known. 11 C.W.N. 848 = 6 C.L.J. 62. **K**
- (w) The giving of a small sum to purchase the release of a right cannot amount to an acknowledgment of the existence of that right; the giving amounts only to this—“I give you so much for not seeking to disturb me.” *Underwood v. Lord Courtown*, 2 Sch. & Lef 67 (1r); Tay. Ev. 10th Ed. p. 561. **L**
- (x) The abandonment of an issue does not amount to a compromise. 22 M. 538 (546). **M**
- (y) An occupancy tenant cannot be said to have abandoned his holding, merely because he had transferred it by mortgage which he subsequently redeemed, and attempted to sell against the rights of the landlords. 36 P.L.R. 1906. **N**
- (s) A letter from a commissioner of Revenue, to the Magistrate of a District, expressing his willingness to recommend the Government to pay for

I.—“An admission is a statement oral or documentary.”—(Continued).

Instances where various sorts of conduct were held not to be admissions.—(Contd).

certain land, taken by the Magistrate for the purpose of making roads, was held not to be an acknowledgment in writing, within S. 4 of Act XIV of 1859. 11 W.R. 1 (2). **O**

(aa) An entry, in a creditor's book, of a balance due for principal and interest or even a verbal assent to such balance, cannot be treated as a payment of interest as such for the purposes of S. 20 of the Limitation Act. A. W.N. (1906), 212. **P**

(bb) The mere omission of a defendant, on first starting his case, to specify the lands in dispute as an accretion, will not affect his right to them, when the fact of their being an accretion comes out in the course of the case. 6 W.R. 162. **Q**

(cc) A statement, made under Act VIII of 1859, is not in the nature of confession and avoidance as in English pleading, where the confession is considered as an admission of the party and the avoidance has to be proved. W.R. (1864), Act N. 27. **R**

(dd) A written statement is not a pleading in confession and avoidance by which the defendant is bound by the confession and so compelled to prove the avoidance; a defendant's written statement may, like every other statement made by a defendant, be used as evidence against him, but the whole statement must be taken together. 9 W.R. 130 (131). **S**

(ee) A written statement put in by a defendant is not a plea by way of confession and avoidance; it is a statement of the grounds of his defence and he must verify the statement; it is like an answer in chancery; if you read a man's answer, you must take the whole admission together. 9 W.R. 190 (191). **T**

(ff) The fact that a plaintiff's allegation of heirship was not traversed does not amount to an admission of title, especially, when there is a general denial of his allegations and when the share, to which he is entitled, is in dispute. 17 W.R. 171. **U**

(gg) Where a sale in execution of a decree was sought to be set aside on the ground of fraud, held that the defendants could not be held to have admitted the plaintiff's allegation of fact by reason of their not having traversed it. 6 A. 406 (414 and 415). **Y**

(hh) The mere fact that an allegation is not traversed, does not relieve a plaintiff of the onus of proving his case. 7 B.H.C.R. (A.C.J.), 136 (137). **W**

(ii) Where a prisoner pleads guilty on a charge of murder, but makes a further statement that he committed the act under grave and sudden provocation, the plea cannot be treated as one of 'guilty' on the charge of murder. Rat. Unrep. Cr. Ca., p. 532. **X**

(jj) An admission by an accused person that he had killed the deceased would not amount to an admission of murder. 9 M. 61 (63). **Y**

(kk) The omission of the Calcutta High Court, in 11 C. 410, to lay down that the expression 'I killed' would not amount to an admission of murder, was due to the fact that those words were coupled with another statement showing, beyond doubt, that the accused did not intend to admit facts which would amount, in the eye of the law, to murder. 9 M. 61 (63) referring to 11 C. 410. **Z**

1.—"An admission is a statement oral or documentary."—(Continued).

Instances where various sorts of conduct were held not to be admissions.—(Concl'd.).

- (II) Where the accused did not formally plead guilty, the fact that he threw himself on the mercy of the Court should not prejudice him. 12 C. W.N. 140. **A**

(45) General rule as to relevancy of admissions.

- (a) The rule of law is that any statement made by a party may be used against him, and may be evidence more or less weighty, possibly even conclusive, according to the circumstances of each case and the result come to by judicial investigation of the case. 12 W.R. 156 (157). **B**
- (b) Every admission is (subject to the rules hereinafter stated) deemed to be a relevant fact as against the person by whom, or on whose behalf, it is made, but not in his favour unless it is, or is deemed to be, relevant for some other reason. Steph. Dig. 7th Ed. Art. 15, p. 24. **C**
- (c) The general rule, both in civil and criminal cases, is that any relevant statement made by a party is evidence against himself. *R. v. Erdheim*, 2 Q. B. 230 (270) Phip. Ev. 4th Ed. p. 208; Steph. dig. 7th Ed. p. 33 Wigm. Ev. 1905, Ed. S. 1349, p. 1612. **D**
- (d) A party's declarations may always be taken to be true as against himself. *Slatterie v. Pooley* 6 M. & W. 654; Phip. Ev. 4th Ed. p. 208. Wigm. Ev. 1905 Ed. S. 1255, p. 1505; Tay. Ev. 10th Ed. p. 319. **E**
- (e) Anything said by a party may be used against him as an admission provided it exhibits the quality of inconsistency with the facts now asserted by him in pleadings or in testimony. Wigm. Ev. 1905, Ed. S. 1040, p. 1217. **F**
- (f) A party's own statements are in all cases admissible against himself. *Darby v. Ouseley*, 1 H. & N. 1, 5; Phip. Ev. 4th Ed. p. 208; Wigm. Ev. 1905 Ed. S. 1048, p. 1217. **G**
- (g) The general rule, regarding the persons, whose admissions may be received, is that the declarations of a party to the record, or of one identified in interest with him, are, as against such party, admissible in evidence. *Spargo v. Brown*, 9 B. & C. 935; Tay. Ev. 10th Ed. p. 531. **H**
- (h) "In civil cases, admissions obtained under compulsion are evidence against a party, provided the compulsion was legal and not illegal." Phip. Ev. 4th Ed. p. 212. **I**
- (i) When a party sues or is sued personally, any admission made by him on a previous occasion, even while he was a minor, is relevant against him. *O'Neill v. Read*, 7 Ir. L.R. 434, Phip. Ev. 4th Ed. p. 210; Wigm. Ev., 1905 Ed. S. 1353, p. 1223. **J**

(46) Ground on which admissions are received as testimony.

Admissions are not admitted as testimony of the declarant in respect to any facts in issue; they are admitted because the conduct of a party to a proceeding, in respect to the matter in dispute, whether by acts, speech, or writing, which is clearly inconsistent with the truth of his contention, is a fact relevant to the issue. *State v. Willis*, 71 Conn. 293, per *Hamersely*, J; Wigm. Ev. 1905, Ed. S. 1045, p. 1218. **K**

(47) Unfavorableness of admissions to conclusion contended for by party whether chief reason for their relevancy.

The condition that admissions must be unfavorable to the conclusion contended for by a party, though the usual reason for tendering them,

1.—“An admission is a statement oral or documentary.”—(Continued).

is by no means an essential one, for a party is entitled to prove any material fact by his opponent's declarations, even though such fact be not necessarily inconsistent with latter's case. *Phil. Ev.* 4th Ed., p. 208. **L**

(48) Admissions and confessions not exceptions to hearsay rule.

(a) It is not correct to say that admissions and confessions generally form exceptions to the rule excluding hearsay. *A.A. & W.* 11th Ed. p. 107. See, also, *Wigm. Ev.* 1905 Ed. S. 1047 *et seq.* **M**

(b) The use of admissions in evidence is, on principle, not obnoxious to the hearsay rule; because, that rule affects such statements only as are offered for their independent assertive value after the manner of ordinary testimony, while admissions are receivable, primarily because of their inconsistency with the party's present claim and irrespective of their credit as assertions; the offerer of the admissions, in other words, does not necessarily predicate their truth, but merely uses them to overthrow a contrary proposition now asserted. *Wigm. Ev.* 1905 Ed. S. 1049, p. 1218. **N**

(49) Admissions must be considered as a whole.

(a) The general rule is that, where a person uses the admission of another as evidence, the whole admission must be put in. He cannot put in half, and exclude the other half. Those who have to decide upon the evidence are not bound to believe the whole of the statement. 7 W.R. 29 (30). **O**

(b) If one party uses the statement of another against him, the whole of the statement must be put in evidence, but the Judge is not bound to believe the whole of it. 11 W.R. 525 (526). **P**

(c) The rule appears to be the same in criminal as in civil cases that the whole of an admission must be taken together. 13 W.R. (Cr. Letters) 3, *L. S. Jackson, J.* **Q**

(d) When a party is desirous of availing himself of an admission made by his adversary in his written statement, the whole of the written statement must be put in and considered together. 22 W.R. 220 (221). **R**

(e) An admission by a defendant must be taken as a whole, and would not bind other co-defendants. 22 W.R. 519 (520). **S**

(f) Verbal admissions must be received with caution, must be taken as a whole, and must not be unduly pressed. 6 A. 406 (415). **T**

(g) It was held that statements, in certain deeds, relied upon by a plaintiff as an admission, estopping the parties to those deeds from asserting that certain lands were not *debutter*, must be taken as a whole. 2° C. 341 (350) (P.C.) = 4 I.A. 52 **U**

50) Reason for such rule.

Though some part of an admission may be favorable to a party, the object being only to ascertain what he has conceded against himself and what may hence be presumed to be true, yet, unless the whole of it is received, the real meaning of the part, telling against him, cannot be ascertained. *Fletcher v. Froggatt*, 2 C. & P. 569; *Tay. Ev.* 10th Ed. p. 523. **Y**

(51) Example.

A passage in a written statement, which, taken by itself, appeared to contain an admission in the plaintiff's favour was, when the written state-

I.—“An admission is a statement oral or documentary.”—(Continued).

ment was considered as a whole, held not to amount to such an admission. 20 W.R. 172 (173). **W**

(52) Proof of admissions contained in documents.

When an admission is contained in a document, or series of documents, or when it forms part of a discourse or conversation, so much and no more of the document, series of documents, discourse or conversation, must be proved as is necessary for the full understanding of the admission, but the Judge of Jury may, of course, attach degrees of credit to different parts of the matter proved. Step. Dig. 7th Ed. pp. 176 & 177. **X**

(53) Confessions also must be considered as a whole.

(a) A confession must be looked at as a whole, and it would not be right to take isolated portions of it, and to consider whether any of them, regarded separately, amounts to an admission of guilt or not, though it is clear that they do not. 7 A. 646 (648). **Y**

(b) Where a prisoner made a certain confession and the Judicial Commissioner, who tried him, assumed a state of facts different from that stated by him, held, that it was wrong on the Commissioner's part to make any such assumption and that the prisoner's confession must be taken in its entirety. 8 W.R. 38 (Cr). **Z**

(c) Where there was no reliable evidence of the prisoner's guilt beyond their confessions, held their confessions must be taken in their entirety. 1 W.R. (Cr.) 17 (18). **A**

(d) It was held that the admissions made by a prisoner, charged with murder, must be taken in their entirety. 3 W. R. (Cr.) 55 (56). **B**

(In this case when the admissions were considered as a whole, the crime of the prisoner was held to be reduced from murder to grievous hurt).

(e) Where a court relies on the confession of a prisoner, it must take the whole and cannot reject any part of it. 5 W.R. (Cr.) 70. **C**

(f) Where the admissions, made by a person ordered to give security to keep the peace, had been taken as evidence, it was held that, if they be so taken, they must be clearly taken as a whole. 25 W.R. (Cr.) 15. **D**

(54) Court cannot pick and choose from confession.

If the Court convicts a man exclusively on his own admissions, it is bound to take the admissions as a whole, and, not entitled to pick out and act only on those parts, which tell most against them. 25 W.R. (Cr.) 23 (24). **E**

(55) Part of conversation relied on to prove crime—Right of prisoners to lay whole before Court.

If one part of a conversation is relied on, as proof of the confession of a crime, the prisoner has a right to lay before the Court the whole of what was said in that conversation; or, at least so much as is explanatory of the part already proved, and perhaps, in *favorem vitae*, all that was relative to the subject-matter in issue. *The Queen's case*, 2 B. & B. 287 H.L.; Tay. Ev. 10th Ed. p. 611. **F**

1.—“An admission is a statement oral or documentary.”—(Continued).

(56) Events occurring subsequently to admissions to qualify the admissions.

Where, in a suit by the plaintiff for a share of a certain property, in which the defence was rested upon a *mokurree* deed under which the defendants alleged that their predecessor and themselves had had possession, the Lower Appellate Court gave effect to certain supposed admissions, without noticing matters noticed, in the first Court's judgment, as having occurred subsequently to the admissions, the Lower Appellate Court's decision was held to be erroneous, and was reversed. 20 W.R. 480 (481). **G**

(57) Rule applies to admissions both verbal and written.

The important rule regarding admissions, that the whole statement containing the admission must be taken together, applies equally both to written and to verbal admissions, *Tay. Ev.* 10th Ed. p. 523. **H**

(58) But Court not bound to give equal weight to all portions of the admissions. •

(a) Ordinarily a Court is bound to take the whole of an admission together, but a Court is not bound to give equal weight to all portions of it. 8 C. 343. **I**

(b) A Judge is not necessarily bound to believe the whole of the statement made by one party, used as evidence against him by the other; he may believe one part of it, and disbelieve the other part. W.R. (1864), Act X, 27. **J**

(c) Where a statement made by one party is used against him by another, the Judge may, though he is not bound to do so, believe that part of the statement which makes against the interest of the person, who makes it, without believing all that part of it which makes in his favour. 11 W.R. 525 (526). **K**

(d) *R. g.*, on the question whether a plaintiff's books were conclusive evidence of the payments of the sums for which he had given credit, it was held that the Judge might believe the entries on the debit side of the account in the plaintiff's books, if put in by the defendant to prove the sums credited, or, if used by the plaintiff, as corroborative evidence of the debts, but that they were not in either case conclusive evidence, or evidence which the Judge was bound to believe. 11 W.R. 525 (527). **L**

(e) Where the lower appellate Court referred to the written statement of the defendant for evidence in the plaintiff's favour, the whole of the written statement of the defendant, so referred to, became evidence in the suit, to which, or to any portion whereof, the Court could, in its discretion, attach just so much value as seemed to it fit. 9 W.R. 290 (291); referring to 7 W.R. 29. **M**

(59) In considering confessions Court can disregard self exculpatory statements.

A confession must be taken as a whole and considered along with the admitted facts of the case, and the accused must be judged by his whole conduct. The Court is at liberty to disregard any self-exculpatory statements contained in the confession which it disbelieves. 15 B. 452 (480); referring to 10 B.H.C.B. 500. **N**

(60) Ordinary rule in dealing with admissions and confessions when inapplicable.

(a) The rule that an admission, relied on by a party to a suit as against his opponent, must be taken as a whole does not apply to pleadings. W.R. (1864) 305 (306). **O •**

1.—“An admission is a statement oral or documentary.”—(Continued).

(b) It is true that an admission which is qualified in its terms, must be ordinarily accepted as a whole, or not taken at all as evidence against a party, but where a party makes separate and distinct allegations without any qualification, the above rule of law does not apply. 10 W.R. 190. **P**

(c) The ordinary rule, in dealing with confessions, is to take them as a whole; and to give the person confessing (supposing there is no other evidence against him) the benefit of any circumstances that may appear in his favour therefrom; but this cannot apply to statements which are diametrically opposed to each other, but only where the more favorable view is not absolutely inconsistent with the general tenor of the confession. 24 W.R. (Cr.) 80 (81). **Q**

(61) Extent to which admission of opponent becomes relevant by a party's tendering part of it in evidence.

One party, by reading “a part of the answer which his opponent had pleaded to a bill filed for discovery, makes the whole admissible, only so far as to waive any objection to the competency of the party making the answer, and he does not thereby admit as evidence all the facts which happened to have been stated therein by way of hearsay only. *Roe v. Ferrars*, 2 B. & P. 542 (548); Tay. Ev. 10th Ed. p. 530; see, also, *Kahl v. Jansen*, 4 Taunt, 565. **R**

(62) Person to whom admission made not material.

(a) It is, in general, immaterial to whom an admission is made; thus, an admission made to a stranger is as relevant as one made to an opponent. Phip. Ev. 4th Ed. p. 209. **S**

(b) An admission of crime, when fairly made after due warning, is not inadmissible simply because, at the time it was made no formal accusation had been made against the party making it. 4 W.R. (Cr.) 10 (11). **T**

(c) A Policeman's evidence, who overheard a prisoner's statement made in another room, in ignorance of the policeman's vicinity, and uninfluenced by it, was held not to be legally inadmissible. 7 W.R. (Cr.) 56. **U**

(d) What a person has been heard to say, while talking in his sleep, is not admissible in evidence. *R. v. Sippet*, or, *Elizabeth Sippets*; Phip. Ev. 4th Ed. p. 246; Tay. Ev. 10th Ed. p. 620; Best. Ev. 9th Ed. p. 442. **Y**

(e) The admissions which a person makes to himself in mere soliloquy are relevant evidence against him. *R. v. Simons*, 6 C. & P. 540; Phip. Ev. 4th Ed. p. 210; Tay. Ev. 10th Ed. p. 621. **W**

(f) An admission, given in answer to interrogatories, is good evidence of an account stated. *Dates v. Townley*, 2 Exch., 156; Tay. Ev. 10th Ed. p. 564. **X**

(g) Private memoranda, not communicated to the opposite party, or to third persons, are relevant evidence against a person. *Bruce v. Garden*, 17 W.R. 990. Phip. Ev. 4th Ed. p. 210. **Y**

(h) To support an account stated, the admission must be made, either to the person to whom the money is due or to some one sent by him. *Breckon v. Smith*, 1 A. & E. 488; Tay. Ev. 10th Ed. p. 564. **Z**

(i) In order to render an account stated binding on a party, the admission of liability must be made to the adversary or his agent. *Hughes v.*

I.—“An admission is a statement oral or documentary.”—(Continued).

Thorpe, 5 M. & W. 667, (But this only refers to the effect of the admission, not to its admissibility). Best. Ev. 9th Ed. p. 440 **A**

(63) Admissions always relevant to prove facts.

Admissions, though uncorroborated, are always relevant to prove matters of fact, though, where corroboration is available, it must be produced. *White v. White*, 62 L.T. 663; Phip. Ev. 4th Ed. p. 213. **B**

(64) Admissions bind crown also.

•Admissions are as much binding on the Crown as on ordinary parties. *Irish Society v. Derry*, 12 C. & F. 641; Phip. Ev. 4th Ed. p. 208. **C**

(65) Admissions founded on hearsay relevant.—Reason for relevancy.

(a) An admission founded on hearsay is admissible, though its evidentiary value may be but little. *In re Perton*, 53 L.T. 707; Phip. Ev. 4th Ed. p. 212. **D**

(b) The reason for receiving in evidence admissions, not based on personal knowledge, is, that, even where a party has no personal knowledge, the admissions would naturally not be made, unless the party making them is satisfied of their truth. *Kitchey v. Robbins*, 29 Gr., 713, (716) (Amer). Wigm. Ev. 1905 Ed. S. 1053, p. 1222. **E**

(66) Admissions sometimes insufficient to prove some kinds of facts.

In some cases a party's admissions are insufficient, without additional evidence, to prove certain kinds of facts; these are rules of quantity, not of relevancy.—(1) the fact of marriage is not sufficiently evidenced by admissions alone, (2) in cases of divorce, the rule adopted from the Civil Law obtains universally, that the opponent's admissions are not alone sufficient proof—the danger of collusion furnishing the reason for the rule; (3) in criminal cases, a rule prevails that the accused's confession is not alone sufficient to found a conviction upon. Wigm. Ev. 1905 Ed. S. 1055, p. 1224. **F**

(67) Admissions to be rejected.

(a) Verbal admissions or declarations of parties which are not put directly in issue by the pleadings, not being consequently open to explanation or disproof, must be rejected, or at least, not be relied upon. *Austin v. Chambers*, 6 Cl. and Fin. 1; Tay. Ev. 10th Ed. p. 531. **G**

(b) Where an admission is an inference from facts, not personally known to the declarant, the Court may reject it and look to the facts. *Bulley v. Bulley*, L.R. 9 Ch. 739; Wigm. Ev. 1905 Ed. S. 1053, p. 1223. **H**

(68) Actual making and truth of admissions are questions of fact.

Where a statement made by a person is admitted in evidence, the questions whether it was actually made and whether it is substantially true are questions of fact to be determined as such. 16 P.R. 1886 (Cr.). **J**

(69) Admission of fact, effect of.

•After an admission has been made as to a fact, no evidence should be received on the matter. *Urquhart v. Butterfield*, 37 C.H.D. 857 (C. A.); Tay. Ev. 10th Ed. p. 552. **I**

1.—“An admission is a statement oral or documentary.”—(Continued)

(70) Gratuitous admission may be withdrawn

A — unless there is some obligation not to withdraw it 26 C 81 (100) (P.C.) K

(71) Weight of admissions

(a) The weight of admissions depends much on the circumstances under which they were made *I v Simon* 10, 1 C & K 164 *Wignall v 100* 1 Id S 2986 p 2512 L

(b) The weight of an admission depending on the circumstances under which it was made these circumstances are always relevant to enhance or diminish its creditability *Phelp v 4th Id* p 209 M

(c) An admission is the easiest possible kind of evidence to procure and when the witnesses are all closely related though not necessarily interested in the case there is no doubt certain suspicion attaching to their testimony *1 B R (1897 1901) p 377 (378)* N

(d) A related confession has but little weight to be placed upon it 15 A 75 20 A 133 O

(72) Extent to which admission of certain matters imply also admissions of other matters

(a) An admission on a point of law is not an admission of a thing within the meaning of S. 11 of the Evidence Act *A W N (1906), 152 3 A L J 533* *referred to* 21 A 283 see also, under S. 115 *infra* P

(b) The acknowledgment and recognition of children by a Mahomedan as his sons gives them the status of sons capable of inheriting as legitimate sons in the absence of certain conditions there need be no proof of an express acknowledgment and it may be inferred from his treatment of the children *S C 122 (P.C.) 91 A S* see also 10 A 259 Q

(c) The inevitable deduction from an admission by a defendant that there were open and current accounts between himself and the plaintiff's deceased father was held to be that the defendant acknowledged his liability to pay his debt to the plaintiff's father or his representative, if the balance should be ascertained to be against him *4 C L J 94 (P.C.) = 33 C 1017* R

(d) Admitting the existence of an *ikhar* is not the same thing as admitting that the copy of the *ikhar* filed, is a correct copy *W R (1864) 156* S

(e) In suit by the son of an elder brother under S. 22 of the Oudh Estates Act (1 of 1869) against the younger brother's widow for possession of the property, which was in her husband's enjoyment and in her enjoyment since her husband's death an admission made by the widow that certain *waqf ul azz* which the plaintiff produced to prove the family custom which the defendant widow denied, were genuine was held not to be an admission of the correctness of the statement contained in them that the property in question was bequeathed to the younger brother by his father *3 O. C. 287 (293)* T

(f) Where in an application by H I & B for a certificate under Act XXVI of 1860, in proof of heirship, to a deceased Mahomedan lady, it was admitted that H and E were the sons of the deceased, and, as such, claimed her property, it was held that such an admission did not

I.—“An admission is a statement oral or documentary.”—(Continued).

necessarily imply that H and E were, to all intents and purposes, brothers and heirs to each other, and that to give such an effect to the admission would be to carry the doctrine of heirship, constituted by acknowledgment, further than is warranted by the principles of the Mahomedan Law. 21 W.R. 113 (115) (P.C.). **U**

- (g) Where, in a former suit, the plaintiff consented that the validity of an adoption there in question should be tried according to the more simple provisions of the law of Bengal, held that the admission there made and the terms in which that law was applied to the case did not, under the circumstances, at all go, to the extent of admitting that the plaintiff was subject in all other matters—Such as, for instance the law of inheritance—to the Bengal Law. 1 W.R. 124 (125). **V**

(73) Accused can make admissions of facts at his trial.

- (a) An accused person can make admissions of facts at his trial, which may relieve the prosecution from bringing evidence to prove such admitted facts. 4 Cr. L.J. 471 (475). **W**

- (b) If a prisoner voluntarily admits his guilt, it is some sign of penitence, and may lead to the inference that the person so confessing is not a hardened offender, but no such inference arises from a confession made at the suggestion of the Sessions Judge. 13 W.R. (Cr. Letters) 1. *Norman v. B. Jackson, J.* **X**

- (c) But it is unfair to obtain an admission by putting it into the accused's mouth. 5 C.P.L.R. (Cr.), 11. **Y**

- (d) The propriety of an accused person, who is in custody charged with a serious offence, being questioned by a Government official with a view to eliciting admissions from him is very doubtful. Such a procedure is in accordance with French Law, but it is not in accordance with English Law. *per Hosking, Commissioner*. L.B.R. (1893-1900), p. 53 (54). **Z**

(74) Duties of Courts in dealing with admissions and confessions.

- (a) A Judge ought to form his own opinion on the whole evidence in the case, as to whether certain entries in account books adduced in evidence, or any of them, was true or false, giving credit to such as he believes to be true, and discrediting those he thinks to be false. 11 W.R. 525 (527). **A**

- (b) It is always essential that the Courts should know as nearly as possible what were the words used by supposed confessors, and what were the questions or matters in regard to which those words were said; for, it may be that the words, ascribed to the confessors, taken with the questions put and with the exact subject-matter of the enquiry did not amount to a confession of the guilt believed by the hearers to have been confessed. 4 A. 46 (43). **B**

- (c) The question of the admissibility of evidence of a statement, oral or documentary, of an accused person—not being his examination before the committing Magistrate—is a question of law to be decided by the Judge. 16 P.R. 1886 (Cr.). **C**

1. — "An admission is a statement oral or documentary." — (Concluded).

(d) An admission by a person required to furnish security expressing willingness to give security should be duly recorded under S. 243 of the CrI. Pro. Code. 17 M.L.J. 438. **D**

(75) High Court's power of interference when written admissions wrongly understood.

The High Court will interfere with the concurrent finding of two Courts on a question of fact in special appeal, where the decision turns on the construction of a written admission, wrongly understood. 18 W.R. 447 (448). **E**

(76) Test of evidence of witnesses not applicable in evaluating confessions.

Tests for appreciating the evidence of witnesses cannot appropriately be applied in estimating the value to be attached to a confession. 6 Bom. L.R. 773 (778). **F**

(77) Whether abstract of pleadings in decree secondary evidence of alleged admission.

Whether an abstract of the pleadings given in a decree is legally secondary evidence of an admission alleged to have been made in such pleadings is doubtful; 1 C.W.N. 513 (516). (But the point does not appear to have been really considered. See 3 C.L.J. 529). **G**

(78) Nature of attestation required by S. 59, Transfer of Property Act, 1882.

The attestation required by S. 59 of the Transfer of Property Act is an attestation by witnesses of the *execution* of the document and not of the *admission of execution*. 14 C.P.L.R. 42 (45). **H**

(79) Admission referred to in S. 70, Evidence Act.

S. 70 of the Evidence Act relates only to the admission of a party in the course of the trial of a suit, and not to the attestation of a document by the admission of the parties executing it. 27 C. 190 (193). **I**

(80) Admissions must be construed liberally.

(a) A certain amount of margin must be allowed to a party in Court as regards his statements admissions or waivers, and he should not be nailed down to a hasty unconsidered admission if promptly withdrawn. 1 P.R. 1908 (Cr.). **J**

(b) "Thus if a witness swore falsely in the beginning of his deposition and subsequently said 'I repent of having made that statement; it was false' although he would have committed perjury, I do not think that any Court will punish him for perjury." 1 P. R. 1908 (Cr). *Per Clarke, C.J.* See, also, S. 31, *infra*. **K**

18. Statements made by a party to the proceeding, (1) or by

Admission—by party to proceeding or his agent;

an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorized by him

to make them, (2) are admissions.

Statement made by parties to suits, suing or sued in a representative character, are not admissions, unless they were made while the party making them held that character (3).

by suitor in representative character;

Statements made by

(1) persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested, (4) or

by person from whom interest derived. (2) persons from whom the parties to the suit have derived their interest in the subject-matter of the suit (5).

are admissions, if they are made during the continuance of the interest of the persons making the statements.

(Notes).

1.—“Statements made by a party to the proceeding.”

(1) Instances of statements of parties regarded as admissions.

(a) A statement made by a defendant in another suit sometime ago was held to clearly be an admission within the meaning of S. 18 of the Evidence Act. 22 W.R. 303. **L**

(b) Admissions are merely the prior assertions of a party, which being inconsistent with his present claim serve now to discredit it by their discrepancy. Wigm. Ev. '05 Ed. S. 1069, p. 1252. **M**

(c) A debtor's answers on public examination are not relevant even in the subsequent stages of the same bankruptcy, against anybody but himself. *Re Brunner*, 19 Q.B.D. 572, Phip. Ev. 4th Ed. p. 233; Tay. Ev. 10th Ed. p. 372, note. **N**

(d) The statements of a bankrupt, made immediately on his return home, regarding the place to which he had gone and his motive in going there, are admissible in evidence. *Bateman v. Bailey*. 5 T.R. 512; Tay. Ev. 10th Ed. p. 416, Phip. Ev. 4th Ed. p. 46. **O**

(e) In an action against an adult for necessities supplied during his minority, admissions made, and letters written, by him, while he was a minor, are relevant for the plaintiff. *O' Neill v. Read*, 7 I.L.R. 434; Tay. Ev. 10th Ed. p. 531; Wigm. Ev. '05 Ed. S. 1053, p. 1223, Phip. Ev. 4th Ed. p. 210. **P**

2) Party's opinion or belief also an admission.

An admission is relevant, apart from its weight, though it consists merely of the declarant's opinion or belief, sworn to in an old answer in Chancery. *Doe v. Steel*, 3 Camp. 115; Phip. Ev. 4th Ed. p. 212; Tay. Ev. 10th Ed., p. 601. **Q**

3) Party's silence, whether equivalent to admission.

Silence is not evidence of an admission, unless there are circumstances which render it more reasonably probable that a man would answer the charge made against him than that he would not. *Wiedemann v. Walpole*, 2 Q.B. 534 (539), per Bowen, L.J.; Wigm. Ev. S. 1071, p. 1255; Best Ev. 9th Ed. p. 568; Phip. Ev. 4th Ed. p. 235; Tay. Ev. 10th Ed. p. 573; Steph Dig. 7th Ed. p. 135. **R**

4) Party's admission on one hypothesis of fact, effect of.

An admission made on one hypothesis of fact will not bind a party upon a different one, *Powell v. M'Glyn*, 2 I.R. 154; Phip. Ev. 4th Ed. p. 211. **S**

1.—“Statements made by a party to the proceeding.” —(Concluded.)

(5) Party not entitled, on appeal, to challenge accuracy of his admission.

It is not open to a party to challenge the accuracy of his admission contained in the judgment, in a Court of appeal. If the admission was not as a matter of fact made, or if it was substantially different from that it was taken by the Court to be, the proper course for the party is to apply for a review of judgment. 7 C.L.J. 414 (417). **T**

See, also, the various kinds of “admissions” noted under S. 17, *supra*.

2.—“Or by an agent to any such party—authorised by him to make them.”

(1) General.

(a) The subject of the relevancy of admissions by agents is rendered difficult by the vast variety of forms which agency assumes, and by the distinction between an agent for the purpose of making a statement and an agent for the purpose of transacting business. Steph. Dig. 7th Ed.; Note XI to Art. 17, p. 178. **U**

(b) As a general proposition, what one man says, not upon oath, cannot be evidence against another man. The exception must arise out of some peculiarity of situation, coupled with the declarations made by one. An agent may undoubtedly, within the scope of his authority, bind his principal by his agreement, and, in many cases, by his acts. *Parlie v. Hastings*, 10 Ves. 128; Tay. Ev. 10th Ed. p. 425; Wigm. Ev. 1905 Ed. S. 1078, p. 1278. **Y**

(2) Statement by agent.

A statement made by an agent whom the Court regards, under the circumstances of the case, as expressly or impliedly authorised to make it, is admissible, even though not on oath. (Evidence Act S. 18). 2 Bom. L.R. 651 (652); *per Jenkins, C.J.* **W**

(3) Force of the words “whom the Court—them.”

The words of the section, “whom the Court regards, under the circumstances of the case, as expressly or impliedly authorised by him to make them,” leave it open to the Courts to deal with each case that arises upon its own merits. Field, Ev. 6th Ed. p. 85. **X**

(4) Knowledge and admissions of agent assimilated to principals.

(a) Where a man employs another to act as his agent, the knowledge of his agent, derived in the transaction, must be imputed to him as though it were his own knowledge. 6 Bom. L.R. 557 (572), referring to *Holland v. Hart*, L.R. 6 Ch. Ap. 682. **Y**

(b) A party may be affected by the acquiescence of his agents or others for whose admissions he is responsible. *Haller v. Worman*, 3 L.T. N.S. 741, Philp. Ev. 4th Ed. p. 235. **Z**

(c) “Where the acts of the agent will bind the principal, there his representations, declarations, and admissions, respecting the subject-matter, will also bind him, if made at the same time, and constituting part of the *res gestæ*.” Story on Agency, S. 134, cited in Tay. Ev. 10th Ed. p. 424. **A**

(5) Agent's declarations and admissions are original, not hearsay, evidence.

“They are original evidence and not hearsay; and, being regarded as verbal acts, they are receivable in evidence without calling the agent himself

2.—Or by an agent to any such party—authorised by him to make them.—(Continued).

to prove them." *Doe v. Hawkins*, 10 L.J.Q.B. 285, Tay. Ev. 10th Ed. p. 421; *Phip*. Ev. 4th Ed. pp. 257 and 263. **B**

(6) Fact of agency to be proved before admitting agent's admissions.

(a) The fact of agency must be somehow evidenced before the alleged agent's declarations can be relevant as admissions; and, therefore, the use of the alleged agent's assertions that he is agent would for that purpose be inadmissible, as merely begging the very question. *Jones v. Harrell*, 140 Ga. 373 (Amer); Wigm. Ev. 4th Ed. S. 1078, p. 1280. **C**

(b) Before the statements of an agent can be relevant as admissions, the fact of agency must be proved. 3 B.L.R. (O.C.J.), 273. **D**

(7) Proof of agency.

(a) The relation of principal and agent might be established by oral evidence though there was a writing as to the terms. *Whitfield v. Brand*, 16 M. & W. 282; referred to in 7 M.H.C.R. 19. **E**

(b) Where the evidence goes to show that a particular person, said to be the agent of the defendant, was really his general agent, and did transact business of various kinds for his principal, it is unnecessary to prove any special power enabling him to enter into a particular contract of bargain and sale. 3 B.L.R. (A.C.) 273. **F**

(c) (*E.g.*) Where it is proved that a person acted ordinarily as an agent for the defendant in bringing and selling articles of merchandise, the fact of his not being proved to have previously purchased a particular kind of article would not necessarily have any effect. 3 B.L.R. (A.C.), 273. **G**

(d) If the agent is authorised to write a letter, it matters not whether he signs the name of the principal or his own name. 6 C. 340 (352). **H**

(e) As long as a document is signed with the name of the principal by his duly authorised agent, in such a way as to make it appear that the document is his and that he is the real author of it, it does not matter what the form of the instrument is, or in what part of it the signature is. 6 C. 340 (352). **I**

(f) On the question whether a person had authorised K to sign a policy of marine insurance for him, evidence that a witness had frequently seen K sign similar policies for the person, though he did not know of any special authority in the case in question, was held to be sufficient. *Neal v. Irving*, 1 Esp. 61 & *Watkins v. Vince*, 2 Stark. 368; *Phip*. Ev. 4th Ed. p. 80. **J**

(g) On the question whether C had authorised T to sign a policy of marine insurance for him, evidence that a witness had seen T sign other policies for C, but knew of no general or special authority to sign, nor of C's having paid any loss on such policies, was held to be insufficient. *Compton v. House*, 1 Camp. 43; cited in *Phip*. Ev. 4th Ed. p. 80, & 7 B.H.C.R. O.C.J. 39 (13). **K**

(8) Scope of agency, a matter of fact.

The extent and nature of the powers vested in an agent are not so much matter of law as matter of fact. 3 B.L.R. (A.C.) 273. **L**

2.—“Or by an agent in any such party—authorised by him to make them.”—(Continued).

(9) Principle—when agent's admissions will bind principal.

(a) What is said or done by an agent, within the scope of his authority, having relation to, and connected with, and in the course of, the particular business in which he is employed, is regarded as said or done by the principal through him, as his mere instrument. *Franklin Bank v. Pennsylvania, D & M.S.N. & Co.*, 11 G. & J. 28 (33) (Amer). Wign. Ev. '05 Ed. S. 1078, p. 1278. **M**

(b) The admission or declaration of an agent binds his principal only when made during the continuance of the agency, in regard to a transaction then depending, *et dum ferret opus*. *Kirkstall Brewery Co. v. Furness Ry. Co.*, L R 9 Q.B. 468; Tay. Ev. 10th Ed. p. 424: see, also, Field Ev. 6th Ed. p. 85. **N**

(c) Statements made by an agent with reference to a contract or other matter in the ordinary course of his business are admissions as against the principal in a suit on such contract or matter; but statements made by the agent on other occasions will not be admissions. *Peto v. Hayne*, 5 Esp. 134; Tay. Ed. 10th Ed. p. 425. **O**

(d) The rule admitting the declarations of an agent being founded upon his legal identity with the principal, such declarations only bind the principal so far as the agent had legal authority to make them. Tay. Ev. 10th Ed. p. 426, referring to *Faussett v. Faussett*, 1849, 7 Notes of Cases, Ecc. & Mar. 93. **P**

(e) For example, the declarations and acts of an agent cannot bind an infant, because an infant cannot appoint an agent; so that, if an infant, even by letter of attorney, appoints a person to make a lease, he will not be bound thereby, neither will his ratification bind him; but such lease, to be good, must be the infant's own personal act. *Doe v. Roberts*, 16 M. & W. 778; Tay. Ev. 10th Ed. p. 426; See, also, Field 6th Ed. p. 85. **Q**

(10) When agent's admissions will not bind principal.

(a) The representation, declaration, or admission of the agent does not bind the principal, if it is not made at the very time of the contract, but upon another occasion, or if it does not concern the subject-matter of the contract, but some other matter, in no degree belonging to the *res gestae*. Story on Agency S. 135; cited in Field Ev. 6th Ed. p. 85, from Tay. Ev., see 10th Ed. p. 424. **R**

(b) When the agent's right to interfere in the particular matter has ceased, the principal is no longer affected by his declarations, any more than by his acts, but they will be rejected in such case as mere hearsay. *Fairlie v. Hastings*, 10 Ves. 123, 126; Tay. Ev. 10th Ed. p. 424. **S**

(c) If A sends a message by B, B's words in delivering it are in effect A's; but B's statements in relation to the subject-matter of the message have, as such, no special value. A's own statements are valuable, if they suggest an inference which he afterwards contests, because they are against his interest; but, when the agent's duty is done, he has no special interest in the matter. Steph. Dig. 7th Ed. Note to Art. 17, p. 178. **T**

1. —“**An admission is a statement oral or documentary**”. — (Continued).

- (b) There can be no waiver, unless the person against whom the waiver is claimed had full knowledge of his rights and of the facts which would enable him to take effectual action for the enforcement of such rights.
11 C.W.N. 848 = 6 C.L.J. 62. **X**

(D) SILENCE.

(33)—**Its effect - Considerations in drawing inference from silence.**

- (a) When, by a party's silence, an assent is given to the assertion of a third person, that assertion is thereby adopted by the party, and, therefore, may be used against him as his own statement and admission. It is the statement, however, that constitutes the admission; the conduct merely effects its adoption. Such admissions form one variety of ‘*recarious admissions*’. Wigm. Ev., 1905 Ed., S. 1052, p. 1222. **Y**
- (b) The mere fact that statements have been made in a party's presence, or documents found in his possession, though it may render them admissible against him as original evidence—*e. g.*, as showing knowledge or complicity—will afford no proof *per se* of the truth of their contents, the ground of reception for the latter purpose is that the party has, by his conduct or silence, admitted the accuracy of the assertions made. *R. v. Smith*, 18 Cox. 470. Phip. Ev. 4th Ed. 233. Tay Ev. 10th Ed. p. 574. **Z**
- (c) In resting on silence as to a particular matter as a legitimate ground of inference, regard must be had to the circumstances, it must be considered whether there was any occasion for words, and any reasonable explanation of the silence, 6 Bom. L.R. 557 (576). **A**
- (d) Admissions are sometimes inferred from *acquiescence in the oral statements of others*. But ‘nothing can be more dangerous than this kind of evidence. It should always be received with caution; and never ought to be received at all, unless the evidence is of direct declarations of that kind which naturally calls for contradictions—some assertions made to the party with respect to his right, which by his silence he acquiesces in.’ *Moore v. Smith*, 11 Serg. & R. 393 (Am.), *per Duigan*. J. Tay. Ev. 10th Ed. p. 574; Wigm. Ev., '05 Ed. S. 1071, p. 1254. **B**

(E) LACHES.

(34) — **Its meaning—When effective.**

Laches means a neglect to do something which, by law, a man is obliged to do. To bar a remedy, it must amount either to waiver, abandonment or acquiescence. To raise the presumption of any of these, the evidence of conduct must be plain and unambiguous. 7 Bom. L.R. 200.—29 B. 234. **C**

(F) PLEADINGS.

(35)—**Their nature and scope.**

- (a) Where in a suit issues have been settled, averments upon which no issue is framed should be taken to be admitted, as the Court, before proceeding to frame and record the issues, is directed to inquire and ascertain upon what question of law or fact the parties are at issue. 18 W.R. 287. **D**
- (b) The pleadings in a cause are, for the purposes of use in that suit, not mere admissions or quasi-admissions, but judicial admissions, *i. e.*, they are not a means of evidence, but a waiver of all controversy (so far as the

I.—“An admission is a statement oral or documentary.”—(Continued).

opponent may desire to take advantage of them), and, therefore, a limitation of issues. Wigm. Ev. 1905 Ed. S. 1064, p. 1240. **E**

(36) Certain limitations in construing ‘pleadings’ as admissions.

(a) In the English Common Law Courts, and, *a fortiori*, in the Courts of Law in India, where the pleadings are less technical, an admission of a fact on the pleadings by implication, is not an admission for any other purpose than that of the particular issue and is not tantamount to proof of a fact. Cun. Ev. 10th Ed. p. 126. **F**

(b) The strict rule that averments, not traversed, must be taken to be admitted was held to be inapplicable to the pleadings in Indian Courts. 2 W. R. 19 (21) (P.C.). 40 M.L.A. 287. **G**

(c) It would be quite incorrect to look at a plaint in Indian Courts in the same manner as a declaration in an English Court. 21 W.R. 59 (60), referred to in 6 A. 406 (413). **H**

(d) The effect given in the English Common Law Courts to admissions on the pleadings has always been greater than that given to admissions in the less technical pleadings in the Courts in India. 23 W.R. 214 (217) (P.C.). **I**

(e) Pleadings in Indian Courts must not be construed with the same strictness as they are in English Courts. 6 A. 406 (413). **J**

(f) The doctrine that non-traverse amounts to an admission is inapplicable to a written statement filed under Act X of 1859. 9 W. R. 83. **K**

(G) PLEA OF GUILTY.

(37)—Meaning and effect of,

(a) A plea of guilty, as an extreme instance, is an admission of the facts on which the charge is founded, as well as an admission of guilt in respect of them. 4 Cr. L.J. 471 (475). **L**

(b) A plea of guilty amounts only to an admission of the offence charged, and not of the truth of the depositions. *R. v. Riley*, 18 Cox. 285, Phip. Ev. 4th Ed. p. 11. **M**

(38) Statements of accused construed as not being admissions of guilt.

(a) Where a prisoner pleaded guilty, but went on to say that he did not commit the offence with which he stood charged, the plea was held to be really one of not guilty. 11 W.R. 53 (Cr). **N**

(b) In cases where an accused person, called upon to plead to a charge before a Court of Session, instead of pleading guilty, makes a long rambling statement, more or less, admitting guilt, it would be much safer if the Judge recorded a formal plea of “not guilty” and proceeded to try the case in the ordinary way, recording the evidence. A.W. N. (1908), 54. **O**

(39) Form of admission immaterial.

The form of an admission is, in general, immaterial; “any statement made by a man on oath may be used against him as an admission”. per Jessel, M.R., in *Ex parte Hall*, 19 Ch. D. 583; Phip. Ev. 4th Ed. p. 513. **P**

EXAMPLES.

40) —(I) Admissions contained in documents.

(a) A return made to a Collector signed by the occupant of a certain land and by the *ticcadar*, in which the amount of the rent was stated, was

I.—“An admission is a statement oral or documentary.”—(Continued)

I.—Admissions contained in documents.—(Continued).

held to be an admission by the occupant of the land of the amount of the rent. 18 W.R. 105 (106). **Q**

(b) The Privy Council upheld the concurrent findings of the lower Courts, based on admissions made in written documents that property which had been originally self-acquired had come into a common stock and become joint property. 15 W.R. (P.C.), 1. **R**

(c) A *dowl fehrisht*, which, it was contended, was a contract requiring to be stamped or registered, was held to require neither, as it was merely a memorandum or record by a zemindar's agents of the rent settled between the zemindar and the ryots, to which the various ryots affixed their signatures in testimony of their admission of the correctness of the jumma therein recited as having been imposed on them. 3 C. 322, (323 & 324). **S**

(d) An entry in a book belonging to a zemindar and showing the extent of a tenant's holding and the rate of rent, which, it was contended, amounted to a lease or agreement requiring stamp or registration, was held to amount to no more than an admission on the part of the defendant that the particulars contained in the entry were true. 5 C. 864 (865) — 6 C.L.R. 286, relying on 3 C. 322. **T**

(e) In a suit, by certain bankers against the son of a deceased customer, for a balance due at the time of the customer's death, evidence of certain admissions contained in a *rookah* (or acknowledgment), and in certain letters written by the deceased, and parol evidence of the admissions were admitted in evidence and their weight considered. 5 M.I.A. 432 (443). **U**

(f) As against a contractor or his partners, accounts proved to have been kept by a servant or agent of the firm, appointed for that purpose, though not proved to have been regularly kept in the course of business, are clearly relevant as admissions under Ss. 17, 18 and 21 of the Evidence Act. 1 B. 610 (617). **V**

(g) Where the contention was that the horoscope of a plaintiff, which was as record from a period *ante litem motam*, produced on the defendant's behalf, was inadmissible in evidence, held, that it, not being put in as evidence admissible under S. 32, but more as an 'admission' under Ss. 17 and 18, of the Evidence Act, was relevant. 17 M. 134 (139); *distinguishing*, 9 C. 619 and 17 C. 949. **W**

(h) A petition, in which the judgment-debtor agreed to pay a certain sum to the person, who attached the decree and took out execution, constitutes an acknowledgment of liability to the decree-holder's representative. 6 C.L.J. 141. **X**

(i) A *khata* (account stated), without any promise in writing, and with an one anna stamp affixed to it, was held to be nothing more than an acknowledgment in writing sufficiently stamped, and not to be a contract, within the meaning of S. 25, cl. 3 of the Contract Act. 8 B. 194 (195). **Y**

(j) Admissions contained in affidavits or answers to interrogatories in the same or former proceedings, without proving the signature or filing the questions, are relevant. *Fleet v. Perrins*, L.R. 3 Q.B. 536; *Philp*, Ev. 4th Ed. p. 213. **Z**

I.—“An admission is a statement oral or documentary.” (Continued).**I.—Admissions contained in documents —(Concluded).**

(k) The omission of a debt in the sworn schedule of a bankrupt is an admission that such debt is not due. *Nicholls v. Downes*, 1 M. & Rob. 13; Tay. Ev. 10th Ed. p. 567; Phip. Ev. 4th Ed., p. 214; Wigm. Ev. 1005 Ed. S. 1072, p. 1257. **A**

(l) In an action by an owner of lost goods against a carrier for goods delivered to the latter, a judgment in an action of trover, previously brought by the carrier against a person to whom he had mis-delivered such goods, was held to be an admission by the carrier that he had received the goods. *Tuley v. Couling*, 1 L.J. Raym. 744. Phip. Ev. 4th Ed. p. 400; Tay Ev. 10th Ed. p. 1222, Wigm Ev. '05 Ed. S. 607 p. 735. **B**

(m) In a suit by the plaintiffs to recover certain immoveable properties, with mesne profits, as their father's heirs, where a sale deed, by one of the plaintiffs alone, describing himself as the guardian of his minor brother, executed previously to the suit, in which the disputed property was described as having been enjoyed by the plaintiffs' father and as belonging to the plaintiffs after his death, was relied on by the High Court in decreeing the suit in the plaintiff's favour, as containing an important admission of the plaintiff's title to the property, the Privy Council *held*, that the High Court was right in so using the document. 9 C. W.N. 89 (95) (P.C.). **C**

(n) A statement made in a mortgage-deed, as to the extent of *debutter* land comprised in certain mouzahs, was held to be a deliberate admission made by the mortgagors, imposing on them the burden of proving that it was untrue or that they were not bound by it. Such an admission was entitled to great weight and should be met by satisfactory evidence. 18 C. 224 (229 & 230) (P.C.). **D**

(o) When, in a petition for postponement of sale, the judgment debtor said that, if the sale be stayed as prayed, he would raise no objection on the ground of irregularities in the publication of the sale proclamation, and the Court granted the adjournment, as prayed for, on a condition, and directed that the sale should take place on the adjourned date without fresh proclamation, and the judgment-debtor accepted all these terms, *held* that, by the express terms of the petition, the judgment-debtor waived all irregularities in the publication of the sale proclamations already issued, and that it must be inferred that he, having raised no objection to the order passed, waived the issue of a fresh proclamation. 2 C.L.J. 584. **E**

(p) In a suit for rent, where the plaintiff relied on an entry in the defendant's own account as *narb* of a village as to the rate of rent payable by him, *held* that, unless the defendant's signature was forged, and the leaf not genuine, the entry was an admission that the rent therein mentioned was the rent paid. 17 W.R. 213. **F**

(q) All statements, made by an accused person, whether oral or documentary, suggesting any inference as to any fact in issue or relevant fact, are admissions under Ss. 17 and 18 of the Evidence Act 16 P.R. 1886 (Cr.). **G**

(41)---(II) Admissions implied in statements, depositions and evidence.

(a) Where there was no proof against a prisoner, charged with killing her daughter, except her own statement, it was held that it did not

I.—“*An admission is a statement oral or documentary.*”—(Continued).

II.—Admissions implied in statements, depositions and evidence.—(Concluded).

amount to more than an admission of having voluntarily caused hurt and that it must be taken in its entirety. 18 W.R. (Cr.) 29. **H**

- (b) The deposition of a witness in a former suit, when the witness is himself a defendant in the subsequent suit, the deposition being sought to be used against him, not as evidence given between the parties, one of whom called him as a witness, but as a statement made by him, *i.e.*, an admission, which would be evidence against him whether he made it as a witness or on any other occasion, comes, not under S. 33 of the Evidence Act, but under the sections relating to admissions. 14 B.L. R. (App.), 3—21 W.R. 414 (415). **I**

- (c) Testimony given by a party, as a witness or in answer to interrogatories, is an admission obtained under legal compulsion, relevant against him in subsequent proceedings, though the questions put to him might have been objected to.—*Smith v. Beadnell*, 1 Camp. 30; Phil. Ev. 4th Ed. p. 212; and, see, also, the other cases there cited. Tay. Ev. 10th Ed. p. 563. **J**

- (d) Evidence given by a party, as a witness or in answer to interrogatories, are admissions obtained under legal compulsion, admissible against him in subsequent proceedings, though the parties may be different. *Ashmore v. Hardy*, 7 C. & P. 501, Phil. Ev. 4th Ed. p. 212, Tay. Ev. 10th Ed. p. 563. **K**

(42) (III) Admissions implied from various sorts of conduct.

- (a) Where a person, claiming the estate of a deceased Hindu, as his heir-at-law, was opposed on the ground that he was disqualified by a grievous leprosy, the fact that he volunteered to state that he had performed the expiatory penance was held to be an admission that his leprosy was of that grievous nature as to demand expiation, before he could succeed to the inheritance. 11 W. R. 535 (536). **L**

- (b) Where a person represented to certain witnesses that a certain petition was his, and asked them to verify his signature, or to identify him as one of the petitioners, it was held to amount as completely as can be, to a statement on his part that he made the statements contained in the petition and to be as effective an evidence against him, as if the petition itself had been filed. 21 W.R. 34 (35). **M**

- (c) In a case where a plaintiff sued to recover his maternal grandfather's property, a petition filed by two sisters of his mother, acknowledging the plaintiff to be the rightful heir and assenting to his suit, was held not to amount to a conveyance or to a disclaimer of title, but merely to an admission made, after the commencement of the suit, that the plaintiff was the real heir, and that they had no defence to offer. 23 W. R. 214 (219) (P.C.). **N**

- (d) With regard to the authority of vakils to bind their clients, there is no valid ground for a distinction between making admissions as to relevant facts and abandoning an issue, which is only another form of admission. 22 M. 538 (517—8), per *O'Farrell, J.* **O**

- (e) In a suit by a plaintiff for a declaration that the lands held by him were not liable to enhancement of rent, certain statements, made by the defendants in a previous petition presented by them, with reference to

1.—“An admission is a statement oral or documentary.”—(Continued).

III.—Admissions implied from various sorts of conduct.—(Continued).

the tenure held by the plaintiff's mother, and their suing his mother, after the plaintiff's coming of age, for rent, due partly before and partly after that time, were held to amount only to admissions, not conclusive, by the defendants that the plaintiff's mother was the tenant. 15 C. 8 (15 & 16) (P C.). P

(f) Acts of ownership, when submitted to, are analogous to admissions or declarations, by the party submitting to them, that the party exercising them has a right to do so and is the owner of the property on which the right is exercised. Starkie Ev. p. 470, note F; cited in 2 W.R. 210 (212). Q

(g) The fact that no objection was raised by the representatives of the present plaintiffs against pottahs, put forward in suits to which they were parties, was held to be conduct amounting to an admission of the bona fides of the pottahs. 10 W. R. 403 (405). R

(h) A defence, founded, for instance, upon the right of self defence, must logically be based upon the admission of the accused that he committed an act, which was, *prima facie*, a crime. 4 Cr. L.J. 471 (475). S

(i) The acceptance by the defendants in a former suit of a map as correct was held to be legal, though not conclusive, evidence against them in a boundary suit and tantamount to an admission. 8 W.R. 291. T

(j) Certain villages were usufructually mortgaged to the defendants for 5 years. The day after the execution of the mortgage, the mortgagor executed a lease deed in favour of the mortgagee and agreed to pay a fixed rent annually, making the rent a charge upon the property. One of the mortgaged properties, which was the subject of a suit for pre-emption at the date of the mortgage was lost, the mortgagees took no steps to obtain an equivalent of that village and remained satisfied with the rest of the security. In a suit for redemption by the representatives of the mortgagor, it was held, *inter alia*, that the defendants were disentitled to claim anything for the loss of the village, as they had acquiesced in the loss of that security and remained content with the other villages in their possession. 27 A. 313. U

(k) Where certain defendants merely took an objection in their written statement that the Court trying the suit had no jurisdiction, but made no application under S. 20 of the Civ. Pro. Code, held that, as no application was made under S. 20, the defendants must be deemed to have acquiesced in the institution of the suit, and that the suit could not be said to have been improperly instituted against them in that Court. 7 Bom. L.R. 289 = 30 B. 81. Y

(l) If a person stands by and allows another, to wit, a sharer, to build a pukka building on his land, he must be considered to have acquiesced in the act, and cannot sue for the demolition of the buildings but only for damages or for rent of the land. W.R. (1864) 166 (167). W

(m) Where a proprietor was aware of the erection of a privy upon his land and allowed it to be completed and to remain standing for many years, say seven years at least, held that the Court below was perfectly justified in inferring the consent of the proprietor. 17 W.R. 466 (468). X

(n) Where a landlord passively allows a tenant to spend money in making alterations and improvements on the premises, his conduct is evidence

1.—“An admission is a statement oral or documentary.”—(Continued).

III.—Admissions implied from various sorts of conduct.—(Continued).

of his consent to the alterations. *Doe v. Allen*, 3 Taunt. 28; Tay. Ev. 10th Ed. p. 570. **Y**

- (o) Determination of the relationship of landlord and tenant which has previously been brought about by forfeiture under the terms of the holding or by notice to quit is waived by the landlord's suing. *Roe v. Mmshel*, 1759, cited Buller, N.P. 96; Tay. Ev. 10th Ed. p. 568. **Z**
- (p) A defendant, who is a ruling chief but who does not take objection as to the Court's jurisdiction, at the proper time, waives his privilege thereby and cannot raise it for the first time on further appeal before the Chief Court. 69 P.L.R. 1903 = 40 P.R. 1903. **A**
- (q) Where a mortgagee accepts irregular payments as payments made in satisfaction of a covenant in a mortgage-deed, which provided for payment by certain instalments, he must be taken to have waived his rights to enforce the penalty provided for the breach of the covenant, which he had an option to enforce under the deed. 3 A.L.J. 469 = 28 A. 622. **B**
- (r) In order to determine whether the judgment-debtor waived all irregularities in the service of the previous sale proclamation as also the issue of a fresh sale proclamation, the Court must look, not merely to the petition of the judgment-debtor waiving such irregularities, but to the whole proceeding, in the case, and, particularly, to the order made by the Court upon that petition. 2 C.L.J. 584. **C**
- (s) Where a plaintiff subpoenaed a Rajah to prove the authenticity of a *sunnad* in virtue of which he claimed to recover possession of land, it was held that the testimony of the plaintiff was strengthened by the Rajah's refusal to come into Court, it lying with the Rajah to rebut the plaintiff's evidence, or prove minority or some other personal disqualification. 8 W.R. 453 (154). **D**
- (t) When a Zemindar comes in and gives notice of enhancement to a tenant on the first of the grounds stated in S. 17, Act X of 1859, he treats him as a ryot having a right of occupancy. per *Markby, J.* 14 W.R. 4 (10). **E**
- (u) The fact that a son of the deceased mortgagor signed the mortgage bond as a witness does not render him liable as if he were one of the mortgagors. 7 C.L.J. 195. **F**
- (v) Where a party is questioned by means of an interpreter, and answers through the same medium, the interpreter's language is assimilated to that of the party, and may be testified to by any person who heard it, without summoning the interpreter himself. *J'abrigas v. Mostyn*, 20 How. St. Tr. 122, 123; Tay. Ev. 10th Ed. p. 545; Wigm. Ev. 1905 Ed. S. 1462, p. 1676. **G**
- (w) Relief given at various times to a pauper, while residing in another parish, was held to be cogent evidence, though not conclusive, that he was settled in the parish giving the relief. *R. v. Barnsley*, 1 M. & Selw. 877; Tay. Ev. 10th Ed. p. 567. **H**
- (x) Where the defendants stood by and did not raise a single question as to the rates claimed by the plaintiff either by his written statement or the oral one of his agent, a fair presumption of admission of the plaintiff's claim by the defendants was held to arise from the pleadings and conduct of the defendants. 14 W.R. 4 (6). **I**

I.—“An admission is a statement oral or documentary.”—(Continued).

III. - Admissions implied from various sorts of conduct. —(Concluded).

(y) Where the payment of rent is not a matter directly in issue, and the ryot produces *dakhilas* to show his right to the presumption, mentioned in S. 4 of Act X of 1859, if the landlord should not deny the receipts, admission is legally presumed by the non-denial. 5 W.R. (Act X) 53 (54). **J**

(z) Where an auction purchaser merely withstood a claim to a *mokurari* tenure advanced by a tenant without taking any steps to legally question the tenant's title, a presumption was held to arise in favour of the title. 25 W.R. 231 (232). **K**

(aa) Payment by a tenant under the landlord's directions to another, or for a specific purpose is tantamount to a payment to the landlord himself, and is a sufficient answer to a suit for rent by the landlord. W.R. (1861) Act X 112 (113). **L**

(bb) Held, in a case under Act VIII of 1885 (Bengal Tenancy), that whether there is abandonment or not in any individual case, is a question of intention to be determined upon the facts of the particular case. 7 C.L.J. 72. **M**

(43) Principle on which admissions by Conduct are rendered relevant.

(a) A party's admissions by conduct as to the existence or non existence of any material fact are generally relevant against him (*Monurty v. I.C. & D. Ry.*, L.R. 5 Q.B. 314); and evidence to explain or rebut such admissions is relevant in his favour (*Methuist v. Colther*, 15 Q.B. 876). Such admissions are properly original evidence, relevant either as constituting, totally or partially, facts in issue or relevant facts from which the occurrence or non-occurrence of a fact in issue may be inferred. Phip. Ev. 4th Ed. p. 598. **N**

(b) The various sorts of conduct which are received against a party are not on principle to be classed as admissions, but as conduct affording circumstantial inferences Wigm. Ev. 1905 Ed. S. 1052, p. 1222. **O**

(44) Instances where various sorts of conduct were held not to be admissions.

(a) Where a plaintiff contributed his share of profit and affixed his signature in the patwari's diary as lambardar, held that his acts did not constitute an admission of the defendant's title as purchaser. 1 Agra 223. **P**

(b) Where, in a former suit, the plaintiff, under a usufructuary mortgage, claimed recovery of the mortgaged property on the allegation of satisfaction of the principal, by reason of the profits exceeding twelve per cent. interest, but having failed to prove that allegation, his suit was dismissed, held that the case then put forward did not amount to an admission that there was an agreement to pay twelve per cent. 18 W.R. 62. **Q**

(c) Where the defendant's claim to the property of G depended upon her establishing her mother K's divorce from a certain person and her subsequent marriage to G, a document, being a certified copy of a statement by the defendant's mother in a criminal case bearing the heading that it was the deposition of K, wife of E—not of G—was held not to be an admission by her that she was E's wife, the heading being no part of her deposition proper, and it being a wrong description. 26 A. 108 (117 & 118) (P.G.). **R**

2.—"Or by an agent to any such party—authorised by him to make them."—(Continued)

(21) Instances of counsel's admissions held relevant.—(Concluded)

- (z) A notice to the solicitor, which alone will bind the client, must be notice in that transaction in which the client employs him. *Huller v. Bennett*, 2 Hare 402, cited in 6 Bom. L.R. 557 (573). **T**
- (a-1) Service on a duly appointed advocate is equivalent to service on the client, unless the Court otherwise directs. 7 O.C. 303. **U**
- (a-2) Where a solicitor makes admissions on the trial of an action, these admissions would be relevant against his client in a new trial of the same action. *Ellis v. Larkins*, 5 C. & P. 385; *Phip. Ev.* 4th Ed. p. 229; *Tay. Ev.* 10th Ed. p. 550. **Y**
- (a-3) Admissions made by solicitors are sometimes even conclusive and may be relevant upon a new trial of the same case, though, previously to such trial, the solicitor has died, and the new solicitor has given notice that he will make no admissions. *Dox v. Rod*, 7 C. & P. 6; *Tay. Ev.* 10th Ed. p. 550; *Phip. Ev.* 4th Ed. p. 229. **W**
- (a-4) After a solicitor is engaged in a cause, admissions made by his managing clerk or agent are generally admissible as his own against his client. *Taylor v. Williams*, 2 B. & Ad. 845; *Phip. Ev.* 4th Ed. p. 230; *Tay. Ev.* 10th Ed. p. 552. **X**
- (b-1) Where a solicitor is already engaged in the cause, the admissions of his managing clerk or agent are generally relevant against him, as his own admissions, in favour of the client. *Ashford v. Price*, 3 Stark. 185, *Phip. Ev.* 4th Ed. p. 230. **Y**
- (b-2) In order to make a party criminally responsible for his solicitor's letters, it must be shown that those letters were written in pursuance of specific instructions from his client, and not merely in consequence of interviews with, or of general instructions from him. *R. v. Downer*, 14 Cox C. C. 486; *Phip. Ev.* 4th Ed. p. 230. **Z**
- (b-3) An attorney authorised to appear for a party in an action has authority to refer it to arbitration without any fresh authority to that effect. *Farrell v. Eastern Counties Ry. Co.*, 2 Exch. 344, *Field Ev.* 6th Ed. p. 87. **A**
- (b-4) An admission made by the legal practitioner conducting a case is sufficient in a quasi civil proceeding of the nature of S. 145 of the Cr. P.C. to justify a Magistrate in passing an order in favour of the other party; the fact that such admission was not recorded did not invalidate the order. 7 C.W.N. 351 (352). **B**

(22) Counsel's admissions stand upon narrower basis than attorney's.

The admissions made by counsel stand upon a narrower basis, for, while the attorney represents the client throughout the cause, the counsel represents him only upon the specific occasion for which he holds the brief. *Richardson v. Peto*, 1 M. & G. 896; *Phip. Ev.* 4th Ed. p. 230. **C**

(23) Instances of counsel's admissions held not relevant.

- (a) A vakil in the Courts of the mofussil is not empowered to make admissions on points of law on behalf of his client, although he may make admissions on points of fact. 1 Ind. Jur. N. S. 65. **D**

2.—“Or by an agent to any such party—authorised by him to make them.” (Continued).

(29) Instances of counsel's admissions held not relevant.—(Continued).

- (b) The opinion expressed by a vakil, in the course of argument, adversely to a claim, which he undertook to advocate, is not binding on his client, when it is not in accordance with the law applicable to the case, and it is clearly not binding on the other contending defendants. 18 M. 73 (83). **E**
- (c) A consent, by the vakil of a party, to a decree being made in it, binding property other than what the parties to the suit may have an interest in, is clearly a consent to what is beyond the scope of the suit, and could neither be binding on the party. (*Swinnen v. Lord Chelmsford*, 5 H and N 890), nor be acted upon by the Court. 2 M. H. C. R. 423 (426). **F**
- (d) A counsel has no authority under an ordinary vakalatnama to relinquish a portion of the claim already decreed, and any such abandonment will not be binding on his client. 3 B. L. R. (Ap.) 15; cited in 12 W. R. 279 (280), per *Hobhouse, J*. **G**
- (e) In a security proceeding, where the Magistrate treated the statement by the accused's vakil as an admission of an intention on the part of the accused to commit a breach of the peace and passed an order calling upon them to furnish security, held that, in such proceedings, no final action should be taken and no order having the effect of a conviction as against the accused should be passed, without formal evidence being recorded. Hence the order was set aside. 17 M. L. J. 407 = 30 M. 320 = 2 M. L. T. 329 = 6 Cr. L. J. 278. **H**
- (f) A vakil has no power to transfer a decree. 2 N. W. P. 195. **I**
- (g) Where a vakil, upon a mistaken view of the law, went beyond, and indeed contravened his client's instructions, his erroneous consent ought not to prejudice his client, or operate as a bar to his bringing a subsequent suit praying for relief from the consequences of the error. 16 W. R. 246 (247). **J**
- (h) The greatest caution should be exercised by the Courts before acting upon statements out of the ordinary scope of a vakil's authority in the particular matter for which he was employed. 6 M. H. C. R. 127 (130). **K**
- (i) An admission by counsel on a point of law cannot bind the client. 134 P. L. R. 1903 (following 98 P. R. 1889). **L**
- (j) An erroneous admission of a pleader on a point of law cannot bind his client. 3 C. W. N. 222 = 26 C. 200 (252). **M**
- (k) A party is not bound, generally speaking, by a pleader's admission in argument on a pure question of law amounting to no more than his view that the question is unarguable. 6 Bom. L. R. 434 (435) = 28 B. 408. **N**
- (l) A plaintiff is not bound by the admission of his pleader, if it is erroneous in law. 24 B. 360 (363). **N**
- (m) Where, in a suit to recover possession, the pleader for the defendants below made a statement, before the Munsiff, that if a thak map—which was not at that time in Court—could show that the suit lands had been surveyed as part and parcel of the plaintiff's taluk, his client would give up his claim, held that the statement was not within the scope of the pleader's authority to make, and, as such, not binding on his client. 18 W. R. 43, referring to 12 W. R. 279. **O**

2.—“Or by an agent to any such party—authorised by him to make them.”—(Continued).

(28) Instances of counsel's admissions held not relevant.—(Continued).

- (n) The Court declined to regard a statement by the defendant's pleader, that L was the previous tenant and held the land after her son, as an admission of continuous hereditary holding, as of right, on the part of the plaintiffs, on whom the *onus* lay of proving such holding. 18 W. R. 60 (61). **P**
- (o) A refusal by a pleader to urge a question of law is a mere admission of law, which is not binding on the party and the party may raise the question on appeal, though not raised in the Court below. 9 C.W.N. 633—33 C. 257. **Q**
- (p) It is not within the ordinary scope of a pleader's duties to give up any portion of his client's case without his express authority, and the client will not be bound by such relinquishment. 12 W.R. 279 (280). **R**
- (q) For a case where, the pleader of the accused having consented to the joint trial of two cases which ought not to be tried jointly, it was held that the consent did not cure the irregularity, see 6 C. 96 (99). **S**
- (r) If a counsel acts without his client's authority and under a misapprehension of his instructions he cannot bind his client. *Neale v. Gordon Lennor*, (1902) A.C. 165, referred to in Phip. Ev. 4th Ed. p. 231; Tay. Ev. 10th Ed. p. 552, n. **T**
- (s) A counsel cannot bind his client by giving up the defence on the oath of the plaintiff. 3 Agra, 309. **U**
- (t) Admissions which a counsel made out of Court, in a conversation with the solicitor of the adversary were held not to be relevant against his client. *Richardson v. Peto*, 1 M. & G. 896; Phip. Ev. 4th Ed. p. 231. **V**
- (u) Where, in a case of special authority given, a counsel, under a misapprehension of his client's instructions, and believing himself to have authority, acts in fact without it, he cannot bind his client. *Swinfen v. Swinfen*, 1 C. B. N. S. 361; cited in 27 C. 423 (449). **W**
- (v) In the absence of a special authority, an advocate is not entitled to admit the claim of the plaintiff and allow a decree to be passed for the full amount claimed. 2 U.B.R. (1897-01), p. 527. **X**
- (w) In a case of an indictment for perjury (a misdemeanour under the law of England) in which the attorneys on both sides had agreed before the trial that the formal proof should be dispensed with and that that part of the prosecutor's case should be admitted, Lord Abinger said, “I cannot allow any admission to be made on the part of the defendant unless it is made at the trial by the defendant or his counsel”. *Regina v. Thornhill*, 8 C. & P. 575; cited in 4 Cr. L.J. 471 (475) & Phip. Ev. 4th Ed. p. 11. **Y**
- (x) In a suit between K & L, an affidavit that had, in K's absence and without his knowledge, been made and used by his attorney's clerk during the early stages of the suit was held not to be admissible in proof of the facts stated against K. *White v. Dowling*, 8 Ir. L.R. 128; Phip. Ev. 4th Ed. p. 240. **Z**
- (y) The admissions of a party's solicitors before the commencement of litigation are not relevant against their clients. *Wagstaff v. Wilson*, 4 B. & Ad. 839; Phip. Ev. 4th Ed. p. 229; Tay. Ev. 10th Ed. p. 552. **A**

2.—“Or by an agent to any such party authorised by him to make them.”—(Continued).

(23) Instances of counsel's admissions held not relevant. —(Concluded).

(-) Where a solicitor made admissions in fraud of his client, they were held not to be admissible in evidence against the client. *Williams v. Preston*, 20 Ch. D. 672 Phip. Ev. 4th Ed. p. 229.

(aa) An admission made by the solicitor of a party in one action cannot be used against him in another, the admissions being mere waiver of proof. *Blackstone v. Wilson*, 26 L. J. Ex. 229; Phip. Ev. 4th Ed. p. 229. C

(bb) On the question whether a debt to the plaintiff was due from the defendant or from a third person, a statement made by the plaintiff's solicitor to the defendant's solicitor in common conversation that the debt was due from the third person was held not to be relevant against the plaintiff. *Petch v. Lyon*, 9 Q.B. 147. Steph. Dig. 7th Ed. Art. 17, p. 28 Phip. Ev. 4th Ed. p. 229 D

(24) Compromise, what is.

A compromise is not merely the giving up of an untenable point, but it may, and often does, involve the giving up of something more in consideration of obtaining a compensating benefit, each party giving up what, though tenable, may not be of much value to him, as compared with the value of that which he secures in return. 6 C.W.N. 82 (87), *per Banerji, J.* E

25) Admission in the course of conduct of case and assent to compromise. distinction between'

(a) A distinction must be drawn between an admission made upon any point by counsel or vakil in the course of his conduct of a case, which still leaves the ultimate decision of the case in the hands of the Court, and a compromise assented to, which really takes the case out of the hands of the Court, so far as the determination of any question of law or fact is concerned, and requires the Court to merely record the agreement arrived at by the parties. 6 C.W.N. 82 (86); *per Banerjee, J.* F

(b) There is a considerable difference between the case where a pleader, by way of compromise, purports to give up a right claimed by the client, or to saddle him with a liability that is not admitted, and the case where a pleader makes admissions as to relevant facts in the usual course of litigation, however much those admissions affect the client's interest. 21 M. 274 (277). G

26) Counsel possesses general authority to make binding compromise.

A counsel possesses a general authority—an apparent authority, which must be taken to continue until notice be given to the other side by the client that it has been determined to settle and compromise a suit in which he is actually retained as counsel, and, in the exercise of his discretion, to do that which he considers best for the interest of his client in the conduct of the particular case in which he is so retained. 27 C. 428 (438). H

2. —“Or by an agent to any such party -authorised by him to make them.” - (Continued).

(27) Compromise outside scope of particular case. whether and when binding.

Where a compromise extended to collateral matters, to matters quite outside the scope of the particular case in which a counsel was retained. *held* that, in order to bind the client, it must be shown that the counsel had, from his client, a special authority to compromise, and compromise upon the definite terms set up by the party. 27 C. 428 (438). **I**

(28) Caution necessary when attorney acts with view to compromise.

“When an attorney goes to an adverse party with a view to a compromise or to an action, you must always look with very great care at his evidence of what there occurred.” *per Lord St. Leonards in Jordan v. Money*, 5 H.L. C. 245; Field Ev. 6th Ed. p. 96. **J**

(29) English Law as to compromise by counsel.

The English Law when it lays down the rule that a counsel has authority to enter into a compromise on behalf of his client goes a little too far. 6 C.W. N. 82 (87) ; *per Banerjee, J.* **K**

(30) Instances of counsel's compromise held not relevant.

(a) It cannot very well be said that, because a party engages a counsel or vakil to conduct his case, he, thereby, also authorises him to enter into a compromise with his adversary. 6 C. W.N. 82 (87) ; *per Banerjee, J.* **L**

(b) The principle that a counsel has an apparent authority to compromise the case in which he is retained and that the other side are entitled to rely upon the continuance of that apparent authority, until they receive notice that it has been determined, does not apply to a case where an express or special authority is requisite. 27 C. 428 (448). **M**

(c) It has been held in several cases in this country that a vakil, though he is authorised to make binding admissions on behalf of his client in the course of conducting a case, is not necessarily authorised to make a binding compromise on his behalf. 6 C.W.N. 82 (86) ; *per Banerjee, J.* **N**

(d) A compromise entered into by a defendant's vakil without the defendant's authority, and the decree passed thereon in spite of his opposition, were held not to be binding on him. 21 M. 274 (276). **O**

(e) A vakil, who is engaged to conduct a case on his client's behalf, has ordinarily no implied authority to compromise it. In the absence of any express provision in the vakalatnamah, he can make no compromise binding on his client without the latter's consent. 2 Agra 222. **P**

(f) Pleaders, except when specially empowered to do so, have no authority to compromise cases conducted by them. 2 N.W.P. 149. **Q**

(31) Instances of counsel's compromise held relevant.

(a) In an English case, a client was held bound by a compromise entered into and announced in his presence by counsel in open Court, although it was made contrary to his express prohibition, on the ground that a repudiation of counsel's authority must be made openly without delay or not at all. *Rumsey v. King*, cited in Field Ev. 6th Ed. p. 87. **R**

(b) Where a case was compromised by counsel on the instruction of a person, who watched the case on behalf of the party, the compromise was held to be binding on the party, if he ratified the acts and the compromise. **S**

2. "Or by an agent to any such party authorised by him to make them."—(Continued).

even if the person instructing should have no authority to bind the party. 6 C.W.N. 82. **S**

(c) A client employing an advocate is bound by a compromise entered into by him, unless it is shown that the counsel acted under any mistake and that some substantial injustice has resulted therefrom, and unless the counsel's authority is revoked and the fact is notified to the opposite side. 13 A. 272 (274) (F.B.). **T**

(d) An attorney in the Courts of Common Law has general authority to compromise an action, provided he acts *bona fide* and reasonably, and not in defiance of the direct and positive instructions of his client. *Pristwick v. Polky*, 18 C.B.N.S. 806. Field Ev. 6th Ed. p. 87; also, Tay. Ev. 10th Ed. p. 553. **U**

(In the courts of chancery it had been held otherwise—*Swinfen v. Swinfen*, 25 L.J.C. P. 303—but the question can scarcely be regarded as settled. 21 M. 276). *Ibid.* **Y**

(52) Partners, agents of one another.

(a) For the purpose of making statements with reference to a point concern of common subject of interest, one co-partner is considered to be the agent of the others; (this rule is enucted in a somewhat concise form in S. 18 of the Evidence Act). 11 C. 588 (591). **W**

(b) A partner charges the partnership by virtue of an agency to act for it; how far his admissions are relevant depends, therefore, on the doctrines of agency as applied to partnership. Wigm. Ev. 405 Ed. S. 1078, p. 1280. **X**

(c) Partners and joint contractors are each other's agents for the purpose of making admissions against each other in relation to partnership transactions or joint contracts. Steph. Dig. 7th Ed. Art. 17, p. 26.

(53) Admissions of partners held relevant.

(a) Admissions of one partner, made after the dissolution of the partnership, in regard to the business of the firm previously transacted, are relevant against all the partners. *Loomis and Jackson v. Loomis*, 3 Deane's Rep. of Sub. Court of Vermont, 198; Field Ev. 6th Ed. p. 90. **Z**

(b) Where a partner makes admissions in fraud of the firm, they will be relevant against the firm. (*Rapp v. Latham*, 2 B. and Ald 295), unless made collusively with the other side. (*Farrar v. Hutchinson*, 9 A. and E. 611); Phip. Ev. 4th Ed. p. 224. **A**

(c) In a suit by two partners against a third person for a debt due to them when in partnership, an admission made by one of the partners, after the dissolution, that the defendant had, after the dissolution, paid the debt was held to be relevant against both of them to prove the payment. *Pritchard v. Draper*, 1 Russ and Myl. 191, Phip. Ev. 4th Ed. p. 225. **B**

(d) Where three persons, as partners, sued a fourth upon an alleged contract regarding the shipment of bark, an admission by the first that the bark was his exclusive property and not the property of the firm, was held to be admissible as against the other two partners. *Lucas v. De La Court*, 1 M. and S. 249; Steph. Dig. 7th Ed. Art. 17, p. 27, Phip. Ev. 4th Ed. p. 225. **C**

2.—“Or by an agent to any such party—authorised by him to make them.”—(Continued).

- (g) Where the contracting parties were three partners, it was held that any one of whom alone could, by his contract, bind the rest for all purposes within the scope of the partnership business, unless, under the particular circumstances of the case, the parties are shown to have intended that a certain act should not be binding without express agreement of each particular partner. *Latch v. Wedlake*, 11 A. and E. 959; referred to in 25 M. 389 (393). **C**
- (h) The admissions made by the manager of a banking company as to its practice in making loans to customers are relevant against the bank. *Simons v. London J. S. Bank*, 62 L.T. 427. Phip. Ev. 4th Ed. p. 227. **D**
- (34) Admissions of partners held not relevant.**
- (a) An admission of the partnership by one of several partners, in an action against them, was held not to be evidence of it against the others, until after such partnership was proved by independent satisfactory evidence. *Nicholls v. Dowding*, 1 Stark R. 81; Tay. Ev. 10th Ed. p. 539. **E**
- (b) An admission made by a partner before the partnership is not evidence against his co-partner. *Tunley v. Evans*, 2 Dowl. & L. 747. Phip. Ev. 4th Ed. p. 223. **F**
- (c) In a suit against two partners on a bill of exchange, signed in the name of the firm by one of them and given in payment of a private debt of his, an admission by him that he had the other's authority to accept the bill was held to be no evidence against the other. *Ex parte Agace*, 2 Cox. Eq. 312, Phip. Ev. 4th Ed. p. 226. **G**
- (d) S. 21 of the Indian Limitation Act, 1877 enacts that one of several joint contractors, partners, executors or mortgagees shall not be made liable by reason only of a written acknowledgment signed by, or by the agent of, any other or the others of them. **H**
- (e) Where two mercantile partners were sued for a joint trespass, an admission by either of them that he had committed the trespass was held not to be relevant against the other, as it did not concern the partnership business. *Fox v. Waters*, 12 A. & E. 43, per *Williams, J.*; Phip. Ev. 4th Ed. p. 225. **I**
- (f) In an action by a seaman for wages against two persons, who were part-owners of a ship and also partners, an admission, by one of the two, concerning the ship, was held not to be admissible against the other, as it related to a subject merely of co-partnership, and not of co-partnership. *Jaggers v. Binings*, 1 Stark. 64; Phip. Ev. 4th Ed. p. 325; Steph. Dig. 7th Ed. Art. 17, p. 28; Tay. Ev. 10th Ed. p. 537. **J**
- (g) Where bankruptcy or death severs the joint interest of partners, the admissions of the deceased's representatives will not bind the survivors. *Slater v. Lawson*, 1 B. & Ad. 396; Phip. Ev. 4th Ed. p. 224. **K**
- (h) Where bankruptcy or death severs the joint interest of partners, the admissions of the survivors will not bind the estate of the deceased. *Atkins v. Tredgold*, 2 B. & C. 23; Phip. Ev. 4th Ed. p. 224. **L**
- (i) The admissions made by the directors of a company at a board meeting of less than the requisite number of members are not relevant on its

2. "Or by an agent to any such party—authorised by him to make them."—(Continued).

behalf. *Ridley v. Plymouth Banking Co.*, 2 Ex. 711; Phip. Ev. 4th Ed. p. 227. **M**

- (1) The confidential reports made by the directors of a company to a meeting of the shareholders are not receivable as admissions on its behalf. *Mear v. Executor's case*, 2 De G.M. & G. 522; Phip. Ev. 4th Ed. p. 227. **N**

(35) Partnership books, whether relevant against partners

- (a) The principle on which partnership books are evidence against the partners is that they are the acts and declarations of such partners, being kept by themselves, or, by their authority, by their servants, and under their direction and superintendence. *Hill v. Manchester & S. W. Co.*, 2 N. & M. 573; *Per Druman*, L.C.J. Wigm. Ev., '05 Ed. S. 1074, p. 1268. **O**

- (b) Where the entries in partnership books are proved to have been made without the knowledge of any particular partner, they will be inadmissible as against him. *Hutcheson v. Smith*, 5 Ir. Eq. 117; Phip. Ev. 4th Ed. p. 237. **P**

- (c) Entries in the books of a corporation on private matters are not relevant against its members—unless so made by statute—even though they have a legal right to inspect, unless their acquiescence in the entries is shown. *Hill v. Manchester Co.*, 5 B. & Ad. 886; Phip. Ev. 4th Ed. p. 237. **Q**

(36) Principal, whether agent of surety.

A principal, as such, is not the agent of his surety for the purpose of making admissions as to the matters for which the surety gives no security. Steph. Dig. 7th Ed. Art. 17, p. 27. **R**

(37) Admissions of principal, when relevant against surety.

- (a) The bare admissions of a principal, made subsequent to the transaction of the business for which the surety is bound, are not relevant against the surety, since, as the surety contracts with the creditor, there is no privity between the principal and himself. *Bain v. Cooper*, 9 M. & W. 701; Phip. Ev. 4th Ed. p. 223. **S**

- (b) In a suit by a creditor to recover the amount of his debt from a person who had become surety for the debtor, an admission of the principal debtor as to the amount of the debt is not evidence as against the surety. A.W.N. (1907), 293—3 M.L.T. 62. **T**

- (c) A judgment or award against a principal is not relevant against the surety, without a special agreement to that effect. *Re Kitchen*, 17 Ch. D. 668; Phip. Ev. 4th Ed. p. 223. **U**

- (d) Where a person stood surety for a clerk, who, being dismissed, made statements as to moneys he had received and not accounted for, held, these statements were not admissible as against the surety as admissions. *Smith v. Whippingham*, 6 C. and P. 78; Steph. Dig. 7th Ed. Art. 17, p. 28. **Y**

- (e) A surety will not be deprived of the benefit of the Statute of Limitations by the principal making part-payments, where the principal and surety execute a joint and several pro-note. *Cockrill v. Sparkes*, 1, H. and C. 699; Phip. Ev. 4th Ed. p. 225. **W**

2. —“Or by an agent to any such party—authorised by him to make them.”—(Continued).

(f) Where, however, the surety's debt arises upon a separate guarantee, the liability will be otherwise. *Re Powers*, 30 Ch. D. 291; *Philp. Ev.* 4th Ed. p. 225. X

g) The declarations of a principal may, in some cases, though rarely, be relevant against the surety; e.g., entries made by the principal debtor in the course of his duty, or whereby he has charged himself with the receipt of money, will, certainly, after his death, be admitted as evidence against the surety. *Whitnash v. George*, 8 B. and C. 566; *Tay. Ex.* 10th Ed. p. 554. Y

(h) A surety is considered as bound only for the actual conduct of the party, and not for whatever he might say he had done. 1 A.T.J. Art. 295. Z

(38) Husband or wife agent of one another

A husband or wife may, in the ordinary way, become an agent, one for the other, and the agent's admissions are then admissible. But the mere marital relation does not of itself make them agents. *Wigan. Ex.* '05 Ed. S. 1078, p. 1280. A

(39) Relevancy of admissions of wife against husband.

(a) The admissions of a wife bind her husband, only where she was authorised to make them. *Thomson v. Blonden*, 1 Esp. 142 *Tay. Ev.* 10th Ed. p. 149. B

(b) The admission of the wife of a person, accused of offences under Ss. 39 and 41 of the *Excise Act* (XXII of 1881), would be evidence against the accused if the woman had been, expressly or impliedly, authorised by the accused to make it. Under the circumstances of the case, the admission was held to be inadmissible. *L.B.R.* (1872 1892), p. 350. C

(c) Where a husband allowed his wife to control certain property and to mortgage it, she was held to be his agent and he bound by her act. *W.R.* (1864) 318. D

(d) Where a person allowed his wife to carry on the business of his shop in his absence, statements made by her that he owed money for goods supplied to the shop, were held to be relevant against him, as admissions by an agent. *Cutford v. Burton*, 1 Bing. 199; *Steph. Dig.* 7th Ed. p. 27. E

(e) Where a wife, by the husband's authority, carried on a business and attended to all the receipts and payments, her admissions to the landlord of the premises as to the amount of rent were held not to be relevant against the husband. *Meredith v. Footner*, 12 L.J. Ex. 183; *Tay. Ev.* 10th Ed. p. 550. F

(f) Where a wife's admission was tendered in evidence to prove a slander by her husband, it was held to be not admissible. *Tatt v. Beggs*, 2 I. R. 525; *Philp. Ev.* 4th Ed. p. 220. G

(40) Under-sheriff whether agent of sheriff—Proof of such agency

(a) Admissions of an under-sheriff in his official capacity are relevant against the sheriff; relationship between them being that of principal and deputy or (quasi) principal not principal and agent, it is not necessary to inquire into the scope of the deputy's authority, as no action lies against him. *Stoddart v. Goodrich*, 4 B. & Ad. 341; *Philp. Ev.* 4th Ed. p. 231. H.

2. - "Or by an agent to any such party authorised by him to make them." (Concluded).

(b) The use of admissions of a deputy sheriff against his sheriff seems to rest on an application of the theory of agency. *Snowball v. Goodricke*, 4 B. and Ad. 541. Wignt. Ev. 1905 Ed. S. 1078, p. 1280. **I**

(c) A bailiff, not being the general officer of a sheriff, agency in the particular instance must be shown, when his admissions will be relevant against the sheriff in the ordinary way. *North v. Miles* 1 Camp. 389; Phelp. Ev. 4th Ed. p. 231. **J**

(41) Receiver, whether agent.

A Receiver appointed in an administration suit, instituted by the creditor of a deceased person against his executor, is not an agent within the meaning of S. 19 of the Limitation Act 1877. He is the agent and an officer of the Court. 10 C.W.N. 959. **K**

(42) Interpreter, whether agent.

An interpreter may be made an agent to converse, and then his translation is admissible as an agent's admission, without calling him to the stand. But otherwise his extra-judicial statements are excluded by the hearsay rule. Wignt. Ev. 1905 Ed. S. 1078, p. 1281. **L**

(43) Manager of Hindu family, whether agent.

The words of S. 20 of Act IX of 1871 must be construed strictly and the manager of a Hindu family, cannot, as such, be held to be an agent "generally or specially authorised" by his co-parceners for the purpose mentioned in that section. 1 M. 385 (386). **M**

3. - "Statements made by parties representative unless character".

(1) Representative, meaning and scope of.

(a) The primary meaning of the terms "representative" and "legal representative" is executor or administrator as such of a deceased person. 16 A. 483 (487). **N**

(b) The Courts in India have not confined the terms "representative" or "legal representative", where those terms have been used in the Code of Civil Procedure, to their primary meaning of an executor or administrator. 16 A. 483 (487). **O**

(c) An executor, under Act V of 1881, was held to be the legal representative of the deceased before probate. 8 B. 241, cited in 16 A. 483 (487). **P**

(d) Where a Hindu executed a deed of gift in favour of his wife and the deed was registered, subsequent to his death, on the admission of his widow, held that, as the widow would have been, if she had applied, entitled, in the circumstances of the case, to letters of administration to his estate, she was his representative, and, as such, qualified to admit the execution of the deed, so as to render the registration proper and effectual. 33 C. 584. 10 C.W.N. 717. **Q**

(e) The discharge of her husband's debt, whether barred or not, being clearly a pious duty on a Hindu widow, and she also being the representative of the inheritance, for the time being, a mortgage by her would clearly bind the reversion by Hindu Law, provided it was executed *bona fide*. 13 M. 189 (190). **R**

3. —“*Statements made by parties—representative—unless—character.*”

—(Continued).

(2) **Representative capacity. when ceases.**

When a party brings a suit to recover his decree on behalf of his minor son or any minor, by the death of that minor, his representative capacity comes to an end, and further steps in execution, or otherwise, must be taken by the legal representative of the deceased plaintiff, whoever that may be. 11 W.R. 162 8

(3) **Decree against non existent person, effect of.**

- If a suit is brought against a non-existent person, as represented by an existing person, and a decree in that form is passed, a decree is obtained against no one as the defendant does not exist and the representative is not sued as a defendant. 4 Bom. L.R. 310 (311) T

(4) **Principle of relevancy of representative's admissions.**

- (a) The admissions of a representative made during the endurance of that capacity are generally relevant against the principal, though the representative may be a mere nominal party or bare trustee, whose name is used only for purposes of form. *Morarty v. L.C.D. Ry.*, L.R. 5 Q.B. 311, Phip. Ev. 4th Ed. p. 218. U
- (b) When a party is sued personally, any admission made by him on a previous occasion while sustaining a representative character may be given in evidence against him. *Stanton v. Perreval*, 5 H.L.C. 257, Phip. Ev. 4th Ed. p. 210. Y
- (c) When a person is sued, or is suing, as a representative, his principal can not be affected by his admissions, made before sustaining, or after he has ceased to sustain, that capacity. *New's Trustee v. Hunting*, 1 Q.B. 611, Phip. Ev. 4th Ed. p. 210. W
- (d) Where the party sues in a representative capacity—i.e., as trustee, executor, administrator, or the like, the representative is distinct from the ordinary capacity, and only admissions made in the former quality are receivable; in particular, statements made before or after incumbency are inadmissible. *Plant v. McEwen*, 4 Conn. 544, 548; Wigm. Ev. 1905 Ed. S. 1076, p. 1275. X
- (e) Conversely, his admissions as executor or the like would not be receivable against him as a party in his personal capacity. Wigm. Ev. 1905 Ed. S. 1076, p. 1275. Y

5) **Executors and trustees Instances of relevant and irrelevant admissions by such.**

- (a) The admissions of the executor of a donor must be treated as the admissions of the donor. 1 W.R. 339 (340). Z
- (b) Where one of several trustees, who are personally liable, admits the receipt of money, his admission will bind the others. *Skayfe v. Jackson*, 3 B. & C. 421, Phip. Ev. 4th Ed. p. 222. A
- (c) The acts or admissions of one of several executors will not be binding on any surviving executor. *Slater v. Lawson*, 1 B. & Ad. 336; Tay. Ev. 10th Ed. p. 538; see same case noted *supra*. B
- (d) The admissions made by an executor are not admissible against an administrator appointed during the absence of the executor. *Rush v. Peacock*, 2 Moo & Rob. 162; Phip. Ev. 4th Ed. p. 222. C

J. "Statements made by parties representative - unless -character."

-(Continued.)

(e) It is doubtful whether an express promise by one executor in his representative capacity will bind the remaining executors in their representative characters. *Tallock v. Dunn*, Ry. & M. 116, approved in *Scholey v. Walton*, 13 L.J. Ex. 12; Tay. Ev. 4th Ed. p. 537. **D**

(f) Admissions made by an executor are not relevant against the heir or devisee where the two capacities are distinct. *Putnam v. Bates*, 3 Russ. 188; *Fordham v. Wallis*, 10 Hare 217; Phip. Ev. 4th Ed. p. 218. **E**

(g) Where a person who made an admission of certain facts was afterwards appointed the executor of another, his previous admissions will not be relevant in an action brought by him as such executor. *Leake v. Edmonds*, 25 L.J. Ch. 125; Phip. Ev. 4th Ed. p. 214. **F**

(h) Where a certain property has been devised by will to executors, an admission by either other than the executor to the will would not bind the estate of the deceased and the admission of one executor would not bind another, at any rate, if the admission was not made in the character of executor. 3 W. R. 63. **G**

(i) An admission of the receipt of money by one of several trustees, who, though joint defendants, were not personally liable, will not bind the other. *Darvis v. Rolue*, 3 Esp. 101; Phip. Ev. 4th Ed. p. 22; Tay. Ev. 10th Ed. p. 537. **H**

(j) Where two executors were sued as such on a covenant by a testator for quiet enjoyment, the plaintiff to establish this fact, was not allowed to put in evidence a declaration by one of the defendants, to the effect that he and his co-defendant both had a lawful title in their own right through the testator, since this admission had not been made by the party as executor, or in relation to any matter touching the testator's estate; but it simply referred to something of which the two defendants had taken advantage in their individual capacities. *For v. Waters*, 12 A. & E. 13; Tay. Ev. 10th Ed. p. 537. **I**

(6) Instances of guardian's admissions held not relevant against minors.

(a) The guardian of an infant has no power to bind him by admissions. 20 W. R. 223 (224). **J**

(b) The payment by the Court of Wards of the revenue due from the other share-holders as well as the minor's own share to save the estate from sale was held not to be an admission of the minor's liability for the excess revenue so paid. 21 W. R. 253 (254). **K**

(c) The declarations of a next friend or guardian are not relevant against an infant plaintiff as, though the names of these persons may appear on the record, they are not really parties to the suit, but simply officers of the Court specially appointed to look after the interests of the infant. *Eccleston v. Speke*, alias *Petty*, 1689, Carth. 79; Tay. Ev. 10th Ed. p. 532. **L**

(d) Although a guardian might have authority to manage the estate of his wards, or, possibly, even to make a partition, it does not follow that he would have power to make admissions of previous transactions so as to bind the estate of his wards. 10 C. L. R. 377 (380) (P.G.). **M**

3. "Statement made by parties --representative unless character."

(Continued).

(e) The acknowledgment of a guardian would not bring within time items otherwise time barred, as the guardian is not the agent of his ward 20
B. 61 (74) , overruled in 26 B. 221 N

(f) It is established law that a guardian cannot bind his ward's estate, except by a document purporting to bind it 12 C. W.N. 256. See p. 1147, however. O

(g) A guardian cannot bind his minor ward by a personal covenant 34 C. 892
=7 C.L.J. 87 P

(h) A guardian, under the Guardians and Wards Act, has no power, under S. 19 of the Limitation Act, to give a new period of limitation by acknowledging a debt, so as to bind the minor 26 C. 51 (52). Q

(i) A person, merely by reason of her office as the mother and natural guardian, has no authority to make an acknowledgment on behalf of minors so as to give a creditor a fresh start for the period of limitation 13 C. 392 (295). R

(j) An account stated against a minor is time barred, unless it be shown that the act of the guardian in the matter of the settlement of the account was beneficial to the interest of the minor 13 C.L.R. 112 (111). S

(k) The proposition that a guardian of a minor cannot bind his ward personally by a simple contract debt, by a covenant, or by any promise to pay money or damages is subject to the indication that the promise will not bind the minor, unless it has been made merely to keep alive a debt, for which the ward's property is liable 12 C. W.N. 256. T

(l) Where the manager of an estate, under the Court of wards, made certain statements admitting, before a Settlement Officer, the claim of a person, viz., his brother, who alleged himself to be an under-proprietor, and obtained a sub-settlement as such under-proprietor, within the meaning of Act XXVI of 1863 it was held that the admission before the Settlement Court was not binding on the minor under the Court of Wards 24 C. 853 (860 & 861) (P.C.) 24 L.A. 107. U

(m) The signature of the guardian of a minor to an acknowledgment of a debt cannot, under S. 19 of the Limitation Act, be considered such an acknowledgment in writing as would give a new period of limitation against the minor, the signature of the guardian not being tantamount to a signature by the party himself 13 C. L.R. 112 (111). V

7) Instances of guardian's admissions held relevant

(a) Where a compromise, made on behalf of a minor in virtue of which his mother conveyed a part of his *watan* lands to certain third persons, was contended to have been ratified by him since he came of age, in proof of which certain receipts given by the minor to the defendant, after he came of age, were adduced in evidence, *held* that the admissions, which these documents contained, that the *watan* land occupied by the defendant had been given him as having fallen to his share, though undoubtedly evidence against him, were not evidence of a conclusive character. 10 B.H.C.B. 311 (318). W.

3. "Statement made by parties representative—unless—character."—

(Continued)

(b) A guardian is legally competent, in the ordinary course of management, either to acknowledge a debt due by his or her ward, or to make a part-payment, or to pay interest 18 M. 156 (457), *following* 17 M. 221. **X**

(c) A minor will be bound by the consent of his guardian to refer the matters in dispute to arbitration, if there is no fraud or gross negligence, although the Court has not, under the provisions of S. 462, C.P.C., sanctioned the agreement to refer. 2 A.L.J. 493; A.W.N. (1905). 171. **Y**

(d) A guardian, appointed under the Guardians and Wards Act, can sign an acknowledgment of liability in respect of, or pay in part the principal of a debt so as to extend the period of limitation against his ward in accordance with Ss. 19 & 20 of the Limitation Act provided it be shown in each case that the guardian's act was for the protection or benefit of the ward's property. 20 B. 221 (233), *overruling* 20 B. 61. **Z**

(9) Duty of Court regarding admissions on behalf of minors

Where an issue is tried between a person of mature years and an infant, it is incumbent on the Court to take care that nothing is taken as admitted against the infant unless it is satisfied that the admission is made by some one competent to bind the infant and fully informed upon the facts. 21 W.R. 228 (229). **A**

(2) Relevancy of admissions by managing member of Hindu family. Admissions held relevant.

(a) A compromise effected by the father of a joint Hindu family whereby he agreed to a partition of the family estate with other co-sharers, was held to be binding on his son. 1 A. 651 (655), *referred to in* 16 A. 231 (233). **B**

(b) The acts done by the father of a joint Hindu family, of which the father was the manager and which he fully represented as such manager, were held to be binding on the other members of the family, in the absence of fraud or collusion. 16 A. 231 (233). **C**

(c) Where, by Hindu Law, the manager of a family has, under certain conditions, authority to contract debts for which the family is liable, he has, by the same law, authority to acknowledge the liability of the family for the debts which he has properly contracted. 17 B. 512 (514). **D**

(d) The manager of a Hindu family has authority to make payments for the family; he has the same authority to acknowledge as he has to create debts, but he has no power to revive a claim barred by limitation, unless expressly authorised to do so. 5 M. 169 (170) (F.B.), *cited in* 17 B. 512 (513). **E**

(e) Where the managing members of a joint undivided Hindu family *bona fide* sold, after the death of a widow, a portion of the property to discharge a mortgage, created *bona fide* by her, in the due performance of her pious duties, and to save the rest of the property from litigation, the sale was held to be binding on the co-parceners. 18 M. 189 (190). **F**

3. "Statements made by parties representative unless character." - (Concluded)

- (j) The manager of a joint Hindu family, in which there may be minors, has authority to acknowledge a debt, provided that it is not barred at the date of acknowledgment. 17 M. 221 (222), per *Muthusami Iyer*, J. G

(10) Such admissions held not relevant.

- (q) The managing member of a Hindu family cannot, by plainly unprovident and groundless admissions, transfer the patrimony of his brothers to a stranger; nor will the Courts lend their aid to such transaction, essentially opposed to the first principles of equity, whatever technical forms they may assume. 10 B.H.C.R. 311 (318 and 319). H
- (r) The manager of a joint Hindu family, or the executor of a Hindu will, has no power by acknowledgment to revive a debt barred by the law of limitation except as against himself. 11 B.L.R. 21. I
- (s) The manager of a Hindu family is not competent to revive a time-barred debt by acknowledgment except as against himself. 20 B. 155 (155). J
- (t) The relation of the managing member of a Hindu family to his co-parceners is a very peculiar one and does not necessarily imply an authority on the part of the manager to keep alive, as against his co-parceners, a liability which would otherwise become barred. 1 M. 385 (386). K

(11) Manager's authority to make binding admission when withdrawn

A manager's authority to make any admission binding on his employers was held to be withdrawn upon his dismissal whether the dismissal was or was not upon such a notice as the manager had a right to demand. 21 W. R. 405 (407). L

4. "Statements made by persons who have any proprietary or pecuniary interest so interested."

(1) Ground of relevancy of statement against interest

- (a) A statement of a fact against interest is receivable in evidence on the ground that such a statement is one which would not be made unless truth compelled it and that it is, therefore, as trustworthy as if made on the stand under cross examination. Wigm. Ev. 1905 Ed. § 1475, p. 1833. M
- (b) To render the admission of a person relevant against another the admission must be in respect of some matters, in which either both are jointly interested, or one is derivatively interested through another, and a mere community of interest will not suffice. Tay. Ev. 10th Ed. pp. 536 and 537. N

(2) General principle regarding relevancy of admissions of persons jointly interested.

- (a) When several persons are jointly interested in the subject-matter of a suit, the general rule is that the admissions of any of those persons are receivable against himself and his fellows, whether they be all jointly suing or sued, provided the admission relates to the subject matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered. 11 C. 588 (590), citing from Tay. Ev. Vol. 1, 1st Ed. p. 489, § 525 and referring to *Kemble v. Farren*, 3 C. & P. 623; *Lucas v. Delacour*, M. 1 and S. 249. O

4.--"Statements made by persons who have any proprietary or pecuniary interest so interested" --(Continued).

(b) Where there are several co-contractors, or persons engaged in one common business or dealing, a statement made by one of them, with reference to any transaction which forms part of their joint business, has always been held admissible as evidence against the other. 11 C. 588 (590). **P**

(c) Where persons are seized jointly, they are seized of the whole, and, being seized of the whole, the admission of each is deemed the admission of the other. *In re Whiteley*, 1 Ch. 508; Philp. Ev. 4th Ed. p. 222. **Q**

(3) Agency whether sole ground of relevancy of partners' and joint contractors' admissions.

The admissions made by partners and joint contractors are relevant not only on the ground of *agency*, as stated above—but also on that of *joint interest*. *Reorthology*, L.R. 1 Ch. 558; Philp. Ev. 4th Ed. p. 222. **R**

(4) A distinction

(a) It is to be observed that admissions are relevant, only so far as the interests of the persons who made them—or of those who claim through such persons—are concerned. On this principle, a distinction must be made between statements made by an occupier of land in disparagement of his own title, and statements which go to abridge or encumber the estate itself. For example, an admission by a *particular* or other holder of a subordinate tenure affects the *patru* or other tenure as against him and those who derive their title from him—but it will not affect the proprietary interest as against the *zemindar* or other superior, so as to encumber or diminish his rights. See clause 3 S. 32, *post*. Field Ev. 6th Ed. p. 91. **S**

(b) Admissions made by the holder of a subordinate title are not relevant to affect the estate of his superior, which he is not entitled to alienate or encumber—e.g., those of an occupier, his landlord's title; or those of a tenant for life, the title of the remainderman or reversioner. *Schols v. Chadwick*, 2 Moo and Rob. 507; Philp. Ev. 4th Ed. p. 219; Tay. Ev. 10th Ed. p. 557. **T**

(c) But in an action to recover land, the admission of a tenant in possession will, from the peculiar nature of the proceedings, be relevant against one who defends as land lord. *Doe v. Titherland*, 4 A. E. 784; Philp. Ev. 4th Ed. p. 220; Tay. Ev. 10th Ed. p. 557. **U**

(5) Right of persons having common interest to make admissions binding against each other --Principle

(a) The fact that two persons have a common interest in the same subject matter, does not entitle them to make admissions, respecting it, as against each other. Steph. Dig. 7th Ed. Art. 17, p. 26. **Y**

(b) It is a fundamental proposition that a plaintiff cannot sue for more than his own right, and that no defendant can, by an admission or consent of this kind, convey the right or delegate the authority, to one for more than his own share in property. 7 A. 358 (359); *per Mahmood*. J.; 6 A. 996, *referred to*. **W**

4. —“ Statements made by persons who have any proprietary or pecuniary interest so interested.” (Continued).

(6) Reason for rule.

(a) One reason for not giving effect to admissions by one defendant against a co-defendant is that it deprives the defendant, against whom such admissions are used, of the opportunity of raising pleas which might be raised, if the defendants making the admission appear in Courts as plaintiffs suing for their rights. 7 A. 353 (359), per *Mahmood, J.*, referring to 6 A. 395. X

(b) The reasons of the rule appear to be . . .

(1) that it would be unjust to bind a co-defendant by the admission of another whom he has had no opportunity to answer or cross-examine and Y

(2) that the plaintiff would be afforded opportunities of defeating his opponent by unfair means. 1 A.L.J. Art. 234. Z

(c) The answer of one defendant in Chancery cannot be read in evidence for his co-defendant, even on an enquiry before the master or the chief clerk or upon a motion for decree, at least without having given notice to that effect. Neither can the answer of one defendant be read in evidence against his co-defendant, the reason being that as there is no issue between them, no opportunity can have been afforded for cross-examination; and moreover, if such a course were allowed, the plaintiff may make one of his friends a defendant, and thus gain a most unfair advantage. 1 A.L.J. Art. 233, referring to *Tay. Ex.* A

(7) (A) Instances of admissions of interested persons held not relevant.

(a) The admission of one of two joint defendants cannot bind the other. 9 C. L.R. 359 (360). B

(b) It is clear that an admission, or even a confession of judgment, by one of several defendants in a suit, is no evidence against another defendant. 23 W.R. 214 (219) (P.C.). C

(c) An admission by a co-defendant of the plaintiff's title, which was also a disclaimer of his own, was held, under the circumstances of the case not to be admissible against the other defendant, so as to entitle the plaintiff to a decree for the entire estate. 6 A. 395 (397), referred to in 7 A. 353 (359). D

(d) An admission made by one defendant that he had relinquished his share, even if it was clearly made in the deed of sale, ought not to affect the other defendants. 16 C. 627 (635) (P.C.). E

(e) Where both principal and surety are impleaded as co-defendants, the admissions of a principal can seldom be received in evidence against the surety. 28 B. 248. F

(f) Where a written statement was sought to be made use of as evidence against the co-sharers of the defendants, the Judges held that the written statement of one party was no evidence against the other, not being legal evidence. 12 W.R. 39, referred to in 15 W.R. 437. G

(g) An admission made by a co-tenant, as to who was the landlord of a holding, was held not to be binding on the other co-tenants. 2 C.W.N. 166 (167 & 168). H

4.—“ Statements made by persons who have any proprietary or pecuniary interest—so interested.”—(Continued).

- (h) The admission made by a certain raiyat as to the rate of rent at which he held, was held not to be evidence against another to prove the rate at which the latter held. 1 Ind. Jur. O.S. 9: W.R. (F.B.), 23: Marsh. All p. 70. I
- (i) Where a mortgage-deed granted by one of two undivided brothers recited that a division had taken place between the mortgagor and his brother, held that the recital was no evidence of separation as against the brother or his representatives. 1 B.H.C.R. 31 (37). J
- (j) Where the daughter of a mortgagor made a certain admission, held that it was not binding on the mortgagor, as it was not the admission of a person having title to the estate in question in the suit. 2 N.W.P. 207. K
- (k) Where an admission was made by a plaintiff's brother, and “lambardar” held that it could not, merely on account of his being such, be binding against the plaintiff, unless it was shown that he was authorised by the plaintiff in that behalf. 2 Agr. 20. L
- (l) Where, in an action against a party for money had and received, the plaintiff, to prove the receipt of the money by the defendant, adduced in evidence certain statements made by a person, whom he had taken into partnership subsequently to the transaction in question, held, such evidence was not admissible, as no joint liability could be presumed merely from a subsequent partnership. *Catt v. Howard*, 3 Stark 3; Tay. Ev. 10th Ed. p. 539. M
- (m) The admissions made by one tenant in common are not relevant against the others. *Dan v. Browne*. 4 Cowen 483 (492); Phip. Ev. 4th Ed. p. 222. N
- (n) In cases in which actions founded on a simple contract have been barred by the Statute of Limitations, no joint contractor or his personal representative loses the benefit of such statute, by reason only of any written acknowledgment or promise made or signed by, or by the agent, duly authorised to make such acknowledgment or promise, of any other or others of them, or by reason only of payment of any principal, interest or other money, by any other or others of them. Steph. Dig. 7th Ed. Art. 17. p. 26 Phip Ev. 4th Ed. p. 224. O
- (o) Admissions made by co-legatees, or co-devisees have been held in America not to be relevant as against the rest. *Shailer v. Bromstead*, 99 Mass. 112, 127; Phip. Ev. 4th Ed. p. 222. P
- (p) In America it has been decided that no such privity exists among several indorsers of a promissory note as will make the admissions of one binding on all. *Staymaker v. Gundacker's Ex.* 10 Serg. & R. 75 (Amer.); Tay. Ev. 10th Ed. p. 538. Q
- (q) Where a person made statements as to a bill of which he had been the holder, those statements were deemed not to be relevant as against the holder, if they were made after he had negotiated the bill. *Pocock v. Billing*, 2 Bing. 269; Steph. Dig. 7th Ed. p. 25. R

(B) Fraud, negligence trespass and offence.

- (a) Where an admission made by one of several parties in fraud of the others jointly interested with him, and in collusion with the adversary, it

4. — "Statements made by persons who have any proprietary or pecuniary interest — so interested." — (Continued).

was held not to be relevant against the others. *Rawstone v. Gurdell*, 15 L.J. Ex. 291; Tay. Ev. 10th Ed. p. 596. **S**

(b) Admissions made by one defendant will not be relevant against any other in an action for negligence or trespass or other tort. *Daniels v. Potter*, M & M. 501; Tay. Ev. 10th Ed. p. 599; Phip. Ev. 4th Ed. p. 78. **T**

(c) In trespass, where the defendants may be found severally guilty or not guilty, a witness may say he heard one acknowledge that he committed the act with the others; this is decisive against that one, and as it is legitimate evidence against him, the Court must hear it, though it is no evidence against the others. *Morse v. Royal*, 12 Ves. Jr. 355, 361; per *Erskine* L.C. Wigm. Ev. 105 Ed. S. 1076, p. 1276. **U**

(d) Where a person, jointly tried with others for an offence and made a principal from his own admission of his presence at the scene of the offence, made in his admission certain statements exculpating himself, held that the Court would attach very little weight to the exculpatory parts of the statements, that, taken with other evidence, it might operate against him, and that, its inherent quality not being that of a confession, it could not be used against the other accused. 10 B.H. C.R. 497 (500 & 501). **V**

(e) The admission of one defendant will not be evidence against another person in criminal proceedings, since the law cannot recognise any partnership or joint interest in wrong, much less in crime. *Grant v. Jackson*, Peake. R. 204; Tay. Ev. 10th Ed. p. 588. **W**

(7) (C) Divorce

(a) In suits under the Indian Divorce Act, the admissions made by a respondent are not evidence against a co-respondent. 58 P.R. 1870 (Civil). **X**

(b) In cases of divorce, the admissions of a respondent are not relevant against the petitioner. *Plumer v. Plumer*, 4 S. & T. 257; Phip. Ev. 4th Ed. p. 223. **Y**

(c) An admission by the defendant, in a petition for damages for adultery, that, at some other and different time, the "*terramina causa*" was the wife of the plaintiff, will not be regarded as conclusive evidence that she was the plaintiff's wife at the time when the adultery was committed. *Morris v. Miller*, 4 Burr. 2057; Tay. Ev. 10th Ed. p. 598. **Z**

(8) Instances where admissions of persons interested held relevant.

(a) The declarations of one identified in interest with a party are receivable against him. 1 A.L.J. Art. 235. **A**

(b) Where a plaintiff sued the defendant to recover a watch, which the defendant claimed to retain as the administrator of a deceased person, a declaration by the deceased that he had given the watch to the plaintiff was held to be relevant against the defendant. *Smith v. Smith*, 8 Bing. N.O. 29; Phip. Ev. 4th Ed. p. 220. **B**

(c) An admission by one of two joint and several obligors is relevant against the obligor, even though the joint defence may raise a dispute as to the subject matter of the admission. *Crosse v. Bedingfield*, 12 Sim. 36; Tay. Ev. 10th Ed. p. 583. **C**

4. —“Statements made by persons who have any proprietary or pecuniary interest—so interested.”—(Concluded).

- (d) Where four persons made a joint and several promissory note, it was held that either could make admissions about it as against the rest. *Whitcomb v. Whitting*, 1 S.L.C. 644, Steph. Dig. 7th Ed. Art. 17, p. 27. **D**
- (e) Where an agreement sued upon was made by the plaintiff on behalf of himself and the other proprietors of a theatre, statements made by one of such^o proprietors are relevant on the part of the defendant. *Kennel v. Farren*, 3 C. & P. 623, Tay. Ev. 10th Ed. p. 573. **E**
- (f) The admissions of one joint tort-feasor are relevant against another on the same principle and with the same limitations as those of conspirators. *R. v. Hardwicke*, 11 East, 578, Wigm. Ev. 1905 Ed. 1079, p. 1282. **F**
- (g) Evidence of an admission made by one of several defendants in trespass will not if it is true establish the others to be co-trespassers. But if they be established to be co-trespassers by other competent evidence, the declaration of the one as to the motives and circumstances of the trespass will be evidence against all who were proved to have combined together for the common object. *R. v. Hardwicke*, 11 East, 578, 585 per *Ellenborough J.C.J.*, Wigm. Ev. 1905 Ed. S. 1076, p. 1276. **G**
- (h) Where several persons are proved to be engaged in one general conspiracy, all transactions of that conspiracy by the different parties may and ought to be given in evidence and it is enough if the party accused can be proved to be privy to the general conspiracy (Powell's Law of Evidence). In India the above principle is embodied in S. 10 of the Evidence Act* and no doubt under it, admissions of joint tort-feasors or co-accused might be received in evidence, though otherwise they would be excluded. 1 A.L.J. Art. 237, referring to 9 B.L.R. 36. **H**
- (i) Though a confession of an accused person proposed to be proved against him to establish an offence, might be inadmissible for such a purpose, it would be admissible for other purposes, as an admission, under S. 18, against the person who made it (S. 21) in his character of one setting up an interest in property, the object of litigation or judicial enquiry and disposal. 9 B. 131 (134).

5. —“Persons from whom the parties to the suit have derived their interest in the subject-matter of the suit”.

(1) General.

- (a) “Admissions by third persons, through whom the person against whom they are received claims, as they derive their legal force from the relation of the party making them to the property in question, may be proved by any witness who heard them, without calling the party by whom they were made. The question merely is, whether the admission alleged was made, and not whether the fact is, as then, admitted.” Tay. Ev. 10th Ed. p. 559. **J**
- (b) “The truth of it may, where the admission is not conclusive,—and it seldom is so,—be controverted by other testimony, and even by calling the party himself, but it is not necessary to produce him, for his declarations, when admissible at all, will be received as original evidence, and not as hearsay.” Tay. Ev. 10th Ed. p. 559, referring to *Woolway v. Rowe*, 3 L.J.K.R. 121 & *Brickell v. Hulke*, 7 A. & E. 456. **K**

5.—“Persons from whom the parties to the suit have derived their interest in the subject-matter of the suit”.—(Continued)

(2) **Privity**, meaning of.

The term *‘privity’* denotes mutual or successive relationship to the same rights of property, and privies are distributed in several classes, according to the manner of this relationship. Tay. Ev. 10th Ed. S. 787 p. 555. **L**

(3) **Privies are of three classes.**

(a) Privies in blood as heir and ancestor, co-parceners, or co-heirs in gavel kind. *Weeks v. Birch*, 69 L.T. 759; Philp. Ev. 4th Ed. p. 219. **M**

(b) Privies in law, as executor to testator or administrator to intestate (sometimes called privies in representation), husbands suing or defending in right of their wives, lords by escheat, tenants by the curtesy, or in dower. Philp. Ev. 4th Ed. p. 219. **N**

(c) Privies in estate or interest as vendor and purchaser (*Melbourne City v. Brougham*, 9 App. Cas. 307), grantor and grantee, donor and donee, lessor and lessee, joint tenants, successive bishops, rectors and vicars. Philp. Ev. 4th Ed. p. 219. **O**

(4) **Representatives who are, and who are not.**

(a) The heir of an intestate was held to be the legal representative of the deceased intestate. 1 C.L.R. 210 cited in 16 A. 183 (487). **P**

(b) Persons, whose sole title to property in their possession was that of heirs to a deceased person have been treated as his legal representatives within the meaning of S. 231, and as his representatives within the meaning of S. 244. 16 A. 183 (487). **Q**

(c) According to the explanation to S. 366 Act XIV of 1882, a certificate of heirship does not of itself constitute the person holding it the legal representative of the deceased. But when the person holding any such certificate obtains thereby property belonging to the deceased, he may be treated as a legal representative in respect of such property. 16 A. 183 (487). **R**

(d) It has been held by the All India and Calcutta High Courts that assignees from a mortgagor of mortgaged property are representatives of such mortgagor in proceedings under S. 244, C.P.C., for the execution of a decree, against the mortgagor, for the sale of the mortgaged property. 16 A. 183 (488). **S**

(e) The Legislature, when, in S. 244, it departed from the phraseology of Ss. 234, 252, 363 to 368, C.P.C., and used the term “representatives” instead of “legal representative” must have intended “representatives” to have a wider application than it intended the term “legal representative” to have, when that term is used in the Code, and must have intended the term “representatives” to include, not only the persons to whom the term “legal representative” would apply in other sections of the Code, but every person who at the time was the transferee, within the meaning of S. 232, of the decree in the suit. 16 A. 183 (488). **T**

(f) Even before the coming into force of Act VII of 1888, a person who was a transferee, within the meaning of S. 232 of Act XIV of 1882 of a decree was, as such transferee, a representative of a party to the suit in which the decree was made within the meaning of the term “representatives”. **U**

S. —“Persons from whom the parties to the suit have derived their interest in the subject-matter of the suit”.—(Continued)

in S. 214 having, consequently, a right of appeal if his application to execute the decree was dismissed. 16 A. 483 (491). **U**

(q) A person, who, within the meaning of S. 232, is a transferee of a decree, is a representative, within the meaning of S. 244, *qua* the decree, of the party to the suit under whom he, immediately, or by *mesne* assignment in writing, or by operation of law, has derived title to the decree in the suit. 16 A. 483 (492). **V**

(h) The term “representative”, as used in S. 244, C.P.C., when taken with reference to the judgment-debtor, does not mean only his legal representative, that is, his heir, executor or administrator, but it means his representative in interest and includes a purchaser of his interest who, so far as such interest is concerned, is bound by the decree 24 C. 62 (72 & 77) (F.B.). **W**

(i) Though an execution-purchaser, who makes his purchase not from the judgment-debtor—and often against his wish—is not bound by some of the acts of the judgment-debtor, such as alienations made by the latter to defeat the decree, it does not show that his rights are not derived from the judgment-debtor, or that he is not the representative of the judgment-debtor in any sense or for any purpose. 24 C. 62 (75-6) (F.B.). **X**

(j) There is no distinction between the case of a private purchase and a purchase in execution of a decree, so far as regards a question which arises under S. 244, C.P.C., cl. (c). 1 A.L.J. 65. **Y**

(k) A purchaser, at an execution-sale, of the equity of redemption in mortgaged properties, can come in in execution-proceedings under a decree upon the mortgage, as a representative of the judgment-debtor under S. 244, C.P.C. 24 C. 62 (77) (F.B.). **Z**

(l) There is no distinction between the case of a private purchaser who purchases by agreement from a judgment-debtor whose property is the subject-matter of a suit for sale at the instance of a mortgagee, and that of a purchaser who purchases at a judicial sale in execution of a simple money-decree; if, in the one case, such a purchaser is to be regarded as a representative of the judgment-debtor, he should be likewise so regarded in the other. 1 A.L.J. 65 (76). **A**

(m) Though a purchaser at a private sale is not bound by any prior alienation made by the vendor to defraud him (*vide* S. 53, Transfer of Property Act), that does not show that such purchaser is not a representative in interest of the vendor. 24 C. 62 (76) (F.B.). **B**

(n) The words “legal representative” in S. 234, C.P.C., cannot be taken to include any person who does not in law represent the estate of the deceased. 17 M. 186 (187). **C**

(o) A purchaser in execution of a money-decree against the mortgagors is not a voluntary purchaser and his title is not one of privity with the mortgagors but in some respects adverse to them, and cannot, therefore, be considered as a representative of the judgment-debtors, mortgagors, within the meaning of S. 244, C.P.C. 16 C. 355 (360). **D**

(p) A purchaser in execution-sale is not the representative of the judgment debtor, and is not estopped by the conduct which would estop the latter from denying the title of the person through whom title was claimed by the other side. 14 C. 401 (413), cited in 20 C. 236 (239). **E**

5.—“Persons from whom the parties to the suit have derived their interest in the subject-matter of the suit”.—(Continued).

(g) A purchaser at a Court sale is not a party, or the representative of a party, within the meaning of S. 244, C.P.C., and he is not bound by any decision in a miscellaneous enquiry under Ss. 280, 281 or 282 of the Code. 15 B. 290 (292), *per Birdwood, J.* F

(5) Grounds upon which admissions are evidence against those in privity with the party making them.

(a) The—is that they are identified in interest. *Woolway v. Rowe*, 1 A & E. 114 : (this is a question, however, which properly belongs to the substantive law, and not to the law of evidence) *Phip. Ev. 4th Ed.* p. 219. G

(b) To render statements by interested persons relevant against one another it is not sufficient that the interest be subsequent in point of time; it must have been derived from the person who made the statement sought to be used as an admission. 10 W. R. 89 : *Field Ev. 6th Ed.* p. 90. H

(6) Instances of admissions by persons from whom interest derived held relevant

(a) An agent's admission that he purchased as agent is evidence that the purchase was made by him in that capacity, and not on his own account, and it is relevant against the agent's heirs as well as against any person who claims through them. 2 W. R. 190 (191). I

(b) Certain documents, which were contended to be inadmissible against a party on the ground that they were *res inter alios acta* and not to come within any of the clauses of evidence enumerated in S. 32 of the evidence Act were held to be relevant against that party, because they were relevant against persons through whom he claimed. 31 C. 871 (883). J

(c) The recitals contained in a mortgage-deed, admitting the receipt of consideration, are binding, as admissions, not only on the mortgagor, but also on the purchaser of that mortgagor's interests. 13 C. P. J. R. 1 (6). K

(d) A statement by a testatrix suggesting any inference as to the execution of a will would be an admission relevant against her representatives and would, therefore, be admissible as evidence. 3 Bom. L. R. 465 (466). L

(e) So far as the parties to a suit, or those under whom they claim, were parties to previous arbitration proceedings, any admissions made by them (e. g., any map filed by them as correct) may be used as evidence (though of course not necessarily as conclusive) in the suit. 7 W. R. 249. M

(f) A statement by a person that he was illegitimate was used admissible after his death to prove his illegitimacy, as a declaration both against pecuniary and proprietary interest. *In re Pertou.* 53 L. T. 707, *Phip. Ev. 4th Ed.* p. 258, *Tay Ev. 10th Ed.* p. 476. N

(g) A, as heir of B, a purchaser of land, sues C, as heir of D, B's widow (deceased), who had continued in possession for 20 years after B's death to recover the land. D's statement that she held the land for life, and, that after her death, it would go to B's heirs was held to be relevant against C. *Doe v. Pettitt.* 5 B & Ald. 223 : *Phip. Ev. 4th Ed.* p. 221 ; *Tay Ev. 10 Ed.* p. 555. O.

5.- "Persons from whom the parties to the suit have derived their interest in the subject-matter of the suit". (Continued).

- (h) The admission by a zemindar that the holding of certain tenants as *mokurree* at a given rent is binding on any subsequent zemindar, not being an auction-purchaser at a sale for arrears of revenue. 10 W.R. 72 (73). **P**
- (i) In a suit by an auction-purchaser of a zemindary for resumption of jaghire lands, forming part of, and within his zamindary, as *mal*, where it was argued that the identity of the jaghire lands with the *mal* lands in the zamindary had been admitted by the defendants, or those through whom they claimed, in a resumption suit previously brought against them by the Government, held that, though the admission was not to be treated as an estoppel, it was a grave one, shifting on to the defendants the burden of proving that the lands were something distinct from the *mal* lands of the zamindary. 14 W.R. 28 (P.C.) - 5 B.L.R. 529. 13 M.L.A. 438 (459 and 460) **Q**
- (j) In a suit by the plaintiffs to recover property claiming it as *sebayets* lately in possession, and wrongfully ousted therefrom by the defendants, it was held that statements made by the ancestors of the plaintiffs and the defendants were receivable as evidence in the suit. 10 W.R. 89 (90). **R**
- (k) In a suit by the Karnavan of Tarwad to recover properties, in the possession of the descendants of a former Karnavan, who was alleged to have acquired them, the original rough draft of a plaint, put on in a former suit, was held to be admissible in evidence to show the admission of the former Karnavan that he alienated the property in a manner which would be adverse to the claim of the Tarwad. 15 M. 19 (29). **S**
- (l) Where a vendor merely declared in her deed of sale of a moiety and that of a landed estate that she was entitled only to that moiety, and that the other moiety belonged to the son of her deceased sister, it was held not to be conclusive evidence against her being the proprietor of the other moiety, nor to impair the right of the purchaser. 13 W.R. 2 (3). **T**
- (m) After a long period of lawful holding on the part of the defendants to the knowledge of Z. without any serious attempt on her part to disturb it, and her admission in a previous suit that the defendants were holding under a *mokurree* pattah, the plaintiff's suit, brought on the ground of a *mokurree* pattah granted by Z. was held to be properly dismissed. 18 W.R. 500. **U**
- (n) Old estate maps, produced from proper custody, are relevant against persons deriving title from the proprietor, under whose direction those maps were made. *Craven v. Pridmore*, 18 T.L.R. 282; Phip. Ev. 4th Ed. p. 219. **V**
- (o) Where the assignee of a bond sued the obligor in the obligee's name, an admission by the assignee of the bond would be deemed relevant on the defendant's behalf. Steph. Dig. 7th Ed. p. 25, ill. (b) to Art. 16. **W**
- (p) In an action by the endorsee of a bill or note, which has been taken by the plaintiff either after it was due or with notice of fraud in its original concoction and without consideration, the declarations of the

5.—“Persons from whom the parties to the suit have derived their interest in the subject-matter of the suit”.—(Continued).

endorser, made while the interest was in him, are relevant for the defendant. *Beauchamp v. Parry*, 1 B. & Ad. 89; Tay. Ev. 10th Ed. p. 557. **X**

(q) The admissions of persons interested in a policy are relevant against the party in whose name the policy was effected. *Bell v. Ansley*, 16 East. 143, Phip. Ev. 4th Ed. p. 218. **Y**

(r) Admissions made by rate-payers are relevant against the church-wardens and overseers in a settlement appeal. *L. v. Hardwick*, 11 East. 578, 586; Phip. Ev. 4th Ed. p. 218, Tay. Ev. 10 Ed. p. 538. **Z**

(s) Acknowledgment of liability or part-payment by a mortgagor has the effect of keeping alive the mortgage-debt as against even such of the mortgaged properties as the mortgagor has sold to a third person, whether the purchaser, when he bought, had notice of the mortgage or not. 9 C.W.N. 868 = 32 C. 1077. **A**

(t) A mortgagee derives his title directly from the debtor, and will be bound by the previous conduct of the debtor in respect of the property mortgaged. 9 I.A. 147; cited in 11 C. 101 (113). **B**

(u) But a party claiming under another, who has made admissions as to a transaction to which the other was a party, may allege and prove that the admissions were made fraudulently and show the real nature of the transaction. 20 W.R. 112 (113). **C**

(v) It was thought to be a very nice question upon which the Court was not aware that there was any authority—what is the effect of admissions made by a person, who subsequently adopts another, in binding the person adopted—whether the person adopted can be said to derive title from the adopter in such a way as to make the admissions evidence against him. 20 W.R. 223 (224). **D**

(7) Instances of such admissions held not relevant.

(a) The admission of a lessor does not bind a lessee in certain cases in which a *bona fide* act might bind him. 3 W.R. 143. **E**

(b) An admission of a predecessor in title of a defendant was held to be inoperative against his successor, because of collusion. 25 W.R. 125 (126). **F**

(c) In an action by a mortgagee to set aside a prior conveyance of the same property by his mortgagor to a third person, an admission by the mortgagor that his mortgagee had advanced money on the mortgage is not evidence against the third party, being made after the mortgagor parted with his interest. *Doe v. Maber*, 1 A. & E. 733; Phip. Ev. 4th Ed. p. 221. **G**

(d) An acknowledgment by a mortgagor in favour of a first mortgagee, does not preclude a puisne mortgagee, whose title accrued before the acknowledgment was given, from relying on the Statute of Limitation. 1 C. L. J. 337. **H**

(e) Where a purchaser from a mortgagee sued a *dur-mokurureedar* for the cancellation of his *mokururee* title, alleged to have been granted without authority by the mortgagor, though the mortgagor's admission of the

5. — "Persons from whom the parties to the suit have derived their interest in the subject-matter of the suit". — (Continued).

mortgage, in a former suit by the mortgagee for possession, was conclusive as between the mortgagor and mortgagee, yet, as the mortgage was pleaded by the defendant to be collusive, he was held to be competent to question its *bonafide* nature. 5 W.R. 280. **I**

(f) A false admission made by a sheristadar to avoid losing his appointment was held not to preclude his heirs from afterwards setting up the truth. 6 W.R. 38 (39). **J**

(g) A testator's declarations are not admissible, as exceptions to the hearsay rule, to prove the execution of his will, even though both the parties claim under the testator. *Atkinson v. Morris*, 1897, P. 40; Phip. Ev. 4th Ed. p. 300. **K**

(h) Where admissions are made after bankruptcy, they will not be relevant against the trustee or the creditors because of the risk of fraud. Phip. Ev. 11th Ed. p. 233, referring to *In re Tollemache, Esparte Edwards*, 11 Q.B.D. 115 & *In re Tollemache, Esparte Revell*, 13 Q.B.D. 720. **L**

(i) The admissions of a former owner of property made after he has ceased to have any interest in it are not evidence against the party in possession. 5 W.R. 268 (269). **M**

(j) Where the name of one person has been struck out of the record and the name of another substituted, the admissions of the former while upon the record are not evidence against the latter. *Armstrong v. Normandy*, 5 Exch. 409; Phip. Ev. 4th Ed. p. 218. **N**

(k) A road cess return, made by a ten-anna proprietor under the schedule of Act X (B.C.) of 1871 was held not to be admissible as evidence against a plaintiff, who represented a five-anna proprietor. 22 W.R. 192. **O**

(l) A compromise made by a person, holding a Hindu widow's or Hindu daughter's estate in the property of a deceased husband or father, is not binding on the reversioners, even though it has been followed by a decree of Court, and the reversioners can only be bound by a decree made after a full contest. 5 A.L.J. 43. **P**

(m) Where the question was whether a person in building a wall had encroached upon land owned by another in fee, the fact that, at the time of building the wall, the latter's father—who was a tenant for life of the land—had directed the former where to build the wall was held inadmissible on the ground that the act and the declaration were by different persons. *Hove v. Mulim*, 27 W.R. 310; Phip. Ev. 4th Ed. p. 57. **Q**

(n) Where, in a suit to recover possession of land, certain petitions of alleged owners, from whom the plaintiff claimed his title, which petitions were presented to the Collector and to the Principal Sudder Ameen and stated respectively the transfer from the one to the other and from the last alleged owner to the plaintiff, were adduced in evidence of the title of the plaintiff, without producing the deeds or proving that such alleged owners had ever been in possession of the property, it was held that the petitions were inadmissible in evidence. W.R. (F.B.), 20 - 1 Ind. Jur. O. S. 97. **R**

8) Auction-purchasers — Interest of such persons from whom derived.

(a) Under a private sale in satisfaction of a decree the purchaser derives title through the vendor, and cannot acquire a better title than that of the

5.—“Persons from whom the parties to the suit have derived their interest in the subject-matter of the suit”.—(Continued).

vendor. Under a sale in execution of a decree the purchaser, notwithstanding he acquired merely the right, title, and interest of the judgment-debtor acquires that title by operation of law adversely to the judgment-debtor, and freed from all alienations or incumbrances effected by him subsequently to the attachment of the property sold in execution. 7 C. 107 (118) (P.C.) 10 C.L.R. 281 (287) — 8 I.A. 65; cited in 20 C. 236 (239). **S**

(b) Where the property is sold in execution of a decree, it cannot be correctly said that the *owner* gives any rights to the purchaser, who acquires his rights by operation of law. 10 B. 400 (405). **T**

(c) An execution-purchaser derives his title by operation of law adversely to the judgment-debtor. 14 C. 401 (413). **U**

(1) Auction-purchasers whether bound by previous owner's acts and declarations.

(a) A plaintiff, as purchaser of the rights of Government in a taluk, does not become privy in estate to the defaulting proprietor. He does not derive his title from him, and is bound neither by his act nor by his laches. The plaintiff, as auction-purchaser, is bound by no limitation which would not bind or affect the Government, 8 W.R. 222, cited in 12 C. 82 (90 & 91). **Y**

(b) An auction-purchaser of an estate, at a revenue sale for arrears of Government revenue, does not derive his title from the late proprietor, and arbitration-proceedings, between the defaulting proprietor and third parties, are not relevant against the purchaser in a subsequent suit brought by him. 12 C. 82 (90), referring to 8 W.R. 222. **W**

(c) The statutory title which the law gives to an auction-purchaser is that, for the protection of the revenue, and in order to ensure its due payment by him, and to avoid the necessity of repeated sales of the property, he is remitted to all those rights, which the original settler, at the date of the perpetual settlement, had, and may, in consequence of that, sweep away or get rid of all the intermediate tenures and incumbrances created by preceding zamindars since that date. 20 W.R. 44 (P.C.). **X**

(d) A purchaser, at a sale by auction in execution of a decree, is not in the position of a person, who takes a conveyance direct from the party, and is not, therefore, bound by what the judgment-debtor may have stated on some previous occasion, in a mortgage to which the auction-purchaser was himself a party, the admission, so far as it can be considered as his, may be used as evidence against him. 18 W.R. 200 (201). **Y**

(e) The only advantage which he gains by the character of being auction-purchaser is that he is relieved from any difficulty arising from the law of limitation and that he is not conclusively barred by the acts or the omissions of the former zamindars, whatever presumptions may arise from the omission to question the tenure by those who preceded him in the zamindari. 11 B.L.R. 71 (P.C.) = 14 M.I.A. 247 (255-6). **Z**

(f) A purchase of property in the inoffusil, at a sale in execution of a decree, is valid in spite of a decree for sale of the property, in a suit for foreclosure, pending in the High Court at the time of the sale, to which the purchaser was not a party. 8 B.L.R. 122 (P.C.) = 14 M.I.A. 101. **A**

5.—“Persons from whom the parties to the suit have derived their interest in the subject-matter of the suit”.—(Continued).

(g) A purchaser at a Court sale is not bound by the specifications in the proclamation of sale contained of the claims of intervenors. They are inserted for his benefit, and no binding effect, as against him is anywhere given to them. On his purchase, he steps into the place of the former owner of the property, and it is quite open to him to exercise and use, as against the intervenors, all the rights and remedies that the owner has. 15 B. 290 (293), *per Parsons, J.* **B**

(h) An admission made by an execution-debtor, or a decree against such a person does not bind a purchaser in execution of a decree of a civil or revenue Court. 6 W.R. 197. **C**

10) Extent to which auction-purchaser represents judgment-debtor.

(a) A purchaser at a Court sale represents the judgment-debtor to the extent of such right, title and interest as he had in the property purchased at the date of sale, and represents the execution-creditor in so far as he had a right to bring such right, title and interest to sale in satisfaction of the decree. 18 M. 13 (18), *referring to* 19 I.A. 203. **D**

(b) And, when the plea of estoppel is available to a decree-holder, it is likewise available to the purchaser, at the execution-sale, as his representative or as one claiming under him. 18 M. 13 (18), *relying on* 19 I.A. 203. **E**

(11) Effect of sale of judgment-debtor's property.

(a) When the Court sells the right, title and interest of a judgment debtor in property, it cannot be regarded as selling more than the judgment-debtor could himself honestly sell. 6 B. 193 (202). **F**

(d) All that is sold and bought in an execution sale is the right, title, and interest of the judgment-debtor with all its effects. 5 I.A. 116 = 3 C. 806 (813) (**P. C.**), *followed in* 17 M. 228. **G**

(c) The Court can sell only such rights as the judgment-debtor has and the purchaser's title cannot extend beyond them. 6 Bom. L.R. 864 (869). **H**

(d) Where a mortgagee purchases, at a sale in execution of a decree upon his mortgage, the right, title, and interest of the mortgagor who has been estopped from asserting a title to the property as against certain parties, he cannot be considered as having put himself by reason of his purchase at the sale in a better position than he was in, as mortgagee taking from the mortgagor. 9 C. 265 (270) (**P. C.**) = 9 I.A. 147, on appeal from 4 C. 783. **I**

(e) A purchaser at a judicial sale takes only that which the judgment-debtor could honestly dispose of, and although the mortgage to the plaintiff may have been without possession, it would bind the mortgagor himself. 6 B. 490 (493), *referring to* 6 B. 193, 9 B.H.C.R. 304, & printed judgments of Bom. H.C. of 1872, Sp. Ap. 286 of 1872. **J**

(f) A creditor may, under his judgment, take in execution all that belongs to the debtor and nothing more. He stands in the place of his debtor. He only takes the property of his debtor subject to every liability under which the debtor himself held it. *Whitworth v. Gaugain*, 1 Phillips, 728, *cited in* 8 B.H.C.R. 169 (174). **K**

(g) A purchaser at an auction sale in execution of a simple money decree could acquire no better title than the judgment-debtor possessed. 13 A. 28 (51). **L**

5.--“Persons from whom the parties to the suit have derived their interest in the subject-matter of the suit”.—(Continued).

- (h) What passes to the purchaser at a Court-sale is the right, title, and interest of the judgment-debtor, subject, however, to this condition, viz., that the purchaser may recover back his purchase-money, when he finds that the judgment-debtor had no saleable interest at all. 17 M. 228 (230). **M**

(12) Equitable principle of estoppel applicable to auction-purchasers.

The equitable principle of estoppel enunciated in the case of *Ramcoomar Coondoo v. Marjzen* 18 W.R. 166 (P.C.), which applies to any person, is equally binding on the purchaser of his right, title and interest at a sale in execution of a decree. 22 C. 409 (1919) (P.C.): referred to in 24 C. 62 (77) (F.B.). **N**

(13) Equitable principle of estoppel above-mentioned.

It is a principle of natural equity, which must be universally applicable, that, where one man allows another to hold himself out as the owner of an estate, and a third person purchases it for value, from the apparent owner, in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing, either that he had direct notice, or something which amounts to constructive notice, of the real title, or that there existed circumstances which ought to have put him upon an inquiry, that, if prosecuted, would have led to a discovery of it. 18 W.R. 166 (168) (P.C.). **O**

(14) Auction-purchaser in no better position than judgment-debtor or private purchaser.

- (a) A purchaser at a Court-auction cannot take rights higher than those which the judgment-debtor possessed at the date of such sale. If, therefore, the estate had been bound up by a prior mortgage, the purchaser takes subject to such mortgage. 19 A. 28, referring to 11 W.R. 29 (P.C.). **P**
- (b) An order passed under S. 244, C.P.C., against a third party, who has acquired the interest of one of the parties to a suit, and who has been given an opportunity of intervening and being heard, will be binding on him, as well as on the parties to the suit. 1 A.L.J. 65, relying on and explaining 19 C. 683 (P.C.). **Q**
- (c) A mortgagee who would be estopped by the representations of his mortgagor was not placed in any better position by his having purchased the mortgage-property at a sale in execution of a decree, which he had obtained on his mortgage bond. 9 C. 265, cited in 20 C. 236 (240). **R**
- (d) No distinction in principle exists between the case of a purchaser of the judgment-debtor's interest at a private sale, and that of a purchaser of his interest at an execution sale, so long as they are both bound by the decree in regard to the interest acquired by purchase. 14 C. 62 (F.B.) referred to in 1 A.L.J. 77. **S**
- (e) There is no difference between the right of a purchaser at a private sale, the reason being that in neither case can the purchaser acquire a right higher than that of the judgment-debtor or the vendor as the

5. —“Persons from whom the parties to the suit have derived their interest in the subject-matter of the suit”.—(Continued).

case may be. This was the case of a judicial sale, at which the existence of an unregistered *san* mortgage binding on the judgment-debtor was not disclosed, and it was held that the purchaser took the property subject to such mortgage. 6 B. 193 (205) (F.B.), referring to 11 W.R. 29 (P.C.). **T**

(f) When the property has been sold under a regular execution and the purchaser is evicted afterwards under a title paramount to that of the judgment-debtor, he has no remedy either against the Sheriff or the judgment-debtor. 3 I. A. 116, cited in 17 M. 228. **U**

(g) In the case of a person purchasing an under-tenure sold at the suit of the landlord, the purchaser is entitled to acquire rights higher than an ordinary purchaser by private contract only to the precise extent to which such privileges are conferred by express terms of law. There is no warrant for holding that a purchaser of a *putni* taluk is entitled to set at naught all decisions arrived at against the defaulting *putnidars*. 14 W.R. 283. **V**

(h) A person who purchased at a sale by auction in execution of a decree, even though he may be the decree-holder, must be considered in the position of a purchaser for value. 20 W.R. 223. **W**

(i) Judgment-creditors can only, by their attachments, take the property of their debtor subject to all the equities which would affect it in his hands. 8 B.H.C.R. 169 (175) (O.C.J.). **X**

(j) A Court-sale cannot by itself be taken to create an estoppel either in favour of or against a Court-purchaser as against or in favour of the person whose right, title, and interest the Court purchaser buys from the Court, because, as was held by *Sargent, C.J.* in 9 B. 285, the Court-purchaser derives his title from proceedings which are entirely *in invitum* as regards the judgment-debtor. 6 Bom. L.R. 864 (867). **Y**

(k) If as to the judgment-debtor there be no estoppel, there can be none also in his favour as against the Court purchaser, for mutuality is one of the essentials of the principle of estoppel as applied to such cases. 6 Bom. L.R. 864 (865). **Z**

(l) Purchasers at an execution sale were in no better position than claimant under any other conveyance or assignment, and a cause of action which would be barred by limitation as against the judgment-debtor would also be barred as against such purchaser. 2 B.L.R. 75 = 11 W. R. 29 (P.C.) = 12 M. I. A. 366. **A**

(m) A purchaser at an auction-sale cannot, where lands are held under an hereditary *ghatwali* tenure, originally created before the decennial settlement and at a fixed rent, resume those lands on the suggestion that the *ghatwali* services are no longer required. 11 B.L.R. 71. **B**

15) Auction purchaser's title—with reference to limitation, nature of.

(a) The title of the judgment-creditor or a purchaser under a decree sale is not on the same footing with respect to the law of limitation of suits, as that of a mortgagor, or one claiming under an alienation from the mortgagor. 14 M.I.A. 101 = 8 B.L.R. 122 (P.C.). **C**

5.—“Persons from whom the parties to the suit have derived their interest in the subject-matter of the suit”.—(Concluded).

(b) No distinction exists as to limitation in favour of the purchaser at a judicial sale between his right and that of a private purchaser. 6 B. 193 (205). **D**

(c) The view of the Calcutta High Court, that, although the suit of a private purchaser might have been barred by lapse of time, the suit of a purchaser at a judicial sale, was not so barred was disapproved by the Privy Council in 12 M.I.A. 366 = 6 B. 193 (205). **E**

19. Statements made by persons, whose position or liability it is necessary to prove as against any party to the suit, are admissions, (1) if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person

Admissions by persons whose position must be proved as against party to suit.

making them occupies such position or is subject to such liability.

Illustration.

A undertakes to collect rents for B.

B sues A for not collecting rent due from C to B.

A denies that rent was due from C to B.

A statement by C that he owed B rent is an admission, and is a relevant fact as against A, if A denies that C did owe rent to B.

(Notes).

1.—General.

(1) Relevancy of admissions by strangers.

(a) Declarations proceeding from a stranger, though he is still living, are, in general, rejected. *Barough v. White*, 1 B. & C. 328; Tay. Ev. 4th Ed. p. 531. *Phip. Ev.* 4th Ed. p. 221. **F**

(b) Statements made by strangers to a proceeding are not admissible as against the parties, with certain exceptions. *Colle v. Braham*. 3 Ex. 183; Steph. Dig. 7th Ed. p. 28. **G**

(2) Exceptions mentioned above, when arise.

The exceptions mentioned arise when the issue is substantially upon the mutual rights which, at the particular time of the admission, were respectively possessed by a party to the record and the person who made such admission; in which cases, such evidence will in general be let in as would be legally admissible in an action between the parties themselves. Tay. Ev. 10th Ed p. 543. **H**

(3) Instances.

(a) In an action by the trustee of a bankrupt, the latter's admissions, made before bankruptcy, are admissible to prove the petitioning creditor's debt. *Coole v. Braham*, 18 L.J. Ex. 105, Tay. Ev. 10th Ed. p. 543. **I**

(b) An admission by a bankrupt of the petitioning creditor's debt is relevant as against the plaintiff, in actions by the trustees of bankrupts. *Jarrett v. Leonard*, 2 M. & S. 265; Steph. Dig. 7th Ed. p. 28. Art. 18. **J**

I. - General. - (Concluded).

- (c) The admissions made by a debtor are relevant against a person to whom he was given money in trust to be divided amongst certain creditors. *Robson v. Andrada*, 1 Stark. 372; Phip. Ev. 4th Ed. p. 217. **K**
- (d) The admissions of a *cestue que trust* are evidence against a trustee as far as their interests are identical. *Harrison v. Vallance*, 1 Bing. 45; Phip. Ev. 4th Ed. p. 217. **L**
- (e) In actions against sheriffs for not executing process against debtors, statements made by the debtor admitting his debt to be due to the execution-creditor are deemed to be relevant as against the sheriff. *Kemp-land v. Macauley*, Peake 95; *Williams v. Bridges*, 2 Star. 42; Steph. Dig. 7th Ed. Art. 18, p. 28. **M**
- (f) But admissions made after the act of bankruptcy are not relevant against the trustees on account of the intervening rights of creditors and of the danger of fraud. *Hoare v. Coryton*, 4 Taunt. 560; Tay. Ev. 10 Ed. p. 243. **N**
- (g) So long as the suit of the assignee of a chose in action was at Common Law required to be brought fictitiously in the name of the assignor, the latter's admissions were relevant as those of the party himself. *Baerman v. Radenius*, 7 T.R. 663 (668). Wigm. Ev. '05 Ed. S. 1075, p. 1274. **O**
- (h) To prove a plea in abatement for a non-joinder, the admission of liability by the person sought to be joined would be relevant. *Clay v. Langslow*, M. & M. 45; Wigm. Ev. '05 Ed. S. 1076, p. 1275. **P**
- (i) So far as procedure still permits any suit to be conducted without joining the real and beneficial party in interest, his admissions would nevertheless be received. *Hanson v. Parker* 1 Wils. 257; Wigm. Ev. '05 Ed. S. 1066, p. 1275. **Q**

2. - "Persons whose position or liability - Admissions".

Admissions of party whose position has to be proved against defendant are original evidence.

- * A plaintiff's vendor being a party whose position in relation to the property in dispute it is necessary to prove against the defendants, his admissions are in the nature of original evidence, not hearsay, and are legal evidence, though he is alive and has not been cited as a witness. 5 M. 239 (241). **R**

Admissions by persons expressly referred to by party to suit.

20. Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute (1) are admissions.

Illustration.

The question is, whether a horse sold by A to B is sound.

A says to B, 'go and ask C; C knows all about it.' C's statement is an admission.

(Notes).**1. "Statements in dispute."**

- (1) **Referee's admission approaches arbitration.**

- (a) Admission made by a party referred to comes very near to the case of arbitration. Steph. Dig. 7th Ed. Note to Art. 19. p. 178. **S**

1. "Statements dispute."--(Continued).

(4) Admission by reference comes close to the principle of awards by arbiters; for, though the validity of the award rests on a contractual basis, yet the process is one of reference to a third person for pronouncement. Wigm. Ev. 1905 Ed. S. 1070, p. 1253. **T**

(2) Referee's opinion relevant by itself irrespective of other considerations.

(a) When one party refers to another for information or an opinion on a given subject, the information or opinion so given is relevant, it being immaterial whether the matter in dispute is one of law or of fact, whether the referee has or has not any peculiar knowledge on the subject, or whether the reference is made expressly or by conduct evincing an intention to rely on the statement as correct. Philp. Ev. 4th Ed. p. 232. **U**

(b) In the application of this principle, it matters not whether the question referred by one of law or of fact, whether the person to whom reference is made have or have not any peculiar knowledge on the subject; or whether the statements of the referee be adduced in evidence in an action on contract, or in an action for tort. Field Ev. 6th Ed. p. 91, citing Tay. Ev. 10th Ed. p. 544. **Y**

(3) Principle.

(a) The general rule is that a party, who refers to another, is conclusively bound by that other's decision; for, after proposing to bound by what another may say, to recede from it after he has said it, is not only dishonest, but liable to be turned to improper purposes, viz., to entrap a witness or to find out how far the party's evidence would go in support of his case. *Stereus v. Thaker*, Peake. R. 187; Tay. Ev. 10th Ed. p. 544. **W**

(b) If a party, instead of expressing his belief in his own words, mentions another person as one whose expected utterances he approves beforehand, this amounts to an anticipatory adoption of that person's statement, and becomes, when made, the party's own. Wigm. Ev. 1905 Ed. S. 1070, p. 1252. **X**

(4) This species of admission is not frequently available.

—, though it is well recognised (*Lloyd v. Willan*, 1 Esp 178). Wigm. Ev. 1905 Ed. S. 1070, p. 1253. **Y**

5) Admission by reference and by adoption, distinction between.

'Admission by reference' differs from 'admission by adoption' in that, in the latter form, the third person's statement is *already* made. Wigm. Ev. '05 Ed. S. 1070, p. 1253. **Z**

6) Scope of section.

(a) The rule contained in S. 20 must not be understood as giving the force of an admission to statements made by a witness, as against the party who calls him. There must be an express reference for information in order to make the statement an admission. Cam. Ev. 10th Ed. p. 134. **A**

(b) A party is not bound by what his witness may say at Nisi Prius. *Gardner v. Moult*, 10 A. & E. 464; Tay. Ev. 10th Ed. p. 545. **B**

1. —“*Statements - dispute.*”.—(Continued).

(7) Instances where referee's admissions held relevant.

- (a) Where a person agreed to admit a liability, provided another will make an affidavit in support of it, the affidavit, so made, was held to be relevant against that person. *Lloyd v. Willan*, 1 Esp. 178; Phip. Ev. 4th Ed. p. 233. **C**
- (b) In an action for injury to a horse, where the defendant said that, if a miners' jury would say that the shaft, where the horse was killed, was his, he would pay the miners' verdict was admitted in evidence, the jury being regarded as his accredited agents. *Sydney v. White*, 1 M. & W. 135; Wigm. Ev. '05 Ed. S. 1070, p. 1253; Tay. Ev. 10 Ed. p. 511. **D**
- (c) Where the defendant wrote, "I refer you to him thereon", meaning one H, the letter of the defendant was held to admit in evidence H's statement respecting the account, though H's statement was made at another time, it being observed, that "anything that he says about the account is admissible." *Hood v. Reece*, 3 C. & P. 532; Wigm. Ev. '05 Ed. S. 1070, p. 1253. **E**
- (d) Where the defendant referred the plaintiff, in an action for warranty of a horse, for information as to his own responsibility to one N, the statements of N were held relevant. *Chadsey v. Greene*, 24 Conn. 562, 572; Amer. Wigm. Ev. '05 Ed. S. 1070, p. 1253. **F**
- (e) Where a defendant, on a demand made, said, "You must apply to J.A., and he will pay you", the admission of J.A., was admitted in evidence, on the principle that, where a person is referred to to settle and adjust any account or business which he says, if it is connected with the business which is referred to him, is evidence. *East v. Palmer*, 5 Esp. 145; Wigm. Ev. '05 Ed. S. 1070, p. 1252. **G**
- (f) Where, it being in question whether a person delivered goods to another, the latter said that if the carman would say that he delivered the goods, he (the latter) would pay for them, the carman's reply would be relevant against the latter. *Daniell v. Pitt*, 1 Camp. 366, n; Steph. Dig. 7th Ed. Art. 19, p. 29; Wigm. Ev. '05 Ed. S. 1060, p. 1252. **H**
- (g) In an action for trover, where the plaintiff said that, if the defendant would take his oath that the horse, the subject of the trover, was his, he should keep him, the fact of the defendant's affidavit being made was received in evidence. *Garnet v. Bull*, 3 Stark, 160; Wigm. Ev. '05 Ed. S. 1070, p. 1253. **I**
- (h) For a case where the witness wrote, at the defendant's dictation, a certain account, which he was allowed to read and hand in, as embodying the defendant's admission, see *State v. Kent*, 4 N.D. 577; Wigm. Ev. 1905 Ed. S. 1070, p. 1253. **J**
- (i) Where, in an action against executors, the defendants wrote to the plaintiff that if she wished for further information as to the assets, it could be obtained from a certain merchant, the replies given, by the merchant were held to be relevant against the executors. *Williams v. Innes*, 1 Camp. 364; Phip. Ev. 4th Ed. p. 234; Tay. Ev. 10th Ed. p. 543. **K**

I. — "Statements — dispute." — (Concluded).

- (j) Where a person, accused of having received stolen property, told a police man that his wife would make out a list of the property, a list, subsequently made out by her, was held to be relevant against him. *R.v. Mallory*, 15 Cox. 456 and 458; Phip. Ev. 4th Ed. pp. 233 and 239; Tay. Ev. 10th. Ed. p. 514. **L**
- (k) Where two persons consented to abide by the decision of a barrister on a disputed question of title, *held* that the opinion given was relevant against both, though it might be invalid as an award. *Downs v. Cooper*, 2 Q.B. 256; Phip. Ev. 4th Ed. p. 233. Tay. Ev. 10th Ed. p. 515. **M**
- (l) Where a cause was referred to an arbitrator and the reference proved ineffectual, admissions made before the arbitrator are relevant in a subsequent trial of the cause. *Gregory v. Howard*, 3 Esp. 113; Tay. Ev. 10th. Ed. p. 562. **N**
- (m) Where a party, on motion before a Judge, uses the affidavit of another person to prove a certain fact stated therein, such affidavit, is, on any subsequent trial evidence of this fact, and that, too, though the person who made the affidavit may be present in Court. *Brickell v. Hulse*, 7 A. and E. 456; Tay. Ev. 10th Ed. p. 515. **O**

(8) Instances of referee's admissions held not relevant.

- (a) The very nature of the employment and the purpose for which the medical referee is employed in an insurance company was held to preclude the notion that the record of the observations made and of the opinions formed by him ought to be treated as admissions made by the insurance company. 25 M. 183 (209), *per Bhashyam Iyengar, J.* **P**
- (b) In a suit to recover money on a policy of insurance, it was held that a statement made, by the medical referee in his report to the company as to the physique of the assured should not be treated as statements made by the company's agent, admissible under Ss. 18 and 21 of the Evidence Act, and that it would make no difference whether the medical referee was specially employed in individual cases or was the standing medical referee of the company. 25 M. 183 — 11 M.L.J. 379, *per Bhashyam Iyengar, J.* **Q**

21. Admissions are relevant and may be proved as against the

Proof of admissions against persons making them, and by or on their behalf.

person who makes them, or his representative in interest (1); but they cannot be proved by or on behalf of the person who makes them, or by his representative in interest, (2) except in the following cases :—

(1) An admission may be proved by or on behalf of the person making it when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section 32 (3).

(2) An admission may be proved by or on behalf of the person making it when it consists of a statement of the existence of any,

state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable. (4)

(3) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission. (5)

Illustrations.

(a) The question between A and B is, whether a certain deed is or is not forged. A affirms that it is genuine. B, that it is forged.

A may prove a statement by B that the deed is genuine, and B may prove a statement by A that the deed is forged; but A cannot prove a statement by himself that the deed is genuine, nor can B prove a statement by himself that the deed is forged.

(b) A, the captain of a ship, is tried for casting her away.

Evidence is given to show that the ship was taken out of her proper course.

A produces a book kept by him in the ordinary course of his business, showing observations alleged to have been taken by him from day to day, and indicating that the ship was not taken out of her proper course. A may prove these statements, because they would be admissible between third parties, if he were dead, under section 32, clause (2).

(c) A is accused of a crime committed by him at Calcutta. He produces a letter written by himself and dated at Lahore on that day, and bearing the Lahore post-mark of that day.

The statement in the date of the letter is admissible because, if A were dead, it would be admissible under section 32, clause (2).

(d) A is accused of receiving stolen goods knowing them to be stolen.

He offers to prove that he refused to sell them below their value.

A may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue.

(e) A is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit.

He offers to prove that he asked a skilful person to examine the coin, as he doubted whether it was counterfeit or not, and that that person did examine it, and told him it was genuine.

A may prove these facts for the reasons stated in the last preceding illustration.

(Notes).

I.—“Admissions are relevant and may be proved as against the person who makes them or his representative in interest”.

1. GENERAL—PARTY MAKING ADMISSIONS.

(1) **Meaning and scope of the section**

(a) The meaning of S. 21 is very plainly illustrated by illustration (a) to the section. 19 A. 76 (92) (P.C). **R**

(b) S. 21 of the Evidence Act lays down the general rule that admissions are relevant and may be proved as against the person who makes them. 2 C.W.N. 702 (714), per *Danerjee, J.* **S**

(c) S. 21 of the Evidence Act provides that admissions are relevant and may be proved against the person who makes them. 8 O.C. 395 (408). **T**

1.—“Admissions are relevant and may be proved as against the person who makes them or his representative in interest”.—(Continued).

1.—GENERAL—PARTY MAKING ADMISSIONS.—(Continued).

(d) S. 21 rules that admissions are relevant and may be proved against the person who makes them. U.B.R. (1897-01), p. 377. **U**

(e) Whenever a representation of some *fact* as distinguished from a bare representation of *intention* has been made by a person for influencing another's conduct, and the latter acts upon it, he will, in such cases generally, be entitled to the assistance of the Court for realising such representation. *Jorden v. Money*, 23 L.J. Ch. 865—5 H.L.C. 245 and *Hammersley v. Baronde Biel*, 12 Cl. and Fin. 45; Tay. Ev. 10th Ed. p. 587. **Y**

(f) The rule contained in S. 21 of the Evidence Act must be taken subject to the special provisions relating to confessions, and statements of accused persons, enacted in Ss. 24, 25 and 26 of the Act, and Ss. 164 and 364, Crim. Pro. Code of 1882, 2 C.W.N. 702 (714), per *Banerji, J.* **W**

(g) Were it otherwise, confessions and statements of accused persons, not recorded in accordance with the requirements of Ss. 164 and 364, Crim. Pro. Code, might nevertheless be proved as admissions by the accused, and the wholesome provisions elaborately laid down in those transactions practically reduced to a nullity. 2 C.W.N. 702 (714), per *Banerjee, J.* **X**

(h) If a man makes statements, he is responsible for them, even though they should not in fact be true. 11 B.H.C.R. 212 (246). **Y**

(2) Relevancy of wife's admissions.

If a wife sue, or be sued, as a single woman, no valid reason can be given why her admissions should not have the same legal effect against her as those of any other person. Tay. Ev. 10th Ed. p. 546. **Z**

(3) Contracts made by person under intoxication, total and partial.

Though contracts made by a party in a state of total intoxication, will be void, they will be enforced where the intoxication is only partial, and insufficient to prevent him from being aware of what he is doing. *Gore v. Guyson*, 13 M. and W. 623, Best. Ev. 9th Ed. p. 442. **A**

(4) Admission not conclusive.

(a) A mere admission is not conclusive; it is only in certain cases that it is—, for instance, where it has been acted upon by the party to whom it was made. 18 W.R. 317 (348), see also, S. 31, *infra*. **B**

(b) A person is not concluded by his own representations unless they have been acted upon by the opposite party; if treated merely as admissions not acted upon, it may be shown by the party who made them, that they were untrue. 20 W.R. 223 (224). **C**

(c) A statement for the purpose of a judicial proceeding can only be conclusive in another proceeding as to such material facts embodied therein as have been found affirmatively to warrant the judgment of the Court upon the issues joined; such statements are only representations and can only be conclusive if the other party has acted upon them and altered his position. 4 O.C. 408 (417). **D**

1.---“Admissions are relevant and may be proved as against the person who makes them or his representative in interest”.---(Continued).

1.---GENERAL---PARTY MAKING ADMISSIONS.---(Continued).

- (d) They are conclusive, not merely because they are the statements of the parties, but because for the purpose of present and prospective litigation, they must be taken to be the truth. 4 O.C. 408 (417). **E**
- (e) Admissions, which do not come within this description, are receivable in evidence against the parties making them and those claiming under them, but do not amount to an estoppel. 4 O.C. 408 (417). **F**

(5) Party may show admissions were mistaken or untrue.

- (a) The express admissions of a party to a suit or admissions implied from his conduct, are evidence and strong evidence against him; but he could show that those admissions were mistaken or not true. 4 A.L.J. 102 (P.C.) = 11 C.W.N. 321 = 5 C.L.J. 145 = 17 M.L.C. 103 = 2 M.L.T. 109 = 9 Bom. L.R. 267 = 29 A. 181, see, also, Wigm. Ev. 1205 Ed. S. 1058, p. 1227. **G**

- (b) The express admissions of a party to the suit, or admission implied from his conduct, are evidence, and strong evidence, against him. He is at liberty to prove that such admissions were mistaken or were untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition; in such a case, the party is estopped from disputing their truth with respect to that person (and those claiming under him), and that transaction; but as to third persons he is not bound. It is a well established rule of law, that estoppels bind only parties and privies, not strangers. Tay. Ev. 10th Ed. p. 377. **H**

- (c) The person against whom an admission is proved is at liberty to show that it was mistaken or untrue. U.B.R. (1897-01), p. 377. **I**

- (d) A party against whom the admission of a deed of gift or conveyance is sought to be used may explain the matter, and show the real nature of the transaction to get rid of the effect of the apparent admission. 18 W.R. 385 (191). **J**

- (e) The Lower Appellate Court in not allowing a defendant in the suit in question, to deny the truth of the admissions made by her in a former case, or to adduce evidence of her own falsehood and deceit, was deemed to have acted in direct opposition to the judgment of the Privy Council in 13 M.L.A. 551 = 15 W.R. (P.C.) 14. 21 W.R. 422 (423). **K**

(6) Very clear evidence necessary to escape from effect of admission.

A party, seeking to get out of the effect of an admission, of the receipt of purchase money, made before a Registrar, should make out his case by *very clear* evidence. 15 W.R. 280 (281). **L**

7) Question whether admission really made different from its relevancy and effect.

- (a) The question of the relevancy and effect of an admission is quite apart from the question whether it was really made. U.B.R. (1897-01), p. 377. **M**
- (b) The mere fact that certain admissions, alleged to have been made by a person, were contained in statements filed in a Court of Justice in the name of that person, does not necessarily prove that they were actually made by that person. 8 W.R. 468 (469). **N**

1.—“Admissions are relevant and may be proved as against the person who makes them or his representative in interest”.—(Continued).

1.—GENERAL—PARTY MAKING ADMISSIONS.—(Continued).

(8) Admissions always to be proved.

The mere fact of one party alleging that a new contract has been substituted for the old one does not of itself put an end to the old contract, even as against the party who so alleges, unless the allegation is proved to be true. 8 C. 926 (929). O

(9) How much of admission relied on can be adduced in evidence.

(a) Where a part of a conversation is relied on as an admission, the opposite party can adduce evidence only of so much of the same conversation as may explain or qualify the matter already before the Court. Tay. Ev. 10th Ed. p. 528, referring to the latter rule followed in “The Queen’s Case,” 2 B. & B. 287. (where all that was said in the same conversation, even matter not properly connected with the statement deposed to, was admitted). P

(b) A witness, who has stated on cross examination that he heard the plaintiff admit on oath that he had repeatedly been insolvent, cannot be asked in re-examination whether the plaintiff had not, on the same occasion, expressly stated that certain money was given to him and not lent. *Prince v. Samo*, 7 L.J.Q.B. 123, Tay. Ev. 10th Ed. p. 521; Phip. Ev. 4th Ed. p. 216, in this connection see *Harrison v. Turner*, 10 Q.B. 482, cited under 8 (1) (c), *infra*. Q

(c) It is a proposition that cannot be maintained that when a defendant admits any one fact contained in the written statement of the plaintiff, and thereby excludes independent evidence thereof, he is entitled to say that the plaintiff has relied on his statement as evidence, and that the defendant is in consequence in a position to claim that the whole of it may be read as evidence in his own favour. 16 W.R. 257 (258). R

(10) Construction of admission.

(a) Misrepresentations as to his separate ownership, made by a member of a joint family in a security bond given by him to the Collector, were held, in determining whether in point of fact the suit property was joint or separate, to be mere admissions inconsistent with the title asserted in a subsequent suit by his successors in interest, the plaintiffs, not material to impair the strength of the case made by them, the defendant not having purchased on the faith of such misrepresentations. 19 W.R. 356 (360) (P.C.). S

(b) In a suit for enhancement, it was held that the plaintiff’s admission that the defendant had held a tenure for 30 or 32 years at the same rent was not an admission that the land had been held at that rate from the Permanent Settlement, and that he should be allowed to rebut any presumption arising from the admission. 10 W.R. 427. T

(c) An admission of a fact on the pleadings by implication is not an admission for any other purpose than that of the particular issue, and is not tantamount to a proof of the fact. 23 W.R. 214 (217) (P.C.): referring to *Edmunds v. Groves*, 2 M. & W. 642, *Smith v. Martin*, 9 M. & W. 304, & *Robins v. Maidstone*, 4 Q. B. 815. U

(d) Refusal by a counsel or pleader to urge a question of law is a mere admission of law which is not binding upon the party, and the party may,

J.—“Admissions are relevant and may be proved as against the person who makes them or his representative in interest”.—(Continued).

1.—GENERAL—PARTY MAKING ADMISSIONS.—(Continued).

raise the question in appeal although not raised in the Lower Courts especially where a question of limitation obviously arises upon the admitted facts of the case. 7 C.L.J. 152. **Y**

- (e) An admission on a point of law is not an admission of a “thing,” so as to make the admission a matter of estoppel, within the meaning of S. 115 of the Evidence Act. 21 A. 285 (287), see, also, under S. 115, *infra*, followed in 3 N.L.R. 72 (79). **W**

(11) Effect of admission.

- (a) Where an admission is duly proved and the person against whom it is proved does not satisfy the Court that it was mistaken or untrue, there is nothing in the Evidence Act, and there is no general principle or rule of law, to prevent the Court from deciding the case in accordance with it. C.B.R. (1897-91), p. 377. **X**

- (b) An admission once made is binding against the party making it for all the purposes of the suit, unless it is shown to have been recorded erroneously. 2 W.R. (Act X) 1. **Y**

- (c) Where a defendant voluntarily appears in Court and admits the claim, the Court has *no other course* than at once to give judgment for the plaintiff, provided, of course, that it was satisfied of the identity of the defendant, or that the advocate who appeared for him was duly instructed. 12 W.R. 432 (134), per *Markby, J.* **Z**

- (d) Where parties have come to a mutual agreement or where the defendant has confessed judgment, every Judge has a *discretion* to decide the suit at once in accordance with such agreement or confession. 12 W.R. 432 (135), per *Jackson, J.* **A**

- (e) Where on the presentation of a plaint, the defendant then and there appeared and confessed judgment, the Judge was *not obliged* at that time to hear the defendant, but was at liberty to follow the ordinary procedure of the Court. 12 W.R. 432 (135) per *Jackson, J.* **B**

- (f) Where there was a clear admission by a defendant that there were open and current accounts between the deceased father of the plaintiffs and himself at the death of the former, the legal consequence would be that, at that date, either of them had a right as against the other on account, and that whoever on the account should be shown to be the debtor of the other, was bound to pay his debt to the other. 4 C. L.J. 91 (P.C.) = 8 Bom. L.R. 501 = 10 C.W.N. 874 = 1 M.L.T. 199 = 3 A.L.J. 525 = 16 M.L.J. 360 = 33 C. 1047 = 2 N.L.R. 130. **C**

- (g) Where a plaintiff admitted that his tenancy was created on the 20th Poos 1241, his admission was held to deprive him of the benefit of the presumption that he held at fixed rates from the time of the permanent settlement. 1 W.R. 428. **D**

- (h) A defendant implicitly admitting a liability, if a fact is proved, must be held liable if that fact is proved. 3 W.R. 28 (29). **E**

- (i) Parties who admit in Court that they have sold their rights in a decree to another cannot be allowed to resume those rights, only because that other fails to establish her claim to one or more of those rights, against a third party. 7 W.R. 360. **F**

1. — "Admissions are relevant and may be proved as against the person who makes them or his representative in interest".—(Continued).

1.—GENERAL—PARTY MAKING ADMISSIONS.—(Contd.).

(j) An admission regarding one act will not render admissible questions as to others. *Bell v. Bell*, 86 L.T. Jo. 148; Phip. Ev. 4th Ed. p. 192. **G**

(k) The admission of the execution of a document and of its terms cannot give it a validity it does not by law possess. 3 N.L.R. 72 (79), referring to (1871) M.H.C.R. 13. **H**

(l) The plaintiff is not bound by an admission of a point of law, nor precluded from asserting the contrary, in order to obtain the relief to which, upon a true construction of the law, he may appear to be entitled. 18 W.R. 359 (367) (P.C.)—L.R. Sup. 1A. 47; cited in 21 A. 235 (287). **I**

(m) An admission made by a person who is a *locum tenens*, as to the proprietary right of a certain absentee will not cure for the benefit of that absentee's son. 75 P.R. 1875 (Civil). **J**

(n) The effect of admission made by the *locum tenens* is merely to prevent limitation from running against the absentee proprietor, and the absentee's death immediately changes the possession of the *locum tenens* into an adverse one, except where the admission expressly relates to the absentee's descendants. 75 P.R. 1875 (Civil). **K**

(o) A party is not bound by an erroneous admission in a petition. 6 W.R. 268, referred to in 15 W.R. 437. **L**

(p) A bare admission of the execution of a sale-deed by the defendant in her written statement was held not to have dispensed with the necessity of proving it, where the defence denied the validity of the deed and charged the whole transaction with fraud. 11 B. 516 (519), referring to 1 B. 67 (69). **M**

(q) Admissions made in the course of a judicial proceeding may or may not amount to an estoppel. 1 O.C. 108 (117). **N**

(11) Effect of erroneous admission on occupancy rights.

Occupancy rights are not affected by admissions made under an erroneous impression. 3 P.R. 1872 (Rev.). **O**

(12) Effect of omission.

(a) An erroneous omission to object to the reception of evidence of an admission by a party, irrelevant within the meaning of S. 21 of the Evidence Act, does not make it relevant as a ground of judgment, and must be entirely disregarded. 19 A. 76 (92) (P.C.). **P**

(b) Where a suit was brought for the division of the whole of certain family properties, the mere omission, whether accidental or fraudulent, to specifically include in the plaint certain of the joint properties, where such properties are ascertained and a decree can be given for partition, will not convert the suit into one for partial partition. 23 C. 538 (550). **Q**

(13) Effect of admission found to be false.

Where a statement, made by a defendant as to the quantity of land he was in possession of, was found to be false, held that the statement was not an admission, which could be taken advantage of by the plaintiff, but

1.—“Admissions are relevant and may be proved as against the person who makes them or his representative in interest”.—(Continued).

1.—GENERAL—PARTY MAKING ADMISSIONS.—(Continued)

must be treated only as a piece of evidence in the cause, unless he could show that his own *status* was affected thereby or that he was misled by it. 12 W.R. 226 (228). **R**

(14) Effect of plaintiff electing to rely solely on defendant's admission.

(a) If the plaintiff were to abandon his own case and deliberately elect to stand by the admissions of the defendant, he would be bound to take them as they stand, taking them as a whole. 15 W.R. 451 (453). **S**

(b) Where a banker sued to recover a certain sum from a defendant upon an account, he should, if he does not produce the accounts and proved the debt, but chooses to rely on admissions made by the defendant, give the most clear and cogent proof of such admissions, and bring into Court a case that is not open to reasonable doubt. 13 C.L.R. 266 (271) (P.C.) : 10 L.A. 71. **T**

(15) Effect of purchaser authorising auctioneer's clerk to enter his name as purchaser.

Where goods were sold by auction, and the purchaser authorised the auctioneer's clerk to put down his name as having purchased certain lots, and the clerk accordingly did so, the entry of the purchaser's name, so made by the clerk, was held, under S. 17 of the Statute of Frauds, to be a sufficient signature under the statute to bind the purchasers. *Bird v. Boulter*, 4 B. & Ad. 413 and *Durrell v. Evans*, 1 H and C. 174, referred to in 6 C. (340-353). **U**

(16) Admissions on appeal.

(a) In a suit for rent brought against joint tenants of a holding, where one of them admitted, on appeal, the correctness of the plaintiff's claim it was held that, the suit having been brought against them as joint tenants, a separate decree for half of the amount admitted could not be passed against the defendant who had made the admission. 9 C.L.R. 359 (360). **Y**

(b) A point not taken by a party before either of the Lower Courts was held not to be open to him at the time of the hearing of the appeal before their Lordships. 10 Bom. L.R. 126 (P.C.) : 12 C.W.N. 345 : 3 M.L.T. 182 : 7 C.L.J. 215. **W**

(17) Genuineness of acknowledgment denied—Duty of Court.

Where a plaintiff denied the genuineness of a letter acknowledging payment, the Lower Court was held to be bound to pronounce a distinct opinion on the evidence of the defendant. 11 W.R. 106. **X**

(18) Admissions under duress irrelevant.

In any civil action, admissions made under duress are not relevant. *Stockwell v. De Tastet*, 4 Camp. 10 ; Steph. Dig. 7th Ed. Art. 20, p. 29; Phip. Ev. 4th Ed. p. 212 ; Tay. Ev. 10th Ed. p. 562. **Y**

(19) S. 58—Facts admitted need not be proved.

Under S. 58 of the Evidence Act, no fact need be proved which the parties agree to admit at the hearing, or which, by any rule of pleadings they are deemed to have admitted by their pleadings. U.B.R. (1897-01), p. 379 (380) ; see, also, under S. 58 *infra*. **Z**

1.—“Admissions are relevant and may be proved as against the person who makes them or his representative in interest”.—(Continued).

1.—GENERAL—PARTY MAKING ADMISSIONS.—(Contd).

(20) Right of parties to agree to evidence being taken and used in particular way.

Parties, if so minded, may ordinarily agree that evidence shall be taken in a particular way, and it is common experience that parties do agree that evidence in one suit shall be treated as evidence in another. That is not a matter which can be said to affect the jurisdiction of the Court. It is merely that parties allow certain materials to be used as evidence which, apart from their consent, cannot be so used.
7 Bom. L.R. 642. **A**

(21) Latitude to be shown to parties making admissions, etc.

(a) A certain amount of margin must be allowed to a party in Court as regards his statements, admissions or waivers. A party should not be nailed down to a hasty unconsidered admission, if promptly withdrawn. 1 P.R. 1908 (Cr). **B**

(b) If a party abandoned any privilege, either in a civil or criminal case, and promptly stated that his waiver had been hasty and ill-considered, and he wished to withdraw it, and if no action had been taken on his abandonment, a Court should not refuse to allow him to withdraw from his abandonment. 1 P.R. 1908 (Cr). **C**

(22) Burden of proof regarding admissions and waivers.

(a) Where the authenticity of certain admissions was impugned by the person alleged to have made them, it was held that it was for those, who relied on them, to make out that they had really emanated from that person, or from some body duly authorised by that person to make them. 8 W.R. 468. **D**

(b) An admission made by the defendant that a piece of a mortgaged land, which the plaintiffs sought, as mortgagors, to redeem, once belonged to the plaintiffs' predecessor, was held not to shift the burden of proof, that the land was not mortgaged, to the defendant, and that it lay on them to prove the mortgage; such admission might perhaps be taken into consideration in estimating the evidence. U.B.R. (1892-96), 222. **E**

(c) An admission by one defendant against another, which admission, the Court finds to be collusive, cannot relieve the plaintiff from the burden of starting his case against the repudiating defendant, nor can it shift the burden of proof to the shoulders of the latter from off the plaintiff. 6 W.R. 299 (300). **F**

(d) Where, in a suit for confirmation of possession and declaration of title, the substance of the defence was that, granting that the *libba* and the deed of sale relied on by the plaintiff were written between him and the party from whom he alleged to have purchased, this could avail the plaintiff nothing as the deeds were fraudulent, held that there was no such admission on the defendant's part as shifted the burden of proof on to themselves. 11 W.R. 328. **G**

(e) Where the Court did not find it denied that a person was one of the *munims* of the defendant firm at the date of a pro-note sued upon by the plaintiff and found it admitted that it was in the handwriting of the *munims*

1. "Admissions are relevant and may be proved as against the person who makes them or his representative in interest."—(Continued).

1.—GENERAL.—PARTY MAKING ADMISSIONS.—(Concld).

it held that the onus lay on the defendants to get rid of the effect of such admission. 1 B.H.C.R. 85 (86). **M**

(f) In a suit for contribution brought by one brother against the widow of his deceased brother on the allegation that, when the parties were joint in food and estate, a lease was taken by the father of the parties, an admission by the widow's husband, that the lease was the joint property of himself and the plaintiff, though not an estoppel, was held to be a weighty piece of evidence to be rebutted by the widow. 6 W.R. 35. **I**

(g) Where, in a suit on a bond, which recites that consideration, passed, the defendant admits the execution of the bond, but denies the receipt of the consideration, or avers receipt of part only, the onus is on the defendant to show that the recitals in the deed are incorrect. 13 W.R. (F.B.) 25 (27). **J**

(h) An admission on the part of a plaintiff, in a suit on a bond against a defendant, pleading non receipt of consideration, that the actual consideration, was different from that described in the bond, was held not to exonerate the defendant from the burden of proving his case. 15 C. P.L.R. 24. **K**

(i) Where a defendant admits a cause of action and pleads discharge by payment, he must prove that the claim, which is admitted, has been discharged by payment. 17 W.R. 509 (510). **L**

(j) Where certain defendants made a written admission that the plaintiffs were proprietors and that they were tenants liable to pay *malikana* and to be evicted at pleasure, the burden of proving that the relationship of landlord and tenant had ceased to exist between them, at such a time as to bar a subsequent suit for proprietary possession, was held to be on the defendants. 110 P.R. 1881 (Civil). **M**

(k) In cases of waiver, the burden of proof that the person waiving had knowledge of his rights and of the facts enabling him to take effectual action for the enforcement of such rights is on the person who relies on the waiver, and such knowledge must be made to appear. 11 C.W.R. 848=6 C.L.J. 62. **N**

2.—REPRESENTATIVE IN INTEREST.

(1) Execution purchaser is representative in interest of judgment-debtor.

The purchaser at a sale in execution of a decree was held to be the "representative in interest" of a judgment-debtor within the meaning of S. 21 of the Evidence Act, so as to make his admission relevant. 21 W.R. 148 (149); referred to in 13 A. 28 (51); see, also, 22 C. 909 (P.C.), and 24 C. 62. **O**

(2) Admission against interest. effect of.

An admission against the interest of the person making it is relevant evidence, not only against privies by title, but also against strangers. 10 C. 688. **P**

1.—“Admissions are relevant and may be proved as against the person who makes them or his representative in interest”.—(Continued).

2.—REPRESENTATIVE IN INTEREST.—(Concluded).

(2) Admission by defendant's ancestor, effect of.

An admission made by defendant's ancestor may be used against them, but that is only evidence upon which the Court, trying the suit, is to act or not, according as it considers it ought to have given effect to it. 18 W.R. 347 (348). Q

(4) Person affected by admissions.

A man may bind himself by an admission, but not those who do not claim under him and who, before his admission, have acquired a right. *Mowatt v. Castle Steel & Iron Works Co.*, 14 Ch. D. 58 (63); A & W Ev. 4th Ed. p. 128. R

3.—ADMISSIONS—STATEMENTS, DEPOSITIONS, REPRESENTATIONS, ETC.

(1) Instances of admissions held relevant against party making them.

(a) An admission made by an intervenor in a former suit is evidence against him *quantum valcat* in a subsequent suit. 14 W.R. 165 (166). S

(b) Admissions made by a bankrupt, after the act of bankruptcy, although they cannot furnish evidence against the trustee because of the intervening rights of creditors and the danger of fraud, are still evidence against the bankrupt himself. *Jarret v. Leonard*, 2 M. & Selw. 265; Tay. Ev. 10th Ed. p. 543. T

(c) Where in the case of an insufficiently stamped *hatchitta* amounting to a promissory note, the defendant admitted the loan but pleaded payment, held that the plaintiff had a cause of action, whereupon he might maintain a suit independently of the *hatchitta*. 23 C. 851 (854). U

(d) Where the defendants admitted the execution of a pro-note on the same date and in terms identical with the pro-note set up by the plaintiff and failed to prove the payment, the onus of which lay on them, the plaintiff was held entitled to a decree. 9 O.C. 315 (321). V

(e) An admission of the receipt of purchase-money, made before the Registrar, ought not to be treated as conclusive, though it is evidence of the strongest and most reliable description. 15 W.R. 280 (281). W

(f) The admission by a surviving daughter of a member of a joint Hindu family that the children of her deceased sister have a title to her father's share is evidence of the existence of the title before the suit. 14 W.R. 484 (485). X

(g) If the plaintiffs sued, not as mortgagors seeking to redeem, but as owners seeking to recover possession, an admission made by the defendant that the plaintiffs' predecessor was, at one time, the owner of a piece of the land in question might avail them. U.B.R. (1892-96), 232. Y

(h) Where a plaintiff admitted, in his written statement in a former suit and in his oral examination in the suit in question, an agreement set up by the defendant by which the plaintiff undertook for consideration not to redeem a mortgaged land till after the death of the defendant, but declined to be bound by it, held that the defendant was not, in the,

1. —“Admissions are relevant and may be proved as against the person who makes them or his representative in interest”.—(Continued).

3 -- ADMISSIONS—STATEMENTS, DEPOSITIONS, REPRESENTATIONS, ETC.—(Continued).

(1) Instances of admissions held relevant against party making them.—(Continued).

face of the plaintiff's admissions, bound to adduce evidence of the agreement. U.B.R. (1897-1901), p. 379. **Z**

(i) Where a plaintiff sued to recover a certain sum of money, alleged to have been lent to the defendant, and there was no witness of the loan and no acknowledgment of it, the only evidence of the obligation being that of three witnesses, a man, his wife and her sister, who said that the plaintiff demanded re-payment and that the defendant admitted that the money was due, but on subsequent occasions before the same people he denied the liability, *held* that, if the Judge's belief that the admission was made was justified, there was no legal objection to the decision on the admission. U.B.R. (1897-01), p. 377 (378). **A**

(j) A mortgagee sued for the recovery for the produce of certain land, alleged to have been mortgaged to him by the defendants, who, admitting the execution of the mortgage-deed, pleaded non-receipt of consideration. *Held*, that the mortgagors' admission, before the Registrar, of the receipt of consideration could not operate as estoppel, though the admission was entitled to much weight as evidence. 153 P.R. 1882 (Civil). **B**

(l) Where, on a suit for rent being dismissed by a Deputy Collector for want of jurisdiction on the defendant's admission that the plaintiff was an *Etmamdar* and not an *Ijaradar* the plaintiff sued in a Civil Court, *held* that any allegation made by the defendant in the first suit which should be put in evidence by the plaintiff, was sufficient proof of the thing alleged. 17 W.R. 372. **C**

(t) Where a copy of a schedule map had been relied on and admitted on previous occasions by both the parties to a suit, the plaintiff cannot sue for a fresh measurement and demarcation and the Judge is wrong in not considering the copy binding on the plaintiffs, 18 W.R. 346 (347). **D**

(m) In a suit for arrears of rent against two persons—a widow and a brother of the widow's deceased husband—the admission, on oath, of a witness who was conducting the case on the widow's behalf and who was also the youngest brother of her deceased husband, as to the suit property being in the possession of the joint family, consisting of the witness and the two defendants above stated, as *Ijaradars*, was held to be evidence of the most important character, whose value was not affected by any trivial circumstance, e.g., the witness not knowing in whose name this *kaboolat* for the suit-property was executed. 18 W.R. 245 (246). **E**

(n) Whilst the plaintiffs have a right to a decree for such sums as the defendants admit, the defendants have also a right to the Judge's opinion upon the opinion which they have adduced in support of their plea of payment. 18 W.R. 331 (332). **F**

(o) Where the assignee of a bond sued the obligor in the obligee's name, an admission made on the obligee's part, that the money had been paid

1.—“Admissions are relevant and may be proved as against the person who makes them or his representative in interest.”—(Continued).

3.—ADMISSIONS—STATEMENTS, DEPOSITIONS, REPRESENTATIONS, ETC.—(Continued).

(1) Instances of admissions held relevant against party making them.— (Continued).

was held to be relevant on behalf of the defendant. *Hanson v. Parker*, 1 Wils. 257; Steph. Dig. 7th Ed. p. 25; Tay. Ev. 10th Ed. p. 541. **G**

(p) In a suit by a consignor against a ship owner for negligence in the carriage of goods, the admissions of the consignor, are relevant to affect a consignee substantially interested in the result. *Baerman v. Radenius*, 7 T.L.R. 663, Phil. Ev. 4th Ed. p. 228. **H**

(q) Where certain judgment-debtors admitted to *wasilat* at a certain rate, held that the admission concluded them in law, entitling the decree-holders to *wasilat* at that rate. 9 W.R. 241 (242). **I**

(r) An admission by the defendant that his trade was a nuisance was held to be relevant. *R. v. Neville*, 1 Feske 91; disapproved in *R. v. Fairie*, 3 E. and B. 486 (190), Phil. Ev. 4th Ed. pp. 212 and 213. **J**

(s) An admission made by a party to a suit in another case, involving other parties than those in the present case may be taken as evidence against him, but cannot have the effect of estopping him in a case where his opponents are persons to whom or to any one else concerned, the admission was not made and who are not proved to have ever heard of it, or to have been in any way misled by it, or to have acted in reliance upon it. 5 W.R. 209 (210). **K**

(t) For a case where the evidence afforded by the statement of a fact in a deed was held to be rebutted, *inter alia* by the admission of parties, see 3 M.L.A. 347, 355 6 W.R. (P.C.), 55. **L**

(u) Where a plaintiff, suing to recover possession of certain land, alleges possession on the occasion of a survey award between himself and the defendant's predecessors, and where the defendant has admitted, in a rent suit, the plaintiff's title and possession, and has intervened in a suit for a *kabuliyat* against the riots, held, that the survey award is evidence *quantum valcat* of the fact of possession, that the defendant's alleged admission is an important part of the plaintiff's case and that the plaintiff's cause of action is the defendant's intervention in the suit. 21 W.R. 27 (28). **M**

(v) In a case where the plaintiffs sought to establish their pedigree by proving, *inter alia*, that A & B were brothers, held that a statement to that effect, made by one of the plaintiffs, in a deposition given long before the controversy in suit arose, was admissible in evidence. 12 C. W.N. 266. **N**

(w) Where, in suits by the plaintiff against a number of tenants to recover the arrears of rent due to him, he produced *inter alia*, the depositions of some of the defendants in the different suits, held, that the depositions were admissible, being used against the defendants as admissions. 22 W.R. 304, Note. **O**

(x) Where a defendant, in his deposition in a former suit, did expressly admit the relation of landlord and tenant between himself and the plaintiff, held that, in a subsequent suit for a *kabuliyat* by the plaintiff, it was sufficient for the plaintiff to put in the defendant's deposition in

1.—“Admissions are relevant and may be proved as against the person who makes them or his representative in interest”.—(Continued).

3.—ADMISSIONS—STATEMENTS, DEPOSITIONS, REPRESENTATIONS, ETC.—(Continued).

(1) Instances of admissions held relevant against party making them.—(Concluded).*

the former case, as proof of the relation of landlord and tenant. 9 W.R. 162. P

(77) Where, in a suit by the plaintiffs to recover from the defendants sums which, according to an arrangement, the defendants ought to have paid to the zemindar, whose *ijaradars* the plaintiffs were, the deposition made, by one of the defendants as a witness for the zemindar, in a former suit by the zemindar against the plaintiffs, as to the existence of the arrangement, was held to be admissible in evidence. 11 C. 388 (390). Q

(78) Where a person repels statements made in his presence, those statements will be evidence against him of the facts stated to the extent to which his reply, directly or indirectly, admits their truth. *Child v. Grace*, 2 C. & P. 193, Phip. Ev. 4th Ed. p. 235. R

(79) In an action in which an alleged bankrupt sought to dispute his bankruptcy, the defendants contended that the plaintiff was estopped from bringing this action, as (in addition to other evidence of his acquiescence in their title) he had given notice to the lessors of a farm which he held that he had become bankrupt and was willing to give up the lease, whereupon the lessors had accepted such lease and taken possession of the premises. Held that the bankrupt may be bound by his representation that he was a bankrupt, and his acting as such as between him and the person to whom that representation was made and who acted upon it, but that he was not bound as between him and the defendant who did not act on that representation. *Hearn v. Rogers*, 9 B. & C. 577; Tay. Ev. 10th Ed. p. 576; Wigm. Ev. 1905 Ed. S. 1058, p. 1227. S

(80) The statements of a party in his plaint can be made use of by the opposite party so far as they assist his case, whereas those statements to which he objects, must be proved. W.R. (1864) 305 (306). T

(81) On the question whether a horse lost by the plaintiff was identical with one in the defendant's possession, where the plaintiff stated that, if the defendant would swear the horse was his own he might keep it, the defendant's sworn statement to that effect was held to be relevant evidence though not conclusive, against the plaintiff. *Garreb v. Ball*, 3 Stark. 160; Phip. Ev. 4th Ed. p. 233. U

(2) Instances of admissions held not relevant.

(a) The bare admission of a vendor that an old debt, mentioned in the sale-deed, formed part of the consideration is not conclusive proof of the allegation as against persons claiming a right of pre-emption. 2 Agr. 348. Y

(b) Where, in a previous suit against the plaintiff, he admitted the genuineness and validity of a will and a subsequent codicil revoking it, it was held that those admissions did not amount to an estoppel, in a subsequent suit by him. 4 O.C. 408 (417). W

1.—“Admissions are relevant and may be proved as against the person who makes them or his representative in interest.”—(Continued).

3.—ADMISSIONS—STATEMENTS, DEPOSITIONS, REPRESENTATIONS, ETC.—(Continued).

(2) Instances of admissions held not relevant.—(Continued).

(c) An entry in the Settlement record and an admission made by the plaintiff's father that the plaintiff was a non-hereditary cultivator were held not to be conclusive evidence of the status of the plaintiff. 25 P.R. 1871 (Civil). X

(d) The mere admission by the plaintiff of her intention to execute a deed in fraud of creditors was held not to affect a latter suit by her for the cancelment of the deed alleged to have been executed by her, there being no proof that she went any further than the intention. 1 W.R. 128 (129). Y

(e) Where a defendant admitted that he was in possession, under an agreement with the plaintiff's brother and other share-holders (including the plaintiff) that they would grant a *mourasce* pattah, which they never granted and the rent to be paid on which was never fixed, held that the defendant's admission established no such relation of land lord and tenant, as would support a suit under Act X of 1859. 2 W. R. (Act X) 45. Z

(f) The admission by two parties in a suit, of the *bona fides* of a mortgage transaction, when made to defeat a third party, is not to be regarded as an estoppel against one, of those two parties, saying, in a suit against the other, that the admission was false and intended as a fraud against the third party. 1 W.R. 156 (157). A

(g) Where a defendant admitted having held certain *bhaolee* land, but pleaded that it was washed away, and the Court below regarded the plea as untenable, held that this was not an absolute finding that there was no diluviation, and that the Court was not bound to fix on the defendant's admission and hold him liable for rent of the *bhaolee* land. 19 W.R. 430 (431). B

(h) Admissions made by a defendant in other suits against third parties were held not to be estoppels in a suit to recover possession of a different property under different circumstances. 19 W.R. 299. C

(i) In a suit for the recovery of possession, together with mesne profits, of a certain portion of a taluk alleged to have been purchased by the plaintiff from one A, where the defendant U was a daughter of A's sister R, who claimed the property through her son V, the question was whether the plaintiff had obtained the property by a valid deed of sale; held that though U had, in a previous suit, admitted the execution of the deed, it was open to her to contest its validity, and to maintain that it was colourable, not real. 19 W.R. 118 (121). D

(j) Where, in the case of an adoption, it was contended that the defendant was estopped, by previous admissions and conduct, from disputing the *factum* or the validity of the adoption, the Privy Council held that, there being no misrepresentation so far as the act was concerned, the admissions and conduct indicated that the defendant erroneously considered that the adoption, admitted in fact, was valid in

1. —“Admissions are relevant and may be proved as against the person whomakes them or his representative in interest.”—(Continued).

3.—ADMISSIONS—STATEMENTS, DEPOSITIONS, REPRESENTATIONS, ETC.—(Continued)

(2) Instances of admissions held not relevant.—(Continued).

law, and that no estoppel whatever was created between the parties.
11 B.L.R. 391 (P.C.); cited in 21 A. 285 (287). **E**

(k) Where a person guaranteed such goods as a trader should send to a third person in the way of trade, the admissions of the third person of the receipt by him of the goods, made after the time of their supposed delivery, are not relevant against the guarantor. *Evans v. Beattie*, 5 Esp. 26; Phip. Ev. 4th Ed. p. 223; Tay. Ev. 10th Ed. p. 551. **F**

(l) Where a statement was made by a person before he became the assignee of a bankrupt, it was held not to be relevant as an admission by him in a proceeding by him as such assignee. *Penwick v. Thornton*, M. & M. 51; Steph. Dig. 7th Ed. p. 25. Phip. Ev. 4th Ed. p. 226. Tay. Ev. 10th Ed. p. 510. **G**

(m) A bare admission by the defendant of the plaintiff's having purchased a *jote* was held to be insufficient to prove that he was ever in the position of the defendant's tenant. 5 W.R. 156 (157). **H**

(n) Where a decree in a former suit, against a person, who was the plaintiff in a subsequent suit, and others, awarded to another co-sharer, who was the plaintiff in the former case, less than what he was entitled to, owing to a mistake of that plaintiff supported by the admission of the plaintiff in the later suit, held the mistake need not be perpetuated, nor will his former admission estop the plaintiff in the later suit. 6 W.R. 176 (178). **I**

(o) An admission by a partner, that an acknowledgment of a debt made by another, at a time when the firm had stopped business, was made on the firm's authority and that he would pay if the joint liability of the partners was established, was held not to be binding on him on failure of the condition. 140 P.R. 1889. **J**

(p) Where, in a suit for a share of the inheritance left by a Mahomedan, one of several defendants admitted the plaintiff's legitimacy, the admission was held not to be conduct, but an admission pure and simple, and, as such, was held not to be evidence against the other defendants. 1 O.C. (Sup.), 49. **K**

(q) An examination in a rent suit not properly recorded was held not to be relevant as an admission. 21 W.R. 414. **L**

(r) Where a plaintiff put in, at a late stage of the case after the defendant had filed his written statement, a copy of an alleged admission made by him in a former suit when he had no means of explaining away the supposed admission, held that the Munsiff was entirely wrong in accepting this copy of the defendant's deposition as an admission binding on him and that the Subordinate Judge was perfectly right in sending for the defendant and examining him. 16 W.R. 220. **M**

(s) The depositions of witnesses in former cases, who were also examined in the case under trial, were held to be no evidence, except when put in to contradict them. 8 W.R. (Cr.) 87 (90). **N**

1.—“Admissions are relevant and may be proved as against the person who makes them or his representative in interest.”—(Continued).

3.—ADMISSIONS—STATEMENTS, DEPOSITIONS, REPRESENTATIONS.—(Concluded).

(2) Instances of admissions held not relevant.—(Concluded).

(t) On the question whether a collision, by which the plaintiff was injured, was due to the negligence of the defendant Tramcar Company, a remark made by a fellow-passenger of the plaintiff to the conductor, shortly after the collision, that, “the driver ought to be reported” and the conductor’s reply that “he has been already reported, for he has been off the line five or six times to-day, he is a new driver”, were held inadmissible. *Agassiz v. London Tram Co.* 21 W.R. 199; Phip. Ev. 4th Ed. p. 57; Wigm Ev. 1905 Ed. S. 1754, p. 2262. **O**

(u) Though the plaintiffs had agreed to be bound by what the defendant said, yet, when the latter’s statements amounted to nothing and were manifestly untrue, the plaintiffs were held not to be bound by his statements. 11 W.R. 110 (111). **P**

(v) A defendant is not estopped by a statement made by him in another case to which the plaintiff was no party. 25 W.R. 69 (70); see under S. 115, *infra*. **Q**

(w) When, in the mutation proceedings before a Revenue Court, a plaintiff, under a misapprehension as to what his legal rights were, stated that he and two sets of defendants were, on the death of a person—whose property the plaintiff now sued to recover—the owners of his property in a certain place, in equal shares, held, that his statement created no estoppel as between him and the defendants. 21 A. 285 (287). **R**

(x) The statement of a co-defendant that he had long ago resigned all his rights in favour of the plaintiff, was held to be only an admission by a co-defendant of the plaintiff’s title and a disclaimer of his own, not to be used against the other defendant, so as to entitle the plaintiff to a decree for the entire estate. 6 A. 395 (397); referring to 23 W.R. 214 (P.C.). **S**

(y) A statement made to a Court, which, so far from acting upon it, passed a decree opposed to it, cannot be treated as conclusive. 18 W.R. 347 (348). **T**

4.—ADMISSIONS CONTAINED IN DOCUMENTS.

(1) Instances of documentary admissions held relevant.

(a) In a suit for enhancement of rent, some road cess returns, rendered under Bengal Act IX of 1880, S. 95 of which makes them admissible in evidence against the person by, or on behalf of, whom they were filed, were held to be, though not conclusive, evidence to show that the claim for enhancement could *prima facie* be supported on the ground that the existing rate was not “fair and equitable” within the meaning of the Bengal Tenancy Act. 30 C. 1033 (1042) (P.C.) = 8 C.W.N. 1 (10). **U**

(b) A road cess return, signed by one of the plaintiff’s vendor and the defendant, was held to be evidence against the plaintiff claiming through his vendor, in a suit by the plaintiff for some lands as being the joint property of his vendors and the defendant, although, by admitting it

1.—“Admissions are relevant and may be proved as against the person who makes them or his representative in interest.”—(Continued).

4.—ADMISSIONS CONTAINED IN DOCUMENTS —(Contd.).

as evidence against the plaintiff, it might become evidence in favour of the defendant. 3 C.W.N. 343. **Y**

(c) The recitals contained in an instrument may be conclusive, and are always evidence against the parties, who made those admissions, but not against third parties. 17 A. 428 = 15 A.W.N. 93. **W**

(d) A recital in a deed or other instrument, is no doubt in some cases conclusive, and in all cases evidence, as against the parties who make it, and it is of more or less weight, or more or less conclusive against them according to circumstances. 6 C. 268 ; cited in 17 A. 428 (430) = 15 A.W.N. 93. **X**

(e) For a case where an *ikrar*, executed by two widows, relating to their management and enjoyment of an estate, was held to bind them to deal with the estate in a certain manner. see. 19 C. 513 (535 & 536) (P. C.) = 19 I.A. 115. **Y**

(f) Judgments in suits for pre-emption passed on the admissions of vendees are relevant when the custom of pre-emption is in question. 43 P. L.R. 1907 (Summary of recent cases) **Z**

(g) Where the decree in a former suit against the defendant's predecessor in title contained an abstract of the pleadings in the case, and, hence, an admission by him therein made in the written statement, held such statement in the decree was admissible in evidence under S. 35 of the Evidence Act. 9 C. 586 ; see, also, under S. 35, *infra*. **A**

(h) Where a lease is not in writing, but the terms of the holding are specified in a notification addressed by the lessor to his servants, such an acknowledgment is, as against the lessor, conclusive evidence of the terms of the agreement. 6 W.R. (P. C.) 84. **B**

(i) Where the plaintiff's account has been made up in accordance with the course of dealing which has practically been assented to by the defendant, and has been followed between the parties for many years, the defendant cannot afterwards refuse to be bound by it, whether it is or is not the case that certain charges are made for which he could not originally have been held liable, without proof that he had expressly agreed to pay them. 24 W.R. 390 (391). **C**

(j) Where an entry signed and admitted by the defendant, in an account book, is relied on by the plaintiff as evidence of his claim to a sum advanced and there is an alteration as to the payment of a very small sum as interest upon it after the defendant had signed the book, held that the plaintiff was entitled to a decree without interest, as the acknowledgment regarding the sum advanced had not been altered or tampered with, and the entry in the book was only put in as an acknowledgment of the defendant's main liability and not of interest. 9 C.W.N. 695. **D**

(k) Where a debtor inspects the books of his creditor and after inspection of the accounts signs them in acknowledgment of what is due from him, he may be sued on such settlement of accounts without a bond on stamp-paper. 19 W.R. 246 (247). **E**

(l) A letter containing an admission needs no stamp to be admitted in evidence. 23 W.R. 325 (326). **F**

1.—“Admissions are relevant and may be proved as against the person who makes them or his representative in interest.”—(Continued).

4.—ADMISSIONS CONTAINED IN DOCUMENTS.—(Contd).

(m) A written statement filed by a defendant may be generally taken as a denial of the plaintiff's claim; but, where the defendant agrees to be bound by an issue taken from his statement, he is shut out from objecting to it. 25 W.R. 214. G

(2) Instances where such admissions held not relevant.

(a) The account books of an adversary may be used as corroborative evidence at most, but it would be highly unjust to bind anybody by entries which his adversary has made against him in books over which he has no control whatever. 13 W.R. 294 (295). H

(b) In a suit, under S. 6 of the Punjab Tenancy Act XXVIII of 1868, the plaintiff relied, to negative defendant's rights of occupancy, on the record of an admission in the *Nagsha mudakhulat* that the defendants had no such right. Owing to the absence of the defendants at the attestation of the *Nagsha*, their elder brother, holding separately from them, represented them by permission. Held that, even if the defendants had been recorded in the *mudakhulat* as admitting they had no occupancy rights, as the Settlement Officer at the time attached no value to such record, it should not be treated as good evidence of the voluntary admission required by cl. (2) of S. 6 of the Act. 16 P.R. 1880 (Rev.). I

(c) In a suit to recover certain villages, claimed by the defendants to be held on a *mokurrari* tenure under a deed executed by the plaintiff, where the plaintiff by his mukhtear had previously filed a petition before the Collector admitting that a defendant was *mokurraridar* of the villages in question, held that the petition was not a conclusive admission of the genuineness of the deeds, that it should not be inferred from it that the plaintiff knew of their existence at their date, and that the case should have been tried on the merits. 2 B.L.R. (P.C.) 111=12 W.R. (P.C.) 6 (18)=11 M.I.A. 289. J

(d) Where the plaintiff sued the defendant for illegal distress, and, to show that he had authorised the distress, produced the warrant, authorising the distress, reciting certain facts as the grounds thereof, held that, though the warrant was relevant against the defendant, the recitals were not. *Davies v. Morgan*, 1 Cr. & J. 587; Phip. Ev. 4th Ed. p. 216. K

(e) The statement contained in a will as to the value of the testator's property is not any evidence of it. 1 B. 561 (570 & 571). L

(f) According to the practice in India, a statement in a deed of compromise of the payment of consideration money is not conclusive evidence of that payment. 6 W.R. (P.C.) 55. M

(g) Where A gains a decree against B, on a *kistbondi*, in which B admitted his share of a debt contracted by himself and C, A was held not entitled to recover, in a subsequent suit brought by him against B and C for the balance of the same debt, for B made no admissions in the subsequent suit, and there was no evidence to support his claim against C. 8 W.R. 448 (449). N

(h) A memorandum of an order made, or proposed to be made, by a Collector upon a reference by his subordinate, found on a paper taken from the

1.—“Admissions are relevant and may be proved as against the person who makes them or his representative in interest.”—(Continued).

4.—ADMISSIONS CONTAINED IN DOCUMENTS.—(Concl'd).

middle of a settlement record, and produced in Court in that form without explanation, cannot be used as evidence of acquiescence, and cannot bind the Collector. 24 W.R. 279 (280). **O**

5.—ADMISSIONS,—WAIVER, LACHES, AND OTHER KINDS OF CONDUCT.

(1) Proof of waiver.

(a) Where waiver is set up by the plaintiff in answer to a plea of limitation, it must be proved by some overt act. It cannot be inferred from the mere abstinence of the plaintiff to enforce the condition. 7 M. 583. **P**

(b) Whether there has been a waiver or not of the rights of a judgment-debtor to object to a sale and to what extent they may have been waived must depend on the circumstances of each individual case; and the question has to be decided not merely upon the language of the petitions preferred by the judgment-debtor, but with regard to the whole of the proceedings in the case, and particularly with reference to the order made by the Court upon the petitions. 11 C.W.N. 848. **Q**

2) Right of waiver subject to public policy.

The right of waiver is subject to the control of public policy, which cannot be contravened by any conduct or agreement of the parties; and an agreement which seeks to waive an illegality may be void on grounds of public policy or morality. 11 C.W.N. 848 = 6 C.L.J. 62. **R**

3) Party may waive benefit of provisions of Statute.

(a) Though a Statute says “no action shall be brought” after a specified time, it is perfectly plain that a defendant may neglect, or refuse to set up the defence that the suit is not instituted within the prescribed period, and that the Court will not, in such a case, consider the enactment as an obstacle to the success of the plaintiff’s suit. P.L.R. (1907), p. 58, Art. portion. **S**

(b) A defendant may waive the benefit of the provisions of the Statute of Frauds, notwithstanding that the Statute enacts that “no action shall be brought.” P.L.R. (1907), p. 58, Art. portion. **T**

(c) So also a defendant may waive the provisions of the Bills of Exchange Act requiring notice of protest. P.L.R. (1907), p. 58, Art. portion. **U**

(d) The benefit of Statutes of Limitation may be waived by a defendant. P.L.R. (1907), p. 58, Art. portion. **Y**

4) Condition precedent to enable party to make binding waiver of benefit of statutory provisions.

(a) The condition necessary to enable a person to waive the benefit of any statutory provision is that the application of the provision to the particular case must be of such a nature as to be intended thereby for his own benefit and protection. If the provision be intended not only for his, but also for others’ protection, or is a matter in which the public have an interest, he cannot waive it. P.L.R. (1907), p. 58, Art. portion. **W**

(b) Examples: A testator cannot dispense with the provisions of the Wills Act with respect to the execution of wills, as those provisions are not merely

1.—"Admissions are relevant and may be proved as against the person who makes them or his representative in interest."—(Continued).

5.—ADMISSIONS—WAIVER, LACHES, AND OTHER KINDS OF CONDUCT.—(Continued).

enacted for the benefit of testators, but also for that of their heirs and next of kin. P.L.R. (1907), p. 58, Art. portion. **X**

(c) By the Statute, 4 Edw. VII C. 31 (D), Railway Companies and their employees are absolutely prohibited from making any bargain or agreement relieving Railway Companies from liability for damages for personal injuries to their employees. P.L.R. (1907), p. 58, Art. portion; see, also, (1907) A.C. 65—95, L.T., 131. **Y**

(d) Where the plaintiff had sold certain chattels on credit and stipulated that in default of payment, the action to recover the price might be brought in a specified Division Court and the purchaser expressly agreed to waive the provisions of the Statute, 6 Edw. VII C. 19, S. 22 (of the Legislature of Ontario),—nullifying all agreements as to the place of trial of any action, subject to certain conditions—the defendant applied, on the plaintiff commencing the action the Divn. Court, for a prohibition on the ground that the cause of action had not arisen within the jurisdiction of that Court, and that the agreement as to a venue was void. *Held* that it was not possible for the defendant to waive the protection of the Statute. *Shupe v. Young*: See P.L.R. (1907), p. 59 Art. portion. **Z**

(5) Instances where conduct amounting to admission held binding.

(a) A Munsiff went on an inspection on Sunday. While there the parties entered into a compromise which was recorded by him and a decree passed on the spot. *Held* that the proceedings of the Munsiff were not vitiated by the fact that they were taken on a Sunday. 5 A.L.J. 106. **A**

(b) Where the defendants admitted, by the terms of a compromise, the title of the plaintiff in the lands under dispute and were not in a position to set up any other plea, they were held to be bound by the terms of the compromise. 12 W.R. 427 (428). **B**

(c) Where a compromise is put forward, the Court may make an enquiry as to the fact of the compromise, and, if it holds that the suit was adjusted by a lawful agreement or compromise, it may pass a decree in accordance with it. 24 C. 908; referred to in 31 C. 357 (361). **C**

(d) Laches on the part of a person, having for a long time lain by without objecting to the terms of a deed, disables him from denying the right created thereby in favour of other persons. 29 M. 1. **D**

(e) Where a party had absolutely renounced all his interest in the property in suit for valuable consideration, and such renunciation was evidenced by a deed of compromise filed in a pending litigation and by a final decree of Court passed thereon, the party filing such compromise was held to be estopped from subsequently challenging it. 8 O.C. 143 (F.C). **E**

(f) Where a suit, under Act X of 1859, had been decreed by a Collector on the basis of an *ex parte* enquiry and report, and the plaintiff in appeal chose to rely on the opinion of the Collector, *held* that he had no

1. —“Admissions are relevant and may be proved as against the persons who makes them or his representative in interest.”—(Continued).

5.—ADMISSIONS—WAIVER, LACHES, AND OTHER KINDS OF CONDUCT.—(Continued).

right to ask to supplement his case by other evidence, after the judge had decided the case against him. 15 W.R. 260. **F**

(v) Where a mortgagee had not, on the mortgagor's failure to make regular payment, proceeded to cancel the agreement for payment by instalments and then the mortgagor made further default, *held* that the mortgagee could not, on such further default, sue to set aside the whole arrangement *ab initio*, but was only entitled to the balance of the principal, together with interest from the date of the last instalment held to be satisfied. A.W.N. (1906), 139. **G**

(h) Plaintiff's late karnavan let certain land to the first defendant, who transferred his right to the second and third defendants. The lease having expired, the plaintiff sued to recover the land. As possession of the land was obtained by the third defendant from the tenant of the plaintiff's karnavan, the 1st defendant, *held* that he could not oppose the plaintiff's claim on any ground such as that the land belonged equally to the Tavazhi of himself and of the plaintiff. 16 M.L.J. 351. **H**

(i) Where the father of the plaintiff expressed his willingness at mutation proceedings to take property alienated by a sonless proprietor for the sum paid by the alienee, but took no proceedings against the alienee, *held* that the plaintiff's father must be deemed to have acquiesced in the alienation and that the plaintiff was thereby debarred from objecting to it. 50 P.L.R. 1907 (Summary of recent cases). **I**

(j) Where a party has voluntarily and fraudulently altered a deed and has thus destroyed the evidence of his debt, he should not be allowed to fall back on the original consideration and establish it by evidence he himself has destroyed. 10 C.W.N. 788 = 3 A.L.J. 363 = 33 C. 812. **J**

(6) Instances of such admissions held not binding.

(a) A defendant, not subject to the jurisdiction of a Court, may plead the privilege, though he might have waived it in previous suits brought against him. 9 C. 535 = 12 C.L.R. 465. **K**

(b) Where an order of remand is illegal, consent of parties would not make it legal. *Per Moore, J.* 15 M.L.J. 236 = 28 M. 437. **L**

(c) Consent of parties cannot confer jurisdiction upon a Court, where it has not inherent jurisdiction over the subject-matter of the litigation, and the judgment of a Court which lacks this essential jurisdiction, is totally void and this would not be cured by waiver or acquiescence. 7 C.L.J. 152. **M**

(c) If the want of jurisdiction appeared on the face of the pleadings or the admission of the parties or upon the evidence, the question could not only be raised in appeal for the first time, but it would be the duty of the Court to entertain it. 7 C.L.J. 152. **N**

(d) Where a tenant of a non-transferrable holding transferred it, *held* that, if the transfer was not meant to be an operative transaction, the mere fact that the tenant went away from the place to reside with her father could not be sufficient to show that she meant to abandon her

1.—“*Admissions are relevant and may be proved as against the person who makes them or his representative in interest.*”—(Concluded).

5.—ADMISSIONS—WAIVER, LACHES, AND OTHER KINDS OF CONDUCT.—(Concluded).

interest in that holding, so as to entitle the landlord to re-enter. 33 C. 1219 (1230) - 10 C.W.N. 1033. **O**

(e) A deed of abandonment, executed in reliance upon the generosity of the party benefited, was held to be without consideration. A.W.N. (1908). 7-4 A.L.J. 792. **P**

(f) Where the defendants were allowed to appear as co-plaintiffs in a redemption suit, to which the plaintiff was no party, held that this mere fact could not be received as an admission adverse to the interest of the plaintiff. 2 Agra 20. **Q**

(g) Where a person merely credited to his daughter in his accounts some of the joint family property, and paid to her the income derivable from it, but the property itself was not severed from the joint estate, the fact that his minor grandson did not make a public protest against his grandfather's payment during his grandfather's lifetime, would not estop him from contesting the validity of an alienation made of the corpus of such property subsequently. 17 M.L.J. 405 30 M. 452 - 3 M.L.T. 23. **R**

(h) It cannot be laid down as an abstract proposition that there is any necessary inconsistency in a person, who has unsuccessfully tried to rescind an agreement, afterwards claiming performance of it. 2 A.L.J. 31 (P.C.). **S**

(i) Where a person, who has executed a document, under false pretences, for his own advantage, is sued upon it, he is not precluded from exposing his own fraud. 25 W.R. 10 (11). **T**

6.—PLEADINGS, ADMISSION BY.

(1) Instances of pleadings held binding on parties.

(a) In a case of pre-emption, a finding that the sale was fictitious was arrived at by the first Court and upheld on appeal. On second appeal, it was urged, on behalf of the plaintiffs, that the defendants in their pleadings never alleged the sale to be fictitious, and there was also no issue on this head and that, hence, the Courts below had acted illegally in raising this point on behalf of the defendants and basing their decree on it held the case for the defence must be confined to the pleas put forward by the defendants. 39 P.R. 1905. **U**

(b) Where parties allow a suit to be conducted in the lower Courts as if a certain fact was admitted, they cannot afterwards, in a special appeal, question it and recede from the tacit admission. 23 W.R. 174 (175); also 6 C. 777 (784) - 8 C.L.R. 117. **Y**

(c) A plaintiff is limited to the sum laid in his plaint as mesne profits, though by the evidence a larger sum appears to be due to him. 5 W.R. 127 (P.C.) - 2 M.L.A. 113. **W**

(d) The rule that a plaintiff must be held to the state of facts and equities alleged and pleaded by him in his plaint, or involved in, or consistent therewith, applies also to the case set forth in his written statement by a defendant. 1 B. 209 (214); referring to, 11 M.L.A. 7, 11 M.L.A., 468 & Marsh. 70. **X**

1. — "Admissions are relevant and may be proved as against the person who makes them or his representative in interest."—(Continued).

6.—PLEADINGS, ADMISSION BY.—(Continued).

(1) Instances of pleadings held binding on parties. —(Continued).

- (c) Under no circumstances can a written statement be read as evidence against any party to a suit save the person by whom it is made, and those who are bound by admissions made by him. 5 W.R. 50 (51); cited in 16 W.R. 257. **Y**
- (f) Where a plaintiff had deliberately termed certain lands as rent free, and claimed them as such, it was held that he could not benefit, so as to vary his claim, by an admission of the proprietor that the lands were leased to the plaintiff's vendors, or even by a similar admission of the defendant. 6 W.R. 289 (290). **Z**
- (g) Where a case has been fought out from start to finish on a certain line of defence, it is not competent for the defendant to ask for a re-trial, on appeal, on the ground that he finds he was mistaken in taking up that defence, since, if this is allowed, there can be no finality in judicial proceedings. 88 P.R. 1905 = 179 P.L.R. 1905. **A**
- (h) The defendant, in a suit for specific performance of an agreement, admitted in his written statement the terms of the agreement and its execution, and it was held that the plaintiff was not called upon to prove the execution of the document, or to put it in evidence. 5 B. 143; cited in U.B.R. (1897-01), p. 379 (381). **B**
- (i) Where the son of the son first adopted sued, as heir of the second adopted son, to obtain the property left by him, and the suit was throughout contested with respect to his claim as heir of that second adopted son, held, that the plaintiff could not, on appeal, shift his ground and regard the second adopted son as a trespasser and seek to recover the property on the ground of its having belonged to the ancestor. 11 B.L.R. 391. **C**
- (j) Where, in an execution-proceeding, a point of law was decided against a party and the decision on the point was not challenged on appeal, the decision is binding on the party against whom it was made, and the same question cannot be re-opened in a subsequent proceeding. 2 C.L.J. 584. **D**
- (k) In a suit based upon a deed, where, from the way in which the issues were framed and the pleadings worded, it was clear that there was no contention as to whether the terms of the deed had been strictly complied with or not, but the *factum* of the deed itself was put in issue, held, it was not a case in which the defendant was entitled to fall back upon an alternative plea and raise the question of compliance. 7 W.R. 306 (307). **E**
- (l) Judgments, in which the lower Courts in Bengal used of old to set out the pleadings—a practice recognised by circulars issued by the Sudder Dewani Adaulat—are admissible in evidence under S. 35, Evidence Act, as an admission by a party. They are also admissible under S. 13 of the Act as instances in which the right in question was claimed, disputed and disallowed. 3 C.L.J. 521 (529). **F**
- (m) To allow a defendant, who has affirmed or denied one state of facts by his pleadings, to affirm or deny the contrary at the trial, would render

1.—“Admissions are relevant and may be proved as against the person who makes them or his representative in interest.”—(Continued).

6.—PLEADINGS, ADMISSION BY.—(Continued).

(1) Instances of pleadings held binding on parties.—(Concluded).

pleadings worse than nugatory, and make them but a means of working injustice, and would be but to encourage fraud and perjury. 1 B. 209 (214). **G**

(n) In a suit to recover lands purchased from the heirs of a deceased proprietor under a *kobalah*, the defendants, who, in the Courts below, relied entirely on the *den-mohur* rights of the deceased's widow, cannot, in special appeal, ask for a decree to the extent of the rights of the widow and her son as heirs. 11 W.R. 133. **H**

(o) A Court cannot set up a defence, not only not put forth by the defendant, but inconsistent with his own statement. 13 W.R. 464 (465). **I**

(p) Though a plaintiff should not be tied down too strictly to his statements, yet he must be limited to the case made in the plaint. 14 W.R. 60 (61). **J**

(q) An admission, made in a verified petition by an intervenor in an Act X (of 1859) suit, and repeated in a verified plaint filed by him in a regular suit, was held to be binding in a subsequent suit on the party who made it. 15 W.R. 437 (438). **K**

(r) Though a certain amount of latitude is permissible in construing pleadings in this country, a plaintiff cannot be allowed to abandon a case set up in the plaint and substitute an absolutely new and inconsistent case. 8 O. C. 116. **L**

(s) Where the defendants denied in a rent suit that they were tenants of the land, they cannot be allowed, in a subsequent suit, to turn round and say that they are tenants. The parties to a litigation must abide by the position they have deliberately adopted. 8 O.C. 353. **M**

(t) Pleadings will be considered relevant against a party if sworn, signed, or otherwise adopted by the party himself. *Marianski v. Carins*, 1 Macq. H.L. 212; Phip. Ev. 4th Ed. p. 231. **N**

(2) Instances of pleadings held not binding.

(a) Where a purchaser of a tenure, in a sale held under the provisions of Bengal Act VIII of 1865, sued the person in possession for rent, and obtained an *ex parte* decree, and then brought a suit, for enhancement of rent, to which the defendant pleaded that he was entitled to hold the land under a *mokarari pottah*, upon which the plaintiff withdrew his suit and brought the present suit for ejectment, held that the plaintiff was not stopped from bringing the suit by reason of his having brought a rent suit against the defendant. 7 C.L. J. 191. **O**

(b) A statement made by a plaintiff in a former pleading will not amount to an estoppel against him. 1 W.R. 162 (163); See, also, Try. Ev. 10th Ed. Art 822, p. 579. **P**

(c) Statements made in a verified written statement of a party are not admissible in evidence. 7 W.R. 493 (494). **Q**

1. "Admissions are relevant and may be proved as against the person who makes them or his representative in interest."—(Continued).

6. PLEADINGS, ADMISSION BY.—(Concluded).

- (d) A written statement is no legal evidence, although the same penal consequences may follow from a false written statement as from a false deposition. 12 W.R. 39 (10). **R**
- (e) Pleadings, although relevant in other actions, to show the institution of the suit and the nature of the case put forward are not relevant against a party as admissions, but are regarded merely as suggestions of counsel. *Boileau v. Rutlin*, 2 Exch. 665, Philp. Ev. 4th Ed. p. 231. **S**
- (f) A Court ought not to pass a decree in a suit on a *hundi*, which is inadmissible in evidence on the ground of its not being on an impressed sheet, basing such decree on admissions made by the defendant in his written statement. 18 B. 369. **T**

7. ADMISSION OF PART OF CLAIM.

(1) Instances where admission of part of claim given effect to.

- (a) Where the defendants admitted tenancy and their plea of payment was found to be false, *held* that a decree should have been passed at the rates admitted by the defendants, and that the whole claim of the plaintiff should not have been dismissed for his failure to prove the rates stated by him. W.R. (1864) Act X 12. **U**
- (b) Where a defendant admits a liability and the plaintiff commits default, the entire claim of the plaintiff in suit cannot be dismissed, but the case should be decided according to the admission of the defendant. 5 W. R. (Act X) 65 (66). **Y**
- (c) If a plaintiff, bringing an action for a certain sum, fails to prove his entire claim, a judgment may be given for a smaller amount, in accordance with the defendant's acknowledgment. 5 W.R. (P.C.) 58 (59). **W**
- (d) Where, in a suit for rent, the plaintiff entirely relied on the defendant's admission, both as to the amount due and for proof of his cause of action, *held* he must accept the admission as a whole, and can only have a decree upon it for the balance admitted to be due. 12 W.R. 317. **X**
- (e) Where a plaintiff sued for arrears of rent at enhanced rates, it was *held* that, if the plaintiff came into Court to ask for a decree at the rates admitted by the defendant, he must be content with these rates, as they were intended to be admitted by the defendant; and that, if on the other hand, he claimed the arrears due on certain rates to be found by the Court, and to take advantage of the finding of the Lower Appellate Court to the effect that the defendant was not entitled to the reduction claimed by him, he must submit to the whole finding taken together. 11 W.R. 162 (163). **Y**
- (f) Where a plaintiff brought a rent suit upon a rate, a fraction of which only was proved to be the rate by a decree obtained in a former suit against the defendant, *held* that the plaintiff was entitled to get a decree the rate admitted by the defendant. 10 W.R. 234 = 13 B.L.R. 246, note. **Z**

1.—“Admissions are relevant and may be proved as against the person who makes them or his representative in interest.”—(Continued).

7.—ADMISSION OF PART OF CLAIM.—(Concluded).

(g) Where a plaintiff failed to prove the *kabooliat* fixing the amount of rent, and there was no evidence of the rate at which he had estimated it, it was held to be right to take as rent the amount admitted by the defendant to be due. 20 W.R. 61. **A**

(h) Where a defendant admitted that he owed rent at a certain rate in money to the plaintiff, but denied that he was bound to pay rent in kind amounting in value to the sum which the plaintiff claimed, *held* that the plaintiff was entitled to recover arrears of rent to the amount admitted by the defendant. 21 W.R. 438 (439). **B**

(i) Where, in a suit for arrears of rent, the defendant admitted tenancy and his liability for a certain rate of rent, the plaintiff was held entitled to recover arrears to the extent admitted, unless the defendant established his plea of payment. 22 W.R. 250 (251). **C**

A landlord, suing for rent at a certain rate, but failing to prove his claim to more than the defendant admits, is entitled to a decree for the amount admitted to be due. 23 W.R. 85 (86). **D**

(In a suit for enhancement of rent, where the defendant admitted a certain sum to be due, and the first Court had decreed rent at the rates admitted with some enhancement, and the Lower Appellate Court, seeing no grounds for enhancement, dismissed the suit, the High Court granted the amount admitted with interest from the date of the first Court's decree. 24 W.R. 82 (83). **E**

(l) Plaintiff sued for rent upon an alleged settlement, between himself and the defendant, which he failed to prove; *held* that, no issue having been raised as to what was the proper amount of rent, he was not entitled to have that question determined in the suit, and that either his suit must be dismissed or he must be satisfied with the rent admitted by the defendant to be due. 6 C.L.R. 208 (209). **F**

(m) A suit to recover lands and arrears of rent, where a defendant admitted being the tenant of a certain land, but denied that she was liable to be ejected, and claimed to deduct the value of certain emoluments, enjoyed by her, from the rent, *held* that the plaintiff should be awarded, upon the defendant's admission, only the amount of rent admitted by her. 7 M. 226 (231-2). **G**

(2) Effect of decree passed on admission of part of claim.

On failure by the plaintiff to prove the rate of rent claimed in the plaint, a decree for rent passed at the rate admitted by the tenant would not have the effect of fixing the rate of rent, in a suit for rent for a subsequent year. 7 C. 298 (303). **H**

8.—AGENTS, PLEADERS, TRUSTEES, MANAGER OF HINDU FAMILY, ADMISSIONS BY.

(1) Admissions of agents and others held relevant.

(a) Acts of a firm of contractors though not proved to have been regularly kept in the course of business, yet, if proved to have been kept

1. —“Admissions are relevant and may be proved as against the person who makes them or his representative in interest.”—(Continued).

8. —AGENTS—PLEADERS, TRUSTEES, MANAGER OF HINDU FAMILY, ADMISSIONS BY.—(Continued).

by a servant or agent of the firm appointed for that purpose, are clearly relevant as admissions as against the contractor or his partners. 1 B. 616 (617). I

(b) The consent given by a party or his pleader to the disposal of a cause, under the provisions of Ch. II of Act XVII of 1879, could not be withdrawn after the hearing had begun and proceeded to a certain stage on the footing of that consent. 11 B. 591 (593). J

(c) Where a solicitor sued a client on a bill of costs, and the client pleaded a set-off for goods sold, and tendered a debtor and creditor account furnished by the solicitor, in which the solicitor debited himself with the amount of the goods, but credited himself with his costs *held*, the account was evidence for the client of the debit items, and the credit items for the solicitor, though no signed bill thereof had been delivered. *Harrison v. Turner*, 10 Q. B. 482 & *Thomson v. Austen*, 5 Bowl. & Ry. 361; *Philp. Ev.* 4th Ed. p. 215; *Tay. Ev.* 4th Ed. S. 726, p. 521. This may come also under 1 (9), *supra*. K

(d) Where a trustee stands by for four years while the trust funds are retained by his co-trustees and makes no kind of enquiry, despite ample grounds to put him upon it, but passively acquiesces in the disappearance of the funds, he is liable to the beneficiary for the debts of his co-trustees. 7 Bom. L.R. 691. L

(e) The manager of a joint Hindu family is the agent for the other members and is supposed to have their authority to do all acts for their common necessity or benefit. The position of a Zemindar or a Poligar, as an undivided member of a joint family, seems to be entirely different from that of an ordinary managing member of an undivided Hindu family. 3 M. 145 (150). M

(f) The effect of a conveyance of property by the managing member of a Hindu family depends upon the intention of the parties to be gathered from the terms of the instrument and from the surrounding circumstances. 18 B. 631 (635). N

(g) A widow, like a manager of the family, must be allowed a reasonable latitude in the exercise of her powers, provided, as *Wong* says, in 11 B. 320, that she acts fairly to her expectant heirs. 1534 (536). O

(h) Where the father of the present plaintiffs had filed a suit contesting an alienation made by a widow and entered into a compromise with her in good faith under which they received some property and gave up all claims as regards the balance, *held* that the plaintiffs were thereby debarred from contesting a subsequent alienation. 2 P.L.R. 1907 (Summary of recent cases). P

(i) The managing member of a joint Hindu family cannot be held liable by the other members for an account, even if the parties sue him jointly, during the period for which the accounts are required. 13 P.B., 75 (78). Q

(j) Where a son, in granting certain leases under a deed with the knowledge and consent of his father and after subsequently ratified his son's action, the father, as principal, could not repudiate

1.—“Admissions are relevant and may be proved as against the person who makes them or his representative in interest.”—(Continued).

8.—AGENTS—PLEADERS, TRUSTEES, MANAGER OF HINDU FAMILY, ADMISSIONS BY.—(Concluded).

the losses, even though the son in granting them might perhaps have exceeded the limits of his agency. 15 M.L.J. 487. R

(2) Such admissions held not relevant.

(a) The offer of the agent of a party, holding a power of attorney empowering him to do all that was necessary for the prosecution of a suit in the ordinary way, or that of his pleader, to be bound by the evidence of the plaintiffs if given on oath in a particular form, was held not to be binding on the party, as the implied appeal to the conscience of the party to whom the offer was made could rightly be made only by a person personally interested, whose confidence in the justice of his cause was based on his own knowledge of its merits. 14 B. 455 (457, 458). S

(b) Where the vakil of a plaintiff admitted verbally that his client was wrong in suing the defendants jointly, it was held that a mistaken petition on the part of the pleader would be no ground for the Courts passing an illegal order. 23 W.R. 400 (401). T

9.—MINOR AND GUARDIAN—THEIR ADMISSIONS.

(1) *Karta* of Hindu family, trustee of minor.

As long as a member of a joint Hindu family is a minor, the *karta* is in the position of a trustee for the minor of the joint property to the extent to which he was entitled to share in it, and, when the trusteeship ceases, he is liable to account to him. 9 W.R. 483 (485). U

(2) Power of guardian to bind minor.

(a) A guardian, has, under the Hindu Law, a qualified power of dealing with the property of an infant under his charge. He can, in case of necessity, sell, charge, or let it for a long term. But the infant is not absolutely bound by the act of the guardian; he could, on attaining majority, recover the property, if it had been disposed of without legal necessity; and in the case of an uncertificated guardian, the burden of proving legal necessity would, generally speaking, be on the person asserting it. 22 C. 545 (550). Y

(b) A minor is bound by the act of his guardian done *bona fide* and for his benefit in the management of his estate, even though his name does not appear in the transaction. 1 N.L.R. 66. W

(3) Duty of minor on coming of age.

A member of a joint Hindu family is bound, when he comes of age, to make himself acquainted with the acts, during his minority, of the manager and to express his dissent at once if he disapprove of such acts. 14 B.L.R. 21. X

1) Generally minors not prejudiced by laches and acquiescence.

Laches and acquiescence do not prejudice infants, for the presumption of law is that they do not understand their rights and are not capable of taking advantage of the rules of law so as to apply them to their advantage. 9 C.W.N. clxxi. Y

I.—“Admissions are relevant and may be proved as against the person who makes them or his representative in interest.”—(Continued).

9.—MINOR AND GUARDIAN—THEIR ADMISSIONS.

—(Continued).

(5) Repudiation or ratification of guardian's act, conditions for.

It is only when the guardian's act was not necessary, proper or prudent that any question of ratification or repudiation can arise. 1 N.L.R. 66. **Z**

(6) Instances where minor bound by admissions.

(a) Where a former guardian of the plaintiff compromised a claim against his estate for debt after sixteen years, the Privy Council refused to set it aside, the plaintiff having failed to prove that the suit was fictitious, and the compromise fraudulent and collusive. 10 B.L.R. 35 (P. C.). **A**

(b) Where there was no proof that the person, who made a sale, was a minor, at the time of the execution of the sale-deed to the plaintiff the onus of proving which lay on the defendant the sale by the minor was upheld. 8 W.R. 371 (372). **B**

(c) On the question 'whether a person was an infant at the time of making a contract, an admission by him that he was so is admissible against him. *R. v. Walker*, 1 Cox. 99, Phip. Ev. 4th Ed. p. 216. **C**

(d) Where there was nothing to show that a minor knew that he was entitled to relief in equity against an agreement, entered into by his mother during his minority, his admissions, as evinced by his conduct, though undoubtedly evidence against him, were held not to be evidence of a conclusive character. 8 B.H.C.R. 311 (318). **D**

(7) Instances where admissions held not binding on infants.

(a) It is not the practice of the Courts in India or of the Privy Council to press against either an infant or a Hindu female a presumption by acquiescence in a rival claim from the mere fact of not contesting an adverse title for a limited time. 17 W.R. 1 (P.C.). **E**

(b) A minor's estate, being under the charge of the Court of Wards, an admission by the *Mukhtear* of the Court of Wards, on the alleged consent of the manager of the Court of Wards, of a claim adverse to the minor, is not enough to give a decree in favour of the claimant, in the absence of evidence to show that the manager was authorised by the Court of Wards to give to the *Mukhtear* authority to make the admission. 23 C. 934 - 23 I.A. 75. **F**

(c) The consent of parties, in a proceeding for the appointment of a guardian, does not give the Judge any power to refer the matter to arbitration. 5 A.L.J. 101. Per *Karamat Husan, J.* **G**

(8) Case where guardian's statements held relevant against him personally.

The guardian of a minor, while defending a suit in that capacity, made certain statements on affidavit. This affidavit is evidence against him of the facts sworn to, in a subsequent action against him personally. *Bensley v. Magrath*, 2 Sch. & Lef. 34; Phip. Ev. 4th Ed. p. 214. **H**

I.—“Admissions are relevant and may be proved as against the person who makes them or his representative in interest.”—(Continued).

10.—DIVORCE—ADMISSIONS OF HUSBAND AND WIFE.

(1) Instances of binding admissions in divorce cases.

- (a) A wife's admission of adultery, though not corroborated, has been held, if trustworthy, to be sufficient evidence for granting a divorce. *Robinson v. Robinson*, 1 S & T. 362; Phip. Ev. 4th Ed. p. 213. **I**
- (b) In an action against a husband by the trustees of his wife under a deed of separation for maintenance arrears, the defence to which was adultery by the wife, evidence of her admission of the criminal conduct ought to be now received. Tay. Ev. 10th Ed. p. 546, referring to *Scholey v. Goodman*, 1 Bing. 349. **J**
- (c) Admissions of adultery, obtained from a respondent by the solicitor's clerk when serving the petition, were admitted in evidence, though the procedure was severely condemned. *Hallam v. Hallam*, 20 T.L.R. 31 and *Purgold v. Purgold*, Times Oct. 29, 1903; Phip. Ev. 4th Ed. p. 199. **K**

(2) Instances of such admission held not relevant.

- (a) To hold the adultery of the husband proved on his mere admission would, under the circumstances of the case, be imprudent and contrary to practice. *Williams v. Williams*, L.R.1.P. 29; see 17 B. 624 (625). **L**
- (b) In suits for divorce, the statements of a respondent are not admissible in evidence against the co-respondent. 18 W.R. 480 = 10, B.L.R. 301 (P.C.)—Sup. Vol. I.A. 106. **M**
- (c) A decree for dissolution of marriage, based entirely on admissions, without any evidence having been recorded, was not confirmed by the High Court, but was sent back to the Court below for further enquiry and evidence. 17 B. 624 (625). **N**

11.—LIMITATION—ACKNOWLEDGMENT.

(1) Requisites of valid acknowledgment under the law of limitation.

- (a) For the purposes of the Limitation Act, the written acknowledgment must contain an admission that a debt is due. 5 M.H.C. 90. **O**
- (b) According to the authority of many English cases, it is sufficient that an acknowledgment should contain an admission that the debt is due, the amount in such case being proved by parol evidence. 6 C. 340 (353), referring to *Tanner v. Smart*, 6 B. and C. 603, *Quincey v. Sharpe*, L.R. 1 Exch. D. 72 and *Skeet v. Lindsay*, L.R. 2 Exch. D. 314. **P**
- (c) Admission of money being due is not essential to constitute an acknowledgment for the purposes of the Limitation Act. It is enough if the defendant acknowledges the accounts must be taken and that he would pay any money that might be found against him on such accounts being taken, though he denies that any balance was due by him. 10 M. 259. **Q**
- (d) The acknowledgment of liability mentioned in S. 19 of the Limitation Act means an acknowledgment of existing liability. 6 C.L.J. 544. **R**

1. —“Admissions are relevant and may be proved as against the person who makes them or his representative in interest.”—(Continued).

11.—LIMITATION—ACKNOWLEDGMENT.—(Continued).

(1) **Requisites of valid acknowledgment under the law of limitation.**—(Continued).

- (e) The acknowledgment must, on the face of it, purport to be that of an existing liability, though the name of the creditor to whom the debt acknowledged is owing, as also the identity of the debt acknowledged in writing, may be proved by oral evidence. 25 M. 220 (F.B.). **S**
- (f) Though, under S. 19, the exact nature of the right or liability need not be disclosed by the acknowledgment, *Quincey v. Sharpe*, L.R., 1 Exch. D. 72 and its exact nature may be established by evidence dehors the written acknowledgment, yet the acknowledgment in itself should import that the person making the acknowledgment is then under an existing liability (*rude* judgment in 25 M. 220), and such liability cannot be read into it by proof *alimde*, or by an admission afterwards made by a party to the suit which relies upon the acknowledgment, as preventing the bar of limitation. 26 M. 34 (37) = 12 M.L.J. 101 (103). **T**
- (g) Whether an acknowledgment is or is not an acknowledgment of an existing liability depends upon the terms of the acknowledgment, and external evidence of subsequent events cannot be relied upon with a view to show that there was an existing liability at the time, and thus to place upon the acknowledgment an interpretation of which it would not otherwise admit. 6 C.L.J. 514. **U**
- (k) There must be an acknowledgment of a debt *as such* involving the admission of a jural relation of debtor and creditor, and an intention to continue the relationship until the same is lawfully determined must also be evident. 16 M. 220 = 3 M.L.T. 35 = 20 M. 239. **V**
- (i) Although an unqualified admission of a debt implies a promise to pay, yet, if there is a covenant and an agreement to pay, which is not absolute but qualified in its terms, for instance, if there is a covenant to receive payment out of a specified fund, it does not create the relation of creditor and debtor as upon a loan of money. 6 C.L.J. 639. **W**
- (j) When the right claimed is a debt, there ought, in order to give a fresh start, to be an unequivocal and unqualified admission of the debt or of the subsisting relationship of debtor and creditor. 30 C. 699 = 7 C.W. N. 651 (*following* 16 M. 220 and *distinguishing* 26 C. 715); see, also, 2 U.B.R. (1897-1901), 448. **X**
- (L) Under S. 1, para 6, Part II, Punjab Civil Code, an admission of a creditor's demand of a debt from the opposite party, to revive a time-barred debt, must be so distinct and unqualified in its terms, as to afford room for the inference of a promise to pay on request, and must be made to the creditor or his agent. 25 P.R. 1870 (Civil). **Y**
- (I) An acknowledgment of a debt due, within S. 4 of Act XIV of 1859, in order to give a fresh start for limitation, should be express and must not be left to inference. 45 P.R. 1870 (Civil). **Z**
- (m) An unconditional acknowledgment has always been held to imply a promise to pay, because that is the natural inference if nothing is said to the contrary. 2 N.T.R. 130 (189) = 4 C.L.J. 94 (P.C.). **A**

1. — "Admissions are relevant and may be proved as against the person who makes them or his representative in interest."—(Continued).

11.—LIMITATION—ACKNOWLEDGMENT.—(Continued).

(1) Requisites of valid acknowledgment under the law of limitation.—(Concd).

- (n) An acknowledgment, in order to take a case out of the Statute of Limitation, must be either one from which an absolute promise to pay can be inferred, or secondly, an unconditional promise to pay the specific debt, or thirdly, there must be a conditional promise to pay the debt, and evidence, that the condition has been performed. 4 C.L.J. 94 (P.C.) = 33 C. 1097. **B**
- (o) An acknowledgment within the meaning of S. 19 of the Limitation Act, 1877, must distinctly and definitely relate to the liability in dispute. It need not be express; it may be left to implication. It must be a necessary implication from the words used that the person acknowledging was referring and admitting the liability, not any liability. 9 Bom. L.R. 715. **C**
- (p) Only acknowledgments signed by a debtor and not by his agent, came under the terms of S. 4 of Act XIV of 1859, taking a case out of the Statute of Limitation. 8 W.R.1. **D**
- (q) S. 19 of the Limitation Act does not require that the person making an acknowledgment should have an interest in the property in respect of which the acknowledgment was made, at the time when the acknowledgment was given. It is enough if, before the period of limitation, expires, an acknowledgment of liability or right has been made in writing by the person against whom the right is claimed. 3 A.L.J. 680 = A.W.N. (06). 286. **E**
- (r) An acknowledgment, under the provisions of explanation 1 of S. 20 of the Limitation Act, need not specify the amount of the debt. 6 C. 340 (353). **F**
- (s) Where a party to a contract signs his name in any part of it, in such a way as to acknowledge that he is the party contracting, that has been held, under S. 17 of the English Statute of Frauds, to be a sufficient signature within the statute. 6 C. 340 (352), referring to *King v. Crookford*, 1 Esp. 190, *Lobb v. Stanley*, 5 Q.B. 574, *Johnson v. Dodgson*, 2 M. and W. 653, & *Daniel v. Evans*, 1 H. and C. 174. **G**
- (t) An express admission that the debt, or a part thereof, is due is not necessary to constitute an acknowledgment. 2 M.H.C. 307. **H**

(2) Instances of acknowledgments held to prevent limitation.

- (a) Acknowledgment of liability or part-payment by a mortgagor has the effect of keeping alive the mortgage-debt as against even such of the mortgaged properties as the mortgagor has sold to a third person, whether the purchaser, when he bought, had notice of the mortgage or not. 32 C. 1077 = 9 C.W.N. 868. **I**
- (b) The admission of a debt, after execution is taken out, gives a judgment-creditor a fresh start for reckoning limitation. 3 W.R. (Mis. Rul.) 27. **J**
- (c) A fresh starting point was held to be given to a decree-holder by the judgment-debtor's admission of the debt. 5 W.R. Mis. Rul. 12 (13). **K**
- (d) A decree-holder gets a fresh starting point for computing limitation by a judgment-debtor's admission of liability. 5 W.R. Mis. Rul. 31. **L**

1. "Admissions are relevant and may be proved as against the person who makes them or his representative in interest."—(Continued).

11.—LIMITATION – ACKNOWLEDGMENT. (Continued)

- (c) An admission by the debtor gives the creditor a fresh start, and avoids the limitation which might otherwise run against execution. 6 W.R. (Mis. Rul.) 115; referring to 3 W.R. (Mis. Rul.), 27 & 5 W.R. (Mis. Rul.), 32. **M**
- (f) To take a debt out of the Law of Limitation, an absolute admission of some liability existing, was held to be sufficient under Circular Order of March 11, 1859; such an admission may be coupled with evidence to prove the amount. 26 P.R. 1889 (Civil). **N**
- (g) An admission made by a mortgagee, who was the elder brother of a co-mortgagee, in a deposition in writing recorded in a previous suit, was held to be an acknowledgment of the title of the mortgagor, within the meaning of Art. 148, Sch. II of the Limitation Act, 1871, sufficient to save the mortgagor's claim for redemption from being barred by limitation. 78 P.R. 1878 (Civil). **O**
- (h) An acknowledgment of a debt sealed with a seal bearing the debtor's name was held to be sufficient, under S. 4 of Act XIV of 1859. 10 P.R. 1873 (Civil). **P**
- (i) An acknowledgment, only signed by an agent, insufficient, under Act XIV of 1859, to prevent a debt from being barred, was considered to be sufficient to sustain a suit on the same cause of action under Act IX of 1871. 6 C. 340 (349 & 350). **Q**
- (j) Where, in an administration suit instituted by the creditor of a deceased person against his executor, another creditor of the estate applied to rank as such, and the Receiver appointed in the administration suit, submitted a statement in the presence of the executor, admitting the debt due to the applicant, but the Court after some time directed the applicant to bring a fresh suit, on whose institution the executor set up limitation, held that, in the face of the admission made in his presence, the executor was estopped from setting up the Statute of Limitation as a bar. 10 C.W.N. 959. **R**
- (k) An admission, in an appeal memorandum, by an advocate or a duly authorised vakil, on behalf of his client, that a certain decree is subsisting, will be an acknowledgment of liability within S. 19 of the Limitation Act, so as to give a fresh start of limitation, if such admission was necessary for the purpose of the pleadings in such appeal. 18 A. 381. (Whether it would be so in case such an admission was unnecessary, is still an open question). 18 A. 384 (following 3 A. 247). **S**
- (l) Under circular order of 14th March 1859, an absolute admission of some liability existing was held sufficient to save a debt from the bar of limitation. 26 P.R. 1869. **T**
- (m) Letters written by a debtor in answer to a demand for payment of a debt and interest, in which he promised to pay the debt by instalments, and begging to be let off payment of interest, were held to be sufficient evidence of an admission or acknowledgment of the debt to save the claim from the bar of limitation. 5 W.R. 18 (P.C.) = 10 M.A. 362. **U**

I. —“Admissions are relevant and may be proved as against the person who makes them or his representative in interest.”—(Continued).

11.—LIMITATION—ACKNOWLEDGMENT.—(Continued).

- (u) An admission of a debt, with an averment that the time for payment has not yet arrived, will constitute an acknowledgment, giving a fresh start for limitation. 3 M.H.C. 208. **Y**
- (o) A petition in which the judgment-debtor agreed to pay a certain sum to the person, who attached the decree and took out execution, is a sufficient acknowledgment to save limitation, under the explanation to S. 19 of the Limitation Act, although it was not addressed to the person entitled. 6 C.L.J. 141. **W**
- (p) S. 19, Limitation Act requires only a definite admission of liability, as to which there can be no reason for departing from the English principle that an unqualified admission and an admission qualified by a condition stand precisely upon the same footing. 2 N.L.R. 130 (135) (P.C.). **X**
- (q) An account stated, written by a debtor himself, with his signature in one of the modes of signing most generally practised by natives, was held to be sufficiently signed within the meaning of S. 4 of Act XIV of 1859. 5 B. 88. **Y**
- (r) Where on a *khata*, the debtor's name had been introduced in his own handwriting at the top of the entry, the whole of such entry, being in the same handwriting, it was held that the *khata* had been sufficiently signed within the meaning of S. 19 Act XV of 1877. 5 B. 89 (91). **Z**
- (s) A *sazu* or adjustment of an account can take effect either as a revival of an original promise or as evidence of a new contract. 6 B. 683 (685). **A**

(3) Instances of acknowledgments held insufficient to take case out of limitation.

- (a) Though a person might have held a general power of attorney from the defendant, in the absence of anything to show that he was continuing as the agent of the defendant at the date of an acknowledgment in question, an acknowledgment by such person was held to be insufficient to take the plaintiff's case out of limitation. 7 I.A. 8. **B**
- (b) A suit on an acknowledgment or an account stated, signed by a person who had been appointed nab for the purpose of collecting rent for the plaintiffs, is not maintainable, if he did not affix his signature till more than a year after the determination of his agency. 5 C. 303 (309). **C**
- (c) An acknowledgment of debt made to a person, who is neither the creditor nor his privy, will not defeat the Statute of Limitations, since it is not evidence of a promise he could take advantage of. *Rogers v. Quinn*, 26 L.R. Ir. 130; *Phip. Ev.* 4th Ed. p. 210. **D**
- (d) An acknowledgment in Art. 148, Limitation Act, must be of a present existing right in the mortgagor. An acknowledgment, reciting the original mortgage, but asserting a subsequent alteration of the original arrangement and the constitution of a fresh relationship between the parties, even though made within sixty years of the original mortgage, was held insufficient to give a fresh starting point. 9 C. 616 = 12 C.L.R. 284. **E**
- (e) A decree-holder's application for execution of his decree was more than 3 years from the last application for execution, but was within 3 years

1. —“Admissions are relevant and may be proved as against the person who makes them or his representative in interest.” — (Continued).

11. —LIMITATION—ACKNOWLEDGMENT. — (Continued).

from the date of an application by the judgment-debtor for postponement of a sale, to which postponement the decree-holder consented. The applicant contended that the judgment-debtor's application served as an acknowledgment under S. 19 of the Limitation Act. *Held* that the judgment-debtor's application and the decree-holder's consent did not constitute an “application by the decree-holder” within the meaning of Art. 179 of the Act and did not serve to give a fresh start for limitation. 28 M. 40. **F**

(f) A payment, by the mother and natural guardian of minors, of interest due upon a bond, executed by the father of the minors, is not a payment by an agent within the meaning of S. 20 of the Limitation Act, 1877, and does not give the creditor a fresh start for the period of limitation. 26 A. 598 = 1 A.L.J. 302 A.W.N. (1901). 137; *following* 13 C. 292 & 20 B. 61, and *dissenting from* 18 M. 456. **G**

(g) A document in the sub-joined form was held not to be a sufficiently unqualified acknowledgment or admission, under S. 4 of Act XIV of 1859:— (“Rs. 2,300, balance struck on 7th July, 1869. The scribe is X, and this has been written as at the request of Y.” (Sealed by Y.) 79 P.R. 1873 (Civil). **H**

(h) An acknowledgment, only sealed by the mortgagee, would not give a fresh start for limitation, under Art. 148, Sch. II of the Limitation Act, 1871, when such acknowledgment is lost, since signing does not include sealing. 93 P.R. 1877 (Civil). **I**

(i) There cannot be an acknowledgment of a conditional liability, unless the condition is fulfilled. Though, so far as the specific cases provided for in the explanation to S. 19 of the Limitation Act are concerned, the Indian Law is not the same as the English Law, yet, there can be no doubt that, here as well as in England, an acknowledgment of a conditional liability would not give a fresh start, so long as the condition remains unfulfilled. 29 M. 519 = 16 M.L.J. 563 = 1 M.L.T. 318. **J**

(j) Memoranda of payments made, endorsed on a bond, and signed by a party, were held not to amount to an acknowledgment within the meaning of S. 4 Act XIV of 1859. 8 W.R. 334 (336). **K**

(k) Where, in a conveyance executed by a mortgagor in respect of a portion of the mortgaged properties in favour of a stranger, there was a recital admitting the mortgagor's liability on account of the mortgage-debt, *held* that, not being addressed to any person and not having been communicated to the creditors or any person on their behalf, it was no an acknowledgment within the meaning of S. 19 of the Limitation Act of 1877. 10 C.W.N. 551 = 3 C.L.J. 576 = 33 C. 613. **L**

(l) A bare acknowledgment of an account or an admission that it is correct, or the debtor's affixing his signature or mark to a balance struck, will not constitute an acknowledgment. 45 P.R. 1870 (Civil). **M**

(m) The manager of a joint Hindu family, or the executor of a Hindu will has no power by acknowledgment to revive a debt barred by the law of limitation except as against himself. 14 B.L.R. 21. **N**

1.—“Admissions are relevant and may be proved as against the person who makes them or his representative in interest”.—(Continued).

11.—LIMITATION—ACKNOWLEDGMENT.—(Concluded).

(n) The schedule of debts verified and filed in Court by a bankrupt was held not to be such an admission as to give rise to a new period of limitation. 25 P.R. 1870 (Civil). **O**

(4) Admission of debt barred by limitation, effect of.

A plaintiff is not entitled to sue on an admission of a debt, made after it was barred by limitation. 95 P.R. 1868 (Civil). **P**

(5) Limitation by acquiescence.

The doctrine of acquiescence does not apply in this country to cases in which the period, within which a suit can be brought, is laid down by statute. 22 W.R. 267. **Q**

12—ADMISSIONS IN CRIMINAL CASES.

(1) Admission by accused person relevant against him.

(a) Where an accused person makes an oral confession which is not liable to the objections that may be raised under Ss. 24, 25 or 26 of the Evidence Act, it is an admission by an accused person and is a relevant fact which may be proved in his trial under S. 21 of the Evidence Act; such a confession made to a Magistrate is relevant and may be proved by him. 21 P.R. 1881 (Cr.). **R**

(b) While a confession might be inadmissible for the purpose of being proved against an accused person to establish an offence, yet for other purposes it would be admissible as an admission, under S. 18, against the person who made it (S. 21) in his character of one setting up an interest in property, the object of litigation or judicial enquiry and disposal. 9 B. 131 (184). **S**

(c) Any statement, made by an accused person, incriminating himself, to be admissible against him, must be free and voluntary, a principle that finds expression, in substance, in Ss. 21, 24, 25 & 26 of the Evidence Act, coupled with S. 164 of the Crim. Pro. Code of 1882. 2 C.W.N. 702 (707), per *Maclean*, C.J. (Case decided on 3rd August 1898). **T**

(d) An accused person, in custody, made, partly in English and partly in Bengali, a statement, to a Presidency Magistrate in Calcutta, in the course of an investigation made by the police in the town of Calcutta, into the circumstances of a crime committed in Calcutta, which the Magistrate recorded in English. During the trial of the accused, the document was tendered in evidence. *Held* that, if the document did not amount to a confession, the document itself would be relevant as an admission under S. 21 of the Evidence Act. 15 C. 595 (F.B.). **U**

(2) Ground on which credence given to statements of accused.

The credence given to the statements of an accused person, when they are voluntary, rests on the improbability of an accused person deliberately adhering to a self-criminatory statement, which is substantially false; and thus variations in detail are of less importance in considering the effect of a confession, than they would be in considering a deposition, incriminating a person other than the deponent. 6 Bom. L.R. 773 (778). **Y**

1 -- "Admissions are relevant and may be proved as against the person who makes them or his representative in interest".—(Continued).

12.—ADMISSIONS IN CRIMINAL CASES.—(Continued).

(2) Right of accused to make partial admissions.

(a) There is no provision of law which says that the accused must either plead not guilty and deny all the facts alleged against him by the prosecution, or plead guilty or confess. There is nothing to prevent him from admitting some facts and pleading that, on those facts, or that, by reason of other facts, he is not guilty of the offence charged against him. 4 Cr. L.J. 471 (475). **W**

(b) An accused person may admit some or even all of the facts alleged by the prosecution, but if he pleads not guilty, the Court trying him is bound to proceed according to law by examining the witnesses and giving an opportunity to the accused to cross-examine the witnesses for the prosecution and adduce his own evidence. 9 Bom. L.R. 1346 (1347). **X**

(4) Accused's admissions not necessary to be proved.

If an accused may, at his trial, admit facts, there appears to be no strong reason why the rule of evidence, that what is admitted need not be proved, should not apply to any fact so admitted, though this may not apply to every case of an admission. 4 Cr. L.J. 471 (475). **Y**

(5) Condition necessary to make accused's admission of guilty knowledge evidence.

Where a prisoner was alleged to have admitted guilty knowledge of the means by which money, supposed to have been acquired by dacoity, had been obtained, *held* that, to make this admission evidence, under S. 150, Crim. Pro. Code, it must be shewn that it was antecedent to the discovery of the money. 17 W.R. (Cr.) 50 (51). **Z**

(6) Effect of prisoner's admission that he was an abettor.

Where a prisoner's admission was to the effect that he was an abettor and that he was present at the time the offence was committed, *held* that S. 114, and not 119, I. P. C. was the proper section to apply to the case. 17 W.R. (Cr.), 52. **A**

(7) Accused pleading guilty to one charge whether can be convicted on another.

Upon the accused pleading guilty before a Sessions Judge to a charge of murder, the Sessions Judge might either convict him on that plea of that charge, or proceed to try him on the evidence, but he cannot, without trial, convict the accused of culpable homicide not amounting to murder, to which offence the accused did not plead guilty. 13 W.R. (Cr.) 55 (56). **B**

(8) Entire admission of prisoner given in evidence—Effect of contradicting any part of it.

Where, after the entire admission of a prisoner has been given in evidence the prosecutor contradicts any part of it, the whole testimony is left to the jury for their consideration, precisely as in other cases, where one part of the evidence is contradictory to another. *R. v. Jones*, 2 C. & P. 639 Tay. Ev. 10th Ed. p. 611. **C**

1.—“Admissions are relevant and may be proved as against the person who makes them or his representative in interest”.—(Continued).

12.—ADMISSIONS IN CRIMINAL CASES.—(Continued).

(9) **Accused's admission recorded according to provisions of Crim. Pro. Code—Effect of absence of formalities prescribed.**

Where the confession of an accused was reduced to writing by a Magistrate in accordance with the provisions of Ss. 122 & 364 of the Crim. Pro. Code, the absence of the formalities prescribed by the sections was held to be matters which affected the weight and the value of the document as evidence and not valid objections to its relevancy as a written admission by the accused. 21 P.R. 1881 (Cr.). **D**

(10) **Accused making two different statements—Effect of taking one of them against him.**

If, where an accused person makes two distinct statements—the one amounting to a confession of guilt, the other repudiating it—one of the statements is taken against him, the other also must be taken, for what it is worth, in his favor. 10 B.L.R. 332. **E**

(11) **Plea of guilty evidence in civil case.**

A plea of guilty in a Criminal Court might be considered in evidence in a civil case, but not a verdict of conviction in the Criminal Court. 10 W.R. 56. **F**

(12) **Condition precedent to using admission against prisoner under S. 150. Cr. P. C. of 1861.**

A Police Officer's deposition should be taken, before an admission can at all be used against a prisoner, under S. 150, Crim. Pro. Code. 9 W.R. (Cr.) 16 (17). **G**

(13) **Instances of admissions and confessions by accused held relevant.**

(a) Having regard to the provisions of S. 21 of the Evidence Act, the confessions made by an accused person to the residents of the neighbouring villages and to the District Magistrate were held to be admissible in evidence. 8 O.C. 395. **H**

(b) The confessions of accused parties are only evidence against themselves. 6 W.R. 84 (Cr) **I**

(c) The admission of prisoners cannot be evidence against any persons other than themselves. 7 W.R. (Cr.) 61 (62). **J.**

(d) The admission of an accused person cannot be taken to be corroborative evidence, or indeed any evidence at all, against anybody other than himself. 8 W.B. (Cr.) 35 (36). **K**

(e) A statement made by a prisoner to the constable who arrested him explaining how he came by property with the theft of which he was charged was held to be admissible in evidence. 10 B.L.R. App. 2. **L**

(f) A confession made by an accused person, before the punchayet who told the accused to speak the truth is admissible in evidence. 11 C.W.N. 904 = 6 Cr. L.J. 154. **M**

(g) Confessions said to have been made before a punchayet and shown to have been clear admissions of the guilty knowledge of, or the participation in, a murder for which the accused were under trial, made by them in the presence of other persons, when they were not in the custody

11.—“Admissions are relevant and may be proved as against the person who makes them or his representative in interest”.—(Continued).

12.—ADMISSIONS IN CRIMINAL CASES.—(Continued).

13.—Instances of admissions and confessions by accused held relevant.—(Contd).

- of the Police, or accused of the murder in question, would be extra-judicial confessions admissible, if proved, against them, subject to the provisions of the Evidence Act relating to confessions. 4 A. 46 (48). N
- (h) If a Judge believes that a confession, even though retracted, contains a true account of the prisoner's connection with the crime, he is bound to act, so far as that prisoner is concerned on the confession, which he believes to be true. 4 A.L.J. 310 = A.W.N. (1907), 140, *per Knox, J.* O
- (i) An admission by an accused person in the presence of several witnesses that he had kicked his deceased wife, and that she had died after receiving the kick was held to be direct evidence against him. 8 W.R. (Cr.) 29 (30). P
- (j) For a case of an unlawful assembly, the members of which were held guilty of an offence under S. 402, I.P.C., on their own admission that they not only knew that the assembly was an assembly for the purpose of committing dacoity, but also that all the persons (including themselves) constituting the assembly lived on the proceeds of dacoity, and had no other means of living. See 7 W.R. (Cr.) 61. Q
- (k) In a case of rape, statements made in the presence of the prosecutrix were admitted as evidence for the prisoner; (but this decision has been considered unsatisfactory). *R. v. Arnall*, 8 Cox. 439; Phip. Ev. 4th Ed. p. 247. R
- (l) Where a person, charged with receiving property stolen by B, did not deny a confession made in his presence by B that B had stolen it, it was held to be relevant against that person. *R. v. Cox*, 1 F. & F., 90 Phip. Ev. 4th Ed. pp. 238 & 251. S
- (m) Statements by the accused before the crime regarding his motives and intentions or the instruments obtained to commit it, are relevant, as admissions, against him. *R. v. Crossfield*, 26 How. St. Tr. 314-5; Phip. Ev. 4th Ed. p. 241. T
- (n) On an indictment for bigamy, the prisoner's admission of a former valid marriage, was held to be some, though not sufficient, evidence to support a conviction. *R. v. Flaherty*, 2 C. & K. 782; *R. v. Savage*, 13 Cox. 178; *R. v. Lindsay*, 66 J.P. 505; but, see, *R. v. Newton*, 2 M. & Rob. 503 & *R. v. Simmonsto*, 1 C. & K. 164. where the evidence was held sufficient, Phip. Ev. 4th Ed. p. 213. U
- (o) A confession, as to which no reasonable doubt existed that it was voluntary and genuine, was held to be legal and sufficient proof of guilt. 7 W.R. (Cr.), 41. Y
- (p) The Admission of a person charged with adultery, coupled with the evidence, to the effect that he went off with the woman, and that he was with her more than a month in various places, was held to lead to the inevitable presumption that acts of adultery must have been committed. 7 W.R. (Cr.), 59. W
- (q) A confession satisfactorily proved was held to be the best evidence available. *R. v. Baldry*, 2 Den. C.C. 430 (446). Tay. Ev. 10th Ed. S. 884, p. 625. X
- (r) The conviction for murder of a prisoner on his own confession was affirmed by the High Court. 6 W.R. (Cr.), 83. Y

1.—"Admissions are relevant and may be proved as against the person who makes them or his representative in interest".—(Continued).

12.—ADMISSIONS IN CRIMINAL CASES.—(Continued).

13.—Instances of admissions and confessions by accused held relevant.—(Contd).

- (s) A confession made by the accused in a previous proceeding is admissible as evidence, if there is proof that the person being tried is the same person who made the confession. L.B.R. (1896-00), 70. Z
- (t) The confession of a prisoner, made before a Magistrate, even if it be retracted before the Judge, is admissible as evidence, provided that it was voluntarily made. 6 W.R. 81 (Cr.). A
- (u) Prisoners may be convicted on their own confessions, without any other corroborative evidence. 6 W.R. (Cr.), 73. B
- (v) In a case of murder by consent, it was held that evidence of consent, which would be sufficient in a civil transaction, would be equally sufficient in exculpation of a prisoner's guilt. 6 W.R. (Cr.) 57 (58). C
- (w) An admission of crime, when fairly made after due warning, was held to be admissible, though, at the time it was made, no formal accusation had been made against the party making it. 4 W.R. (Cr.), 10. D
- (x) The statement of a prisoner before the Magistrate is evidence, whether it were taken as a confession or as an examination. 5 W.R. (Cr.) 1. E
- (y) The admissions of prisoners in their own statements before the Magistrate ought to be given in evidence at the trial. 4 W.R. (Cr.) 18. F
- (z) A prisoner may be convicted on his own confession without any corroborating evidence, even when a confession is retracted. 4 A.L.J. 310 = A. W.N. (07), 140-5 Cr.L.J. 360 = 29 A. 484, per *Knox, J.* G
- (a-1) Under the Evidence Act, admissibility is the rule and exclusion the exception. S. 25, Evidence Act, excludes only "confessions" made by persons accused of any offence; an admission made by an accused person to a Police Officer may be proved, if it does not amount to a confession. 3 N.L.R. 51 = 5 Cr. L.J. 494. H
- (b-1) Where a European British subject waived his right to be tried as such in the First Court, it was held that he could not re-assert it for the purposes of appealing to the Chief Court. 17 P.R. 1878 (Cr.); cited in 1 P.R. 1908 (Cr.). I
- (c-1) For the waiver, made by a European British subject of his privilege to be tried as such, to be effective, it must appear that the accused's rights, as a European British subject have been made known to him and understood by him. 6 C. 83; cited in 1 P.R. 1908 (Cr.). J
- (d-1) A confession made to a private individual would be evidence against a prisoner, when proved by the person to whom the admission was made. 13 W.R. (Cr.) 69 (70). K
- (e-1) The admission of an accused person made to a police officer, before his arrest, is relevant evidence. 6 C. 530 (532) = 7 C.L.R. 541. L
- (f-1) It is not necessary for a Sessions Judge to read out to prisoners the confessions made by them before a Magistrate, and ask them if they have any objection to the reception of these confessions. The examination of prisoners before a Magistrate can be received in evidence and the attestation of the Magistrate is *prima facie* proof of the circumstances. 14 W.R. (Cr.) 9 (10). M

1.—“Admissions are relevant and may be proved as against the person who makes them or his representative in interest.”—(Continued).

12.—ADMISSIONS IN CRIMINAL CASES.—(Continued).

13.—Instances of admissions and confessions by accused held relevant.—(Concl'd).

(q-1) An admission made by an accused person before a Magistrate on another previous occasion would probably be admissible in a subsequent preliminary enquiry in a different way, i.e., it would have to be proved by the Magistrate or by some one who heard him make the admission 13 W.R. (Cr. Letters) 1. per *L.S. Jackson, J.* **N**

(i-1) An admission, not amounting to a confession, however illegally or improperly the Police may have induced it, is not necessarily rendered inadmissible in evidence by anything in the Crim. Pro. Code or the Evidence Act. 8 P.R. 1882 (Cr.). **O**

(i-1) For a case where voluntary confessions of the prisoners (charged with murder) and their consistency with the probabilities of the case were held to reduce their crime from murder to culpable homicide, see 1 W.R. (Cr.) 17 (18). **P**

(j-1) Where a person, charged with giving false evidence, has admitted, both in his examination and in his defence, that he made the statement, which is alleged to be false, the conviction is not necessarily illegal by reason of the fact that no evidence of the identity of the accused with the person who made the alleged false statement was adduced. 4 Cr. L.J. 471. **Q**

(k-1) A confession, made by a prisoner voluntarily before a Magistrate in a Native territory, and recorded by him under S. 164 of the Code of Criminal Procedure, is admissible in evidence in a trial in British India, although such confession was subsequently retracted in the Court of the Committing Magistrate and the Court of Session. 8 P. R. 1907 (Cr.) = 33 P.W.R. 1907 = 6 Cr. L.J. 337 = 46 P.L.R. 1908. **R**
 where the accused made a confession, which he subsequently retracted, admitting that he stabbed his wife on the back, which caused her to fall down in the portico of his house and to die immediately, and partially burnt her body thereafter, held that, as in such cases the accused's story is the only one accounting for the death, it must be accepted except in so far as it is not consistent with reason. 86 P.L.R. 1907 (Summary of recent cases) = 19 P.W.R. (Cr.), 1907 = 6 Cr. L.J. 260. **S**

(14) Instances of accused's admissions and confessions held not relevant.

(a) Certain statements made by the accused containing incriminating matter and made to a Magistrate by him when in the custody of the Police, were held to be inadmissible as admissions under S. 21 of the Evidence Act, unless they were shown to be voluntary. 2 C.W.N. 702 (708). **T**

(b) Where the confessions, made by certain prisoners during the preliminary investigation of a case—but retracted at the trial—amounted to this, that the crime was committed by other persons, and that any share they had in it was under compulsion, held, that, though such a confession contained an important admission, it was not an admission of guilt, upon which any person ought to be convicted. 7 W.R. (Cr.) 8 (9). **U**

(c) Where it was probable that a statement made to a police officer was not intended as a confession of guilt but was rather made by the prisoner

1.—“Admissions are relevant and may be proved as against the person who makes them or his representative in interest”.—(Continued).

12.—ADMISSIONS IN CRIMINAL CASES.—(Continued).

in self-exculpation, it was nevertheless held to be an admission of a criminalizing circumstance on which the prosecution mainly relied as the most important part of the evidence against the accused, coming properly within the rule of exclusion laid down by the Legislature. 6 B. 34 (36 & 37); referred to in 14 B. 260 (263). **Y**

(d) An admission of a criminalizing circumstance elicited from an accused person by a police officer in cross-examination in a departmental enquiry is inadmissible in evidence against the accused. L.B.R. (1893-00), 42 (45). **W**

(e) A deposition by an accused person is inadmissible in evidence against him in another proceeding without proof of his identity. 11 C. 589. **X**

(f) Where the accused did not formally plead guilty, the fact that he threw himself on the mercy of the Court should not prejudice him. 12 C. W.N. 140 = 6 Cr. L.J. 434. **Y**

(g) A prisoner's admission of the prosecutor's *telle* to property was rejected. *R. v. Philp*, 1 Moo. C.C. 263; *Philp. Ev.* 4th Ed. p. 213. **Z**

(h) In criminal cases, admissions for the purpose of dispensing with proof are not generally receivable. *Il. v. Thornhill*, 8 C. & D. 575; *Philp. Ev.* 4th Ed. p. 11; *Steph. Dig.* 7th Ed. p. 73. **A**

(i) In a Criminal trial, the Court is bound to draw no inference of waiver against an accused person, especially in the case of omission by the Court to perform a duty imposed on it, in express terms, by the legislature, in his interest, unless the accused waived it expressly. 9 Bom. L.R. 356 = 5 Cr. L.J. 332. **B**

(j) The accused at a trial pleaded not guilty and the trial proceeded on that footing. At the close of the prosecution evidence, the accused, when asked, admitted the offence, on which the Judge, without taking the opinion of the assessors, found her guilty on her own admission and sentenced her; *held*, reversing the conviction and sentence, that it was the duty of the Judge to proceed with the trial, as provided in S. 309. Cr. P.C., hear the defence and take the opinion of the assessors on the case. 7 Bom. L.R. 731. **C**

(k) Where a Sessions Judge admitted in evidence the accused's plea of guilty to the charge framed against him by the District Magistrate. *held* that the plea should not have been admitted, as an accused person who is committed to the Sessions Court should not be called upon to plead until he is placed on his trial before the Sessions Court. L.B.R. (1893-1900), 52 (53). **D**

(l) The refusal of an accused European British subject to claim the privilege of trial by jury, at the outset of the proceedings against him before the District Magistrate was held in no way to estop him from afterwards asserting his right, provided he did so before he had entered upon his defence. 24 A. 511 (513); referred to in 1 P.R. 1908 (Cr.). **E**

(m) Where a European British subject waived his right to be tried as such, it was held that, under the circumstances of the case, his waiver was not absolutely irrevocable, and that, if he withdrew his waiver shortly and

1.—“Admissions are relevant and may be proved, as against the person who makes them or his representative in interest”.—(Continued):

12.—ADMISSIONS IN CRIMINAL CASES.—(Continued).

promptly after the waiver had been made, and if substantially nothing has been done in the interval upon the abandonment of his privilege, the withdrawal of the waiver should be allowed. 1 P.R. 1908 (Cr.). **F**

(n) A statement to the police by an accused person that, if certain other persons were sent for, he would see that stolen property was traced and restored is not legal evidence to convict the accused of abetment of theft. 2 A.L.J. 53 : 2 Cr. L.J. 22. **G**

(o) Informalities in recording the deposition of an accused person render the record of his evidence inadmissible. 6 C. 762 (763). **H**

(p) It is a direct contravention of the law to admit in evidence against a prisoner, admissions said to have been made by her to the police officers while in their custody, especially when no witnesses are called to prove such statements. 3 W.R. 21 (22) (Cr.). **I**

(q) It is not safe to convict an accused person on his retracted confession standing by itself uncorroborated. 3 P.W.R. 1907 (Cr.). **J**

(r) Where a confession is a suspicious one and grossly improbable in certain parts, it must altogether be set aside. 17 P.W.R. 1907. **K**

(s) Where a Sessions Judge had referred to an admission made by the prisoner's yakil, held that such admissions could not be used against an accused person and that the Judge should be careful not to rely on them in future. 17 W.R. (Cr.) 49. **L**

(t) The bare fact that a person was seen getting on board a boat with four persons who had, on their own admissions, been convicted of belonging to a gang of dacoits, was held not to be sufficient evidence against those so seen. 17 W.R. (Cr.) 50 (51). **M**

•(u) A statement, made by an accused person to the Police as to how he came by the goods, which are alleged to be stolen property, cannot be used in evidence against him, when he is being tried for an offence under S. 411 of the Penal Code. 11 P.L.R. 1905. **N**

(15) Instances of illegal and irregular criminal proceedings held not cured by consent or waiver of accused.

(a) Criminal proceedings, which are substantially bad, cannot be cured by any amount of waiver or consent on the part of the accused, not personal to the latter. 2 C. 23. **O**

(b) When criminal proceedings are substantially bad in themselves, the defect will not be cured by any waiver or consent of the accused or their pleaders. 6 C. 96—6 C.L.R. 521; referring to 2 C. 23. **P**

(c) The prisoner on his trial can consent to nothing. It is the duty of the Magistrate and all Criminal Courts to follow the procedure prescribed by law, and the consent of the accused cannot be invoked against irregularity in procedure. 12 C.W.N. 140. **Q**

(d) Except where the law expressly permits waiver, the rights of an accused person should not be held to be lost by his consent to a procedure or to admission of evidence which the law does not authorise. 12 C.W.N. 140—6 Cr. L.J. 431. **R**

1.—“*Admissions are relevant and may be proved as against the person who makes them or his representative in interest.*”—(Concluded).

12.—ADMISSIONS IN CRIMINAL CASES.—(Concluded).

(e) A prisoner on his trial can consent to nothing. 15 C.P.L. R. 66. **S**

(f) The consent of the accused or his pleader to the illegal combination of charges cannot cure the illegality of a trial. 7 Bom. L.R. 527 (581). **T**

(g) A joint trial of two persons severally charged with having given false evidence was held bad. The fact that the accused, who were defended by a pleader, did not object to the joint trial would not legalise the procedure. The illegality vitiated the trial altogether. 4 Bom. L.R. 53 (55). **U**

(h) Where, after several witnesses were examined the case was transferred to another Magistrate, the latter acts irregularly in convicting the accused upon evidence partly recorded by the former Magistrate. S. 350 of the Cr. P.C., not being applicable to such a case, the irregularity could not be waived by the accused. 12 C.W.N. 140. **Y**

(i) In criminal cases, except by a plea of guilty, admissions dispensing with proof, as distinguished from admissions or confessions, which are evidential, are not allowed in cases of felony. Phip. Ev. 4th Ed. p. 11. **W**

2.—“*but they cannot be proved by or on behalf of the person who makes them or by his representative in interest*”.

(1) **Party not entitled to determine his statements as evidence for him.**

(a) A party cannot himself determine that his own statement shall be used as evidence in his favour. 16 W.R. 257 (258). **X**

(b) Until he has subjected himself to cross examination, no statement which a defendant may volunteer, can be used as any evidence in support of his own case, unless the right, so to use it, has accrued from the deliberate act of his adversary. 16 W.R. 257 (258). **Y**

(2) **Party's own statement may be corroborative.**

A man's own statement is not evidence for him, though in certain cases it may be used as corroborative evidence. 11 W.R. 525 (526). **Z**

(3) **Instances of party's own statement held not relevant.**

(a) Where the declarations of a party are adduced in evidence in his own favour, no presumption of truth will arise with regard to them; otherwise, every man in difficulty, present or prospective, can make statements to suit his own case. *R. v. Hardy*, 24 How. St. Tr. 1093-4; Phip. Ev. 4th Ed. p. 209. **A**

(b) For a case that shows that a woman's admission that she is married is inadequate to prove the fact on her behalf, see *Walton v. Green*, 1 C. & P. 621; Tay. Ev. 10th Ed. p. 546. **B**

(c) Where a party admitted that he had been discharged under the Insolvent Debtors Act, his admission was held insufficient evidence of a valid discharge, as the judicial document, when produced, might be found irregular and void, and the party might be mistaken. *Scott v. Clare*, 3 Camp. 236; Tay. Ev. 10th Ed. p. 320. **C**

(d) In taking the accounts of a mortgagee in possession, his income-tax papers are inadmissible in his favour as evidence of what the collections were; they may be used against the mortgagees but cannot be taken against the mortgagor. 9 W.R. 275. **D**

**3.—“An admission may be proved by or on behalf of the person making it—
—Section 32.”**

(1) Declarations when relevant for party.

- (a) A declaration made by the declarant as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases where the cause of that person's death is in question, is deemed to be relevant. Vide S. 32, sub-s. (1). E
- (b) A declaration is relevant when it was made by the declarant in the ordinary course of business, or in the discharge of professional duty, at or near the time when the matter stated occurred, and of his own knowledge. *Steph.*, Dig. 7th Ed. Art. 27, p. 36. F

(2) Instances of statements of party held relevant for him.

- (a) On the question whether A trusted B with goods in consequence of a third person's representation that B was solvent, A's statement, at the time of supplying the goods to B, that he had received a favorable report of him from the third person, was held to be relevant on behalf of A. *Fellores v. Williamson*, M. & M. 306; *Philp*, Ev. 4th Ed. p. 59; *Tay.*, Ev. 10th Ed. S. 585, p. 411. G
- (b) On the question whether A murdered B, a statement by B to the effect that A murdered him, made when B had no hope of recovery, though his doctor had such hopes, and though B lived ten days after making the statement, was held to be relevant. *R. v. Mosby*, 1 Moo. 97; *Steph.*, 7th Ed. Art. 26, p. 35; *Tay.*, Ev. 10th Ed. S. 718, p. 510; *Philp*, Ev. 4th Ed. p. 294. H
- (c) On the question whether a person delivered certain beer to another, the fact that a deceased drayman of that person, on the evening of the delivery, made an entry to that effect in a book kept for the purpose, in the ordinary course of business, was held to be relevant. *Doe v. Turford*, 3 B. & Ad. 890; *Steph.*, Dig. 7th Ed. Art. 27, p. 36. I

(3) Cases not falling within exception.

- (a) In a suit claiming enforcement of an equitable mortgage, alleged by the plaintiff to have been executed by the deposit of title—deeds with him by the defendant, against whom an adjudication in insolvency had been previously made, the evidence of a witness, whom the plaintiff had told, before the adjudication, that documents relating to the land had then been deposited with him as security by the defendant, was held to be evidence of an admission by a party, within the meaning of S. 21 of the Evidence Act, not admissible in the plaintiff's favour. 19 A. 76 (92) (P.C.). J
- (b) A statement about rent payable for a holding, as given in a sale certificate, obtained by a purchaser of the holding at a sale in execution of a decree against the former tenant, being in the nature of an admission by him or his predecessor in title, cannot be used as evidence on his behalf, as it does not come under any of the exceptions to S. 21. 31 C. 380 (383). K

**4.—“An admission may be proved by or on behalf of the person making it—
—improbable.”**

1.—GENERAL.

(1) Principle.

- (a) “The fundamental proposition is that an intention in the mind of a person can only be shown by some external manifestation, which must

4.—“An admission may be proved by or on behalf of the person making it—improbable.”—(Continued).

1.—GENERAL—(Concluded).

be some look or appearance of the face or body, or some act or speech; and that proof of either or all of those for the purpose of showing the state of mind or intention of the person is proof of a fact from which the state of mind or intention may be inferred.” *Commonwealth v. Trefethen*, 157 Mass. 185; Wigm. Ev. '05 Ed. S. 1714, p. 2205. **L**

- (b) “The doctrine has been that there is a fair necessity, for lack of other better evidence, for resorting to the person's own contemporary statements of his mental condition. It is indeed possible to obtain by circumstantial evidence (chiefly of conduct) some knowledge of a human being's internal state of pain, emotion, motive, design and the like; but in directness, amount, and value, this source of evidence must usually be decidedly inferior to the person's own contemporary assertions of those conditions.” Wigm. Ev., '05 Ed. S. 1714, p. 2204. **M**

(2) Cases elucidating principle.

- (a) “I incline to the opinion that all that the Courts can mean by the use of the phrase under consideration, ‘from the necessity of the case,’ is that necessity growing out of the inherent difficulties connected with an enquiry into, and the very nature of the proof required to show, the mental and physical condition of an individual. From the nature of the case, that condition can only be known as it finds its expression in external symptoms and in the common complaints of pain and distress which are the natural concomitants of illness and physical injury.” *Sanders v. Reister*, 1 Dag. 173; Wigm. Ev., '05 Ed. S. 1714, p. 2205. **N**
- (b) “Wherever it is material to prove the state of a person's mind, or what was passing in it, what were his intentions, there you may prove what he said, because that is the only means by which you can find out what his intentions are.” *Sugden v. St. Leonards*, L.R. 1 P.D. 151; Wigm. Ev., '05 Ed. S. 1714, p. 2205. **O**
- (c) “A man's state of mind or feeling can only be manifested to others by countenance, attitude, or gesture, or by sounds or words, spoken or written.” *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285; Wigm. Ev., '05 Ed. S. 1714, p. 2205. **P**
- (d) “It is almost the only kind of evidence by which the condition of body or mind can be ascertained.” *Biles v. Holmes*, 11 Fred. 90; Wigm. Ev., '05 Ed. S. 1714, p. 1205. **Q**

2.—THE ADMISSIONS MUST BE MADE AT OR ABOUT THE TIME WHEN THE STATE OF MIND OR BODY EXISTED.

Illustrations.

- (a) “The evidence is admitted on the presumption, arising from experiences, that when a man does an act his contemporary declaration accords with his real intention, unless there be some reason for misrepresenting such intention.” *Hadley v. Carter*, 8 N.H. 42; Wigm. Ev. '05 Ed. S. 1714, p. 2205. **R**

4.—“*An admission may be proved by or on behalf of the person making it—improbable.*”—(Continued).

2.—THE ADMISSIONS MUST BE MADE AT, OR ABOUT THE TIME WHEN THE STATE OF MIND OR BODY EXISTED.—(Continued).

Illustrations.—(Continued).

- (b) “Such declarations, made with no apparent motive for misstatement, may be better evidence of the maker’s state of mind *at the time* than the subsequent testimony of the same person.” *Elmer v. Fessenden*, 151 Mass. 359; Wigm. Ev. ’05 Ed. S. 1714, p. 2205. **S**
- (c) “Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence. These expressions are the natural reflexes of what it might be possible to show by other testimony...As independent explanatory or corroborative evidence, it is often indispensable to the due administration of justice...Such evidence must not be extended beyond the necessity upon which the rule is founded. It must relate to the *present*, not to the past. Anything in the nature of narration must be excluded.” *Insurance Co. v. Mosley*, 8 Wall. 397; Wigm. Ev. ’05 Ed. S. 1714, p. 2205. **T**
- (d) “The *present* state of health or feeling is always allowed to be proved in this way, since it is the only mode in which it can be shown.” *State v. Howard*, 32 Vt. 380, 404; Wigm. Ev. ’05 Ed. S. 1714, p. 2205. **U**
- (e) “The declarations of the defendant as to his intent or object in killing the cow do not depend in the slightest degree upon the credit that might be awarded to him as a man, but solely and exclusively upon the presumption arising from experience that his *contemporary* declarations accord with his real intentions.” *Cornelius v. State*, 12 Ark. 805; Wigm. Ev. ’05 Ed. S. 1714, p. 2205. **Y**
- (f) “The ground of receiving those declarations is that they are reasonable and natural evidence of the true situation and feelings of the person *for the time being*. But in reference to past periods they have no such claim to confidence, as they are manifestly, to that purpose, but the narrative of one not upon oath.” *Lush v. Mc. Daniel*, 13 Ired. 487; Wigm. Ev. ’05 Ed. S. 1722, p. 2216. **W**
- (g) “A witness has been received to relate that which has always been received from patients to explain,—her own account of the cause of her being in bed at an unseasonable hour with the appearance of being ill... What were the complaints, what the symptoms, what the conduct of the parties themselves *at the time*, are always received in evidence upon such inquiries, and must be resorted to from the very nature of the thing. . . . The declaration was upon the subject of her own health *at the time*, which is a fact of which her own declaration is evidence; and that too made unawares before she could contrive any answer for her own advantage and that of her husband, and therefore, falling within the principle of.” *Thomson v. Trevanion*, Skinner, 402. *Aveson v. Kinnaird*, 6 East 195; Wigm. Ev. ’05 Ed. S. 1714, p. 2204. **X**

4.—“An admission may be proved by or on behalf of the person making it—*improbable*.”—(Concluded).

2.—THE ADMISSIONS MUST BE MADE AT OR ABOUT THE TIME WHEN THE STATE OF MIND OR BODY EXISTED.—(Concluded).

Illustrations.—(Concluded).

(h) “Expressions of *present* existing pain and of its locality are admitted upon the ground of necessity as being the only means of determining whether pain or suffering is endured by another. The rule is not to be extended beyond the necessity upon which it is founded, and, therefore, not to past events or the circumstances of the injury.” *Cleveland C.C. & I.R. Co. v. Newell*, 104 Ind. 269; Wigm. Ev. '05 Ed. S. 1722, p. 2215. Y

5.—“An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.”

(1) General.

(a) Illustrations (d) and (c) show cases in which statements not proveable on a man's behalf as admissions, may yet be admissible under other provisions of the Code. For example, the recitals in a deed, admissible as a transaction by which a right was asserted, &c., would be admissible under S. 13, though they will be excluded as admissions. 10 B.L.R. 263; Cun. Ev. 10th Ed. p. 138. Z

(b) With reference to the third clause of S. 21, an admission may be proveable on behalf of the person making it by being relevant—otherwise than an admission—under S. 6 or some one of the sections following it. Field. Ev. 6th Ed. p. 94. A

2) Admissions relevant otherwise than as admissions.

(a) Where two defendants denied a former exclusive possession by them, and a partition in their favour, a petition and a written statement filed by them in a former suit were held to be relevant against them under S. 21 (3) and S. 11 (2) of the Evidence Act. 25 C. 210=2 C.W.N. 91 (93); see, also, under S. 11, *supra*. B

(b) In an action for assault and battery upon the wife of the plaintiff, Lord Holt allowed that what the wife said immediately upon the hurt received, and before she had time to devise or contrive anything for her own advantage might be given in evidence. *Thompson v. Trevanion*, Skinner, 402; Wigm. Ev. '05 Ed. S. 1746, p. 2250. C

(c) In a case of manslaughter by driving a cab over a person, statements made by the deceased, to a person who did not witness the accident but immediately afterwards heard the deceased person groan and went up and asked what was the matter, were admitted, on the principle that they were the best possible testimony that, under the circumstances, could be adduced to show what it was that had knocked down the deceased. *R. v. Foster*, 6 C. and P. 325; Wigm. Ev. '05 Ed. S. 1746, p. 2250. D

(d) “Declarations of an individual made at the moment of a particular occurrence, when the circumstances are such that we may assume that his mind is controlled by the event, may be received in evidence, because they are supposed to be expressions involuntarily forced out of him

5.—“An admission may be proved by behalf of the person making it, if it is relevant otherwise than as an admission”—(Concluded).

by the particular event and thus have an element of truthfulness they might not otherwise have. But you are not to give any more weight to a declaration thus made, or any weight at all, unless you are satisfied that it was made at a time when it was forced out as the utterance of a truth, forced out against his will or without his will, and at a period of time so closely connected with the transaction that there has been no opportunity for subsequent reflection or determination as to what it might or might not be wise for him to say. *U. S. v. King*, 34 Fed. 311; Wigm. Ev. '05 Ed. S. 1747, p. 2252. **E**

- (c) Whatever force is given to dying declarations as the utterances of those who on account of their peculiar situation may be relied on to tell the exact truth as it appears to them, must needs be accorded also to the exclamations of mortal terror caused by deadly assault. To reject the evidence afforded by the agonized entreaties of one standing face to face with death in the person of a murderer with an uplifted weapon is quite unreasonable. *State v. Wagner*, 61 Mo. 195; Wigm. Ev. S. 1747, p. 2251. **F**

22. Oral admissions as to the contents of a document are not relevant, ⁽¹⁾ unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question.

•When oral admissions as to contents of documents are relevant.

(Notes).

1.—“Oral admissions as to the contents of documents are not relevant.”

(1) Rule in section a departure from English Law.

The rule contained in S. 22 is a change from the English Law, according to which the oral admission of a party as to the contents of a document is admitted, even when the document might have been produced as evidence against him. This doctrine was, after great consideration, affirmed by the Court of Exchequer in *Slatterie v. Pooley*, 6 M. & W. 664; Cun. Ev. 10th Ed. p. 139. **G**

(2) English law.

- (a) Where a party makes an admission out of Court, they are primary evidence against him to prove the contents of documents, without notice to produce, or accounting for the absence of the originals, though here the chances of error are double instead of single. *Slatterie v. Pooley*, 6 M. & W. 664; Phip. Ev. 4th Ed. p. 213; Tay. Ev. 10th Ed. p. 319; Best Ev. 9th Ed. p. 433. **H**

- (b) It is a rule of the law of evidence in England that the statement of a party to a suit is admissible original evidence against himself to prove the contents of a written instrument, and the same rule is applicable here. 3 M.H.C. 158 (160). **I**

1:—" *Oral admissions as to the contents of documents are not relevant.*"

—(Continued).

(3) Analogous Indian decisions.

- (a) Although a plaintiff, when the defendant denies his claim, is bound to prove his case by the document on which he relies, still, if the defendant admits any sum to be due, that admission, irrespective of proof offered by the plaintiff, is sufficient to warrant a decree for that amount in the plaintiff's favour. 6 W.R. 132 (133). **J**
- (b) In a suit to recover the balance of rent due under, and founded on, a lease, it was held that the plaintiff might, so far as regards proof of the terms of the lease, recover on the defendant's admission without the payment of the stamp duty and penalty. 3 M.H.C. 158 (160). **K**
- (c) Whether the document is produced or not, the basis of the decree would be the jural relation created by the concordance of wills between the parties, and, of that jural relation, the document is merely evidence, but, if its production is essential, on the principles of the law of evidence, the only evidence. Where, however, that jural relation is admitted upon the record, the production of the document becomes unnecessary, and there is no violation of the Act in decreeing in accordance with the admission. 3 M.H.C.R. 342; cited in U. B. R. (1897-01), p. 380. **L**
- (d) Where the first defendant conveyed certain lands and houses to some other defendants by a written instrument which, though presented for registration, was returned to the first defendant at her request in consequence of her objecting to its registration, and she conveyed the same land to the plaintiff by a written instrument which was subsequently registered, held, in a suit by the plaintiff to recover the property from her, that evidence of certain admissions, made by the first defendant in the enquiry held before the Registration Officer, were relevant against the plaintiff as to the terms of the sale. 7 M.H.C.R. 13 (17). **M**
- (e) Where there is an independent admission of a loan, the holder of a bill or note, which is defective and inadmissible in evidence for want of a stamp, may still sue, on the consideration, the person to whom he gave it, though he cannot use the bill in support of his suit. 24 B. 360 (363, 366). **N**
- (f) An agreement admitted by the plaintiff need not be proved, although apparently, if proof had been necessary, it could not have been afforded owing to the document, embodying the agreement, not having been registered. 24 C. 20; cited in U.B.R. (1897-91), p. 380. **O**
- (g) In a suit to recover the amount due on a pro-note by the payee, the defence was that the consideration was advanced, not by the plaintiff, but by a third party, on whose account the note was taken with the name of the plaintiff as payee and that, the amount having been duly re-paid to the real party, the suit was fraudulent and unsustainable. Held that it was competent to a defendant to adduce oral evidence, in a suit on a pro-note, to show that the plaintiff was not the true owner, if such proof would enable the defendant to establish a defence, consistent with other rules governing negotiable instruments, valid against the true owner. 28 M. 244; per *Subramanier, J. Davies, J. contra*. **P**
- (h) Parol evidence is admissible to show to what debt an acknowledgment in writing relates. 12 W.R. (app. O.J.) 2 (3). **Q**

1.—“Oral admissions as to the contents of documents are not relevant.”

—(Continued).

(4) Judge may direct production of documents in such cases.

The Judge also may direct the document itself to be produced in cases where a party's admissions to prove the contents of a written document are tendered in evidence. *Farrow v. Blomfield*, 1 F. & F. 653; Phip, Ev. 4th Ed. p. 213. R

(5) Party cannot be compelled to make admissions.

Although a party's admissions out of court are primary evidence against him of the contents of documents and he may be asked on cross-examination not only as to previous inconsistent writings made by himself, but also as to any other documents, yet he cannot be compelled to make such admissions in the box. *Henman v. Lester*, 31 L.J.C.P. 370; Phip. Ev. 4th Ed. p. 462. S

(6) Case where rule of English Law not applicable.

Generally, a person who takes a pro-note, with the idea of settling prior transactions, can, when the note is improperly stamped, resort to, and sue upon, the original consideration. But where the creditor gives a receipt, admitting complete satisfaction of prior transactions by the delivery of the pro-note, and his having no further claim thereon, the above rule would not apply. 82 P.R. 1891; following 7 C. 256. T

(7) Propriety of rule questioned.

(a) The propriety of the rule, however, has been much questioned on the ground that, though what a party himself admits may reasonably be presumed to be true, there is no such presumption in favour of the truthfulness of the evidence by which such admission must be proved. *Sanders v. Karnell*, 1 F. & F. 356; Best, Ev. 9th Ed. p. 440, & Cun. Ev. 10th Ed. p. 140. U

(b) The doctrine that parol admissions can prove the contents of a written document is the most dangerous proposition; by it a man might be deprived of an estate of 10,000 £ per annum, derived from his ancestors by regular family deeds and conveyances, by producing a witness, or by one or two conspirators, who might be got to swear they heard the defendant say he had conveyed away his interest therein by deed, or had mortgaged or otherwise encumbered it; and thus, by the facility so given, the most open door would be given to fraud, and a man might be stripped of his estate through this invitation to fraud and dishonesty. *Lawless v. Queale*, 8 Ir. Law Rep. 382; Best Ev. 9th Ed. p. 440; Tay. Ev. 10th Ed. p. 320; also 12 C. 69 (79). Y

(8) Section follows *Lawless v. Queale*, cited *supra*.

The view expressed in *Lawless v. Queale*, 8 Ir. L.R. 382, has been adopted in the Evidence Act. Cun. Ev. 10th Ed. p. 140. W

(9) Instances of oral admissions held not relevant to prove contents of documents.

(a) Where the supposed admission is contained in a writing produced to the Court, it should suffice to dispense with the attesting witness; but not where it is alleged as a mere oral utterance and is denied by the opponent. Wigm. Ev. '05 Ed. S.1900, p. 1583. X

1.—“*Oral admissions as to the contents of documents are not relevant.*”

—(Continued).

- (b) When the original cause of action is the bill or note itself and does not exist independently of it, the note is the only contract between the parties, and, if for want of a proper stamp or some other reason, the note is not admissible in evidence, the creditor must lose his money. 7 C. 256 (260). **Y**
- (c) Where the consideration of a bill is advanced by the plaintiff to the defendant upon that particular bill, the bill itself is the best evidence of the terms upon which the advance was made, and the plaintiff cannot establish his case without proving the bill. 8 C. 721=11 C.L.R. 310 (312), following 7 C. 256. **Z**
- (d) In the absence of direct evidence of a transaction, which might reasonably be expected, it would, in accordance with principle, be exceedingly dangerous, especially in this country, to rely upon verbal statements of oral admissions. 12 C. 69 (78), referring to 10 I.A. 74 and *Lawless v. Queale*, 8 Ir. L.R. 382. **A**
- (e) Where a plaintiff lends money on terms contained in a promissory note given at the time of the loan, he must prove those terms by the promissory note. The decisions which have held otherwise (23 C. 851) ignore the provisions of Ss. 91, 65 and 22 of the Evidence Act and it cannot be denied that these decisions condone and encourage evasion of the Stamp Act. 26 A. 178 (182)—A.W.N. (1903) 217, per *Aikman*, J, following 7 C. 256 and 8 C. 721. **B**
- (f) Where the suit is brought on a promissory note as the original cause of action and the document is itself inadmissible in evidence for want of stamp, the admission of the contents of the document made by the defendant in his written statement does not avail the plaintiff. 12 B. 443 (445). **C**
- (g) Where, in a suit for accounts, the plaintiff failed to produce his accounts and the defendant made verbal admissions that a certain sum was due by him to the plaintiff, held that it would be unsafe in such a case to decree in favour of the plaintiff on the strength of the oral admissions, in the absence of clear and cogent proof of such admissions, especially when the plaintiff keeps back his accounts from the Court. 10 I.A. 74 **D**
- (h) Proof of a sale necessarily involves proof of the consideration for which the property passed; that is, of the terms upon which the parties dealt, and it follows that, in the present case, there being a writing, the sale cannot be proved by mere oral evidence. 7 M.H.C.R. 13 (19). **E**
- (i) Under S. 19 of the Limitation Act, XV of 1877, oral evidence of the contents of an acknowledgment may not be received, nor is there any saving of acknowledgments received or given back before the Act came into operation. 12 B. 268 (269). **F**

10) Explanation of 3 M.H.C.R. 158, cited *supra*.

The case at 3 M.H.C. 158 applied to the defendant's admission of a transaction embodied in a written document not receivable in evidence and is no authority whatever for construing a document, present to the Court, upon a defendant's admission. 6 M.H.C.R. 245 (246). **G**

1.—“Oral admissions as to the contents of documents are not relevant.

—(Concluded).

(11) Construction of para 2, S. 19, Limitation Act.

Para 2 of S. 19 of the Limitation Act, XV of 1877, belongs to the branch of the law of evidence, covered by S. 91 of the Evidence Act, and ought not to be read as excluding secondary evidence of the contents of an acknowledgment, which has been lost or destroyed. 12 C. 267 (271). **H**

(12) Party's admission in deposition is secondary evidence only.

A plaintiff's admission, made not in the pleadings, but in a deposition, of the contents of a document, was held to be merely secondary evidence and not to supply the place of the document itself. 8 B.H.C.R. (A.C.) 163 (165). **I**

(13) Ss. 58 & 65 of the Evidence Act.

This section will not, of course, exclude admissions which the parties agree to make at the trial, under S. 58, *infra*, in which case, it becomes unnecessary to prove the facts so admitted. Cum. Ev. 10th Ed. p. 140; see, also, S. 65, *infra*, for the rules regulating the admissibility of secondary evidence of documents. **J**

23. In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given. ⁽¹⁾

* Admissions in civil cases when relevant.

Explanation.—Nothing in this section shall be taken to exempt any barrister, pleader, attorney, or vakil from giving evidence of any matter of which he may be compelled to give evidence under section 126.

(Notes).

1.—“In civil cases no admission is relevant, if it is made—given, or under circumstances—given.”

(1) Section does not extend to criminal cases.

This—Field Ev. 6th Ed. p. 95; see also Cum. Ev. 10th Ed. p. 152; and S. 29, *infra*. **K**

(2) It applies to civil cases only.

(a) In civil actions, admissions, made under circumstances from which the Judge infers that the parties agreed together that evidence of it should not be given, are not relevant. *Paddock v. Forrester*, 3 M. & G. 903; Steph. Dig. 7th Ed. Art. 20, p. 29; Wigm. Ev. 1905 Ed. S. 1062, p. 1235. **L**

(b) No admission is relevant in any civil action, if it was made upon an express condition that evidence of it should not be given. *Cory v. Bretton*, 4 C. & P. 462; Steph. Dig. 7th Ed. Art. 20, p. 29; Wigm. Ev. 1905 Ed. S. 1062, p. 1234. **M**

1.—“In civil cases no admission is relevant, if it is made—given, or under circumstances—given.”—(Continued).

(3) Principle.

A concession which is hypothetical only can never be treated as an assertion representing the party's actual belief and, therefore, cannot be an admission; and, conversely, an unconditional assertion is receivable, without any regard to the circumstances which accompany it. Wign. Ev. '05 Ed. S. 1061, p. 1229—1230. N

(4) Test of admissibility of statement, marked without prejudice.

(a) The preliminary question always is not merely whether an admission of a fact was made during a settlement or negotiation, but whether a statement or act was intended to be an admission. It is a question, not of time or circumstances, but of intention. On that question, the time and circumstances may be material evidence. An offer of payment, whether accepted or rejected, is evidence, when the party making it understood it to be, and made it as, an admission of his liability. It is not evidence when he made it for the purpose of averting litigation, not intending to admit his liability. An entire claim may be paid to avoid a law suit, the payer intending to admit nothing but his desire for peace. “Compromise” generally signifies a settlement in which there is a concession on both sides. Used in that sense, the word does not describe all the cases in which peace is bought without an admission of liability, and is not an adequate statement of the law. *Colburn v. Gorton*, 66 N.H. 151, 156, 28 Atl. 95; Wign. Ev. '05 Ed. S. 1061, p. 1233. O

(b) What is important is the *form* of the statement, whether it is *hypothetical* or *absolute*. If, making all implications from the context and the circumstances, the statement assumes the adversary's claim to be well-grounded for the mere purpose of discussing a settlement which will avoid litigation, then nothing is actually admitted in any true sense; and, therefore, the party making it is in none the worse condition for having omitted the phrase “without prejudice,” nor for having offered the full amount of the claim without any pretence of compromise. If, on the other hand, the statement is absolute, so far as appears, it is not saved by any cabalistic phrase nor by its occurrence in the course of compromise-negotiations. Wign. Ev. '05 Ed. S. 1061, p. 1232. P

(5) Ground on which ‘offers to compromise’ are protected.

(a) The ground on which *confidential overtures of pacification* and any other offers or propositions between litigating parties, expressly or impliedly made “without prejudice,” are excluded is that of public policy; if this were not so, it would often be difficult to take any steps towards an amicable compromise or adjustment. Lord Mansfield has observed that all men must be permitted to purchase their peace, without any prejudice to themselves, were the offer not to succeed; such offers being made with the object of stopping litigation, without regard to the question whether anything is due or not. Tay. Ev. 10th Ed. S. 795, p. 560. Q

(b) Offers to compromise made “without prejudice” are protected by this section. “Such communications made with a view to an amicable

1.—“In civil cases no admission is relevant, if it is made—given, or under circumstances—given.”—(Continued).

arrangement ought to be held very sacred, and, even if the correspondence contained any admission affecting the plaintiff's rights, such admissions, made solely with a view to compromise, should be disregarded.” *Hoghton v. Hoghton*, 15 Beav. 278, 315, 321; Wigm. Ev. ‘05 Ed. S. 1062, p. 1235, see, also, Field. Ev. 6th Ed., p. 95.

(6) Meaning of ‘without prejudice.’

R

(a) “What is the meaning of the words ‘without prejudice’? I think they mean, without prejudice to the position of the writer of the letter, if the terms he proposes are not accepted. If the terms proposed in the letter are accepted, a complete contract is established, and the letter, although written ‘without prejudice’, operates to alter the old state of things and to establish a new one.” Per *Linley, L.J.*, in *Italko v. Walsher*, L.R. 23 Q.B.D. 335; Wigm. Ev. ‘05 Ed. S. 1061, p. 1231.

S

(b) What do the words without prejudice mean? Simply this. “I make you an offer, if you do not accept it, this letter is not to be used against me”. Per *James, L.J.*, in *re River Steamer Co., Mitchell's Claim*, 6 Ch. App. 822, 827, cited in 23 B. 177 (180); see also, per *Mellish, L.J.*; Wigm. Ev. ‘05 Ed. S. 1061, p. 1231, *infra*.

T

(c) “If a man says his letter is ‘without prejudice’, that is tantamount to saying, ‘I make you an offer which you may accept or not, as you like, but, if you do not accept it, my having made it is to have no effect at all. It appears to me, not on the ground of bad faith, but on the construction of the document, that when a man says in his letter, it is to be ‘without prejudice,’ he cannot be held to have entered into any contract by it, if the offer contained in it is not accepted.” Per *Mellish, L.J.*, in *re River Steamer Co.*, L.R. 6 Ch. App. 822, 832; Wigm. Ev. ‘05 Ed. S. 1061, p. 1231.

U

(7) ‘Offer to compromise,’ what is.

The essence of an ‘offer to compromise’ is that the party making that offer is willing to submit to a sacrifice and to make a concession. *Thomson v. Austen*, 2 Dowl. and Ry. 358, 361. Wigm. Ev. ‘05 Ed. S. 1061, p. 1231. See also, Tray, Ev. 10th Ed. S. 795, p. 561.

Y

(8) Instances of letters marked “without prejudice” excluded.

(a) Nothing which passes between the parties to a suit in any attempt at arbitration or compromise should be allowed to effect the slightest prejudice to the merits of their case as it eventually comes to be tried before the Court. Unless this were so, the only thing that could be prudently recommended to suitors would be never to listen for one moment to any proposal to settle the matter, or to compromise it, after it had come into the Civil Court. 20 W.R. 172 (173).

W

(b) Where a compromise was entered into an appeal, which was subsequently cancelled, as the agent of one of the parties to the suit was not authorised to enter into it, but the appellate Court dismissed the appeal after taking into consideration the facts admitted by the appellant in the compromise deed, held that S. 23 of the Evidence Act precluded the Court from making use of the admissions contained in the deed of compromise. 83 P.R. 1877.

X

1.—“In civil cases no admission is relevant, if it is made—given, or under circumstances—given.”—(Continued).

- (c) Money paid upon a complaint made, paid merely to purchase peace, is no proof that the demand is well-founded. It is very often a wise thing, however unfounded a complaint may be, for parties to pay a sum of money in order to quiet the party making the complaint. *Tenant v. Hamilton*, 5 Cl. & F. 133; Wigm. Ev. '05 Ed. S. 1061, p. 1231. **Y**
- (d) Where a letter was sent to the adverse party by a solicitor, expressed to be written “without prejudice,” it cannot be received as an admission nor can the reply be admitted, even though not guarded in a similar manner. *Paddock v. Forrester*, 3 M. & G. 903; Tay. Ev. 10th Ed. S. 782, p. 552, Phip. Ev. 4th Ed. L. 211, Steph. Dig. 7th Ed. Art. 20, p. 29. **Z**
- (e) Where a person was sued for keeping mischievous dogs which had killed some of the cattle of the plaintiff, and it was proved that, on being apprised of the injury done by his dog, offered compensation for it, *held*, though this fact should have been submitted to the Jury as evidence of *scienter*, it was entitled to little, if any, weight, “as it might have been made from motives of charity, without any admission of liability at all.” *Thomas v. Morgan*, 2 C. M. & R. 496, Tay. Ev. 10th Ed. S. 796, p. 562 & Wigm. Ev. '05 Ed. S. 1062 p. 1231–5. **A**
- (f) Letters marked “without prejudice” cannot, without the consent of both the parties be read on a question of costs in order to show willingness to settle, although the bare fact and date of such letters and negotiations, as distinguished from their contents, may sometimes be relevant to explain delay. *Walker v. Wilsher*,* 23 Q.B.D. 335, C.A. Phip. Ev. 4th Ed. p. 211 Tay. Ev. 10th Ed. S. 795, p. 561; Wigm. Ev. '05 Ed. S. 1062, p. 1235.* (Note,* also, spelt Wiltshire).

(9) Instances of such letters held relevant.

- (a) An offer “without prejudice” will be admitted in evidence, if the offer has been accepted. *Re River Steamer Co.*, L. R. 6 Ch. 822; *Walker v. Wilsher*, 23 Q. B.D. 335, C. A. & *Re Lette*, 72 L.T. Jo. 97; Phip. Ev. 4th Ed. p. 211. **B**
- (b) Where a person sued another on a bill of exchange, of which the latter had received no notice of dishonour, and the latter wrote “without prejudice” that he would waive the omission to give notice, if the former would receive the debt without costs and the former accepted the offer but the latter made default in payment, *held*, in a fresh action that the latter's admission was relevant. *Holdsworth v. Dunsdale*, 19 W. R. 798; Phip. Ev. 4th Ed. p. 215. **C**
- (c) An offer of compromise is clearly relevant as *some* evidence of liability, in the absence of any express or strongly implied restriction as to confidence. *Wallace v. Small*, M. & M. 446; Tay. Ev. 10th Ed. S. 796, p. 561; Wigm. Ev. '05 Ed. S. 1062, p. 1231. **E**
- (d) In the absence of any such express agreement, or implied condition, an offer of compromise will be *some* evidence of liability: but it must be borne in mind that such an offer may be made for the sake of purchasing peace, and without any admission of liability. Much depends upon the circumstances of each case. Field. Ev. 6th Ed. p. 95. **F**
- (e) The mere fact of an offer having been made is entitled to considerable weight, *e.g.*, if the drawer of a bill, whose signature in question, has

I.—“ In civil cases no admission is relevant, if it is made—given, or under circumstances—given.”—(Continued).

proposed a settlement. *Harding v. Jones*, Tyr. & Gr. 135; Tay. Ev. 10th Ed. S. 796, p. 562. **G**

(f) A letter marked “without prejudice” containing a threat against the person who receives it, if the offer be not accepted, is relevant to prove the threat. *Kurtz v. Spence*, 58 L.T. 438; Phip. Ev. 4th Ed. p. 211. **H**

(g) Where a person, sued on a bill of exchange, during confidential negotiations for a settlement admitted the signature of the bill to be his, held, this was relevant against him, though the rest of the negotiations were not. *Walbridge v. Kemnison*, 1 Esp. 143; Phip. Ev. 4th Ed. p. 215; see, also, Tay. Ev. 10th Ed. S. 795, p. 561. **I**

(h) Where admissions had been made before an arbitrator and the reference to the arbitrator proved ineffectual, it was held that the admissions were relevant in a subsequent trial of the same cause. *Gregory v. Howard*, 3 Esp. 113; Tay. Ev. 10th Ed. S. 796, p. 562. **J**

(i) It has been held in the American Courts that the evidence of the admission of any independent fact is admissible, even though it was made during a treaty of compromise. *Mount v. Bogert*, Anthon, 190 (Am.); Tay. Ev. 10th Ed. S. 795, p. 561 & the cases there cited. **K**

(10) Conditions under which letters without prejudice will be operative.

(a) A letter written with regard to an action and marked “without prejudice” was held to be privileged only for the purposes of that action. *Strelton v. Strelbs*, Times, Feb. 28, 1905, C. A., 10 C.W.N. XLII (XLIII) & Phip. Ev. 4th Ed. p. 211. **L**

(b) Letters marked “without prejudice” are only protected when there is a dispute or negotiation pending between the parties and the letters have been *bona fide* written with a view to its compromise. *Grace v. Baynton*, 21 Sol. Jol. 631; Phip. Ev. 4th Ed. p. 211. **M**

(c) A letter by a debtor to a creditor offering to compound the debt and declaring himself unable to pay and about to suspend if no composition could be made and marked “without prejudice” was held to be relevant, as it was not an offer of terms of settlement in a pending dispute or negotiation. *Re Daintrey*, 2 Q.B. 116; Wigm. Ev. '05 Ed. S. 1062, p. 1235; Phip. Ev. 4th Ed. p. 211 & 23 B. 177 (180). **N**

(d) The remarks of *Vaughan Williams, J.*, in *In re Daintrey; Ex parte Holt*, 2 Q.B. 116, are not mere *obiter dicta*. They state the fact that the rule which excludes documents marked “without prejudice” has no application unless some person is in dispute or negotiation with another, and terms were offered for the settlement of the dispute or negotiation. That rule is to be found in many cases. *Per Candy, J.* 23 B. 177 (180). **O**

(e) With reference to a post card, having on it the words “without prejudice,” *Candy, J.*, observed, “I doubt whether the postcard was inadmissible in evidence. To exclude it from evidence, it would be necessary to hold that the words “without prejudice” amounted to an express condition that the card should not be used in evidence against the writer. In England apparently the card would have been admissible.” 23 B. 177 (180). **P**

1.—“In civil cases no admission is relevant, if it is made—given, or under circumstances—given.”—(Continued).

(f) A letter marked “without prejudice” protects subsequent (*Paddock v. Forrester*, 3 M. & G. 903; *Re Harris*, 44 L. J. Bky. 33) and even previous (*Peacock v. Harper*, 26 W.R. 109, *Oliver v. Nautilus Co.*, 2 K. B. 639, C. A.) letters of the same correspondence. Phip. Ev. 4th Ed. p. 211. **Q**

(g) The protection afforded to letters marked “without prejudice” applies only between the same parties, and not between them and third persons. • *Teign Valley Co., v. Woodcock*, Times, July 22, 1899; Phip. Ev. 4th Ed. p. 212. **R**

(11) Offer of compromise from an unauthorised person.

An ——— cannot amount to an admission of the party himself. *State v. Jaeger*, 66 M. O. 173 (offer from defendant's wife); Wigm. Ev. '05 Ed. S. 1061, p. 1234. **S**

(12) An illustration of the inveteracy of the “without prejudice” notion.

“Mr. Chitty relates an anecdote of a young attorney who had been carrying on a correspondence with a young lady, in which he had always, as he thought, expressed himself with the greatest caution. Finding, however, that he did not perform what he had led the lady to believe that he would, she brought an action for breach of promise of marriage against him. When his letters were produced on the trial, it appeared that he had always concluded—‘this without prejudice, from yours faithfully, C.D.’ The Judge facetiously left it to the jury to determine whether these concluding words, being from an attorney, did not mean that he did not intend any prejudice to the lady, and the Jury found accordingly.” Law & Lawyers, II, 305; Wigm. Ev. '05 Ed. S. 1061, p. 1231. **T**

(13) Caution to be observed by Courts.

When an attorney goes to an adverse party with a view to a compromise or to an action, the Courts must always look with very great care at his evidence of what then transpired. *Jorden, v. Money*, 5 H.L.C. 245; Field. Ev. 6th Ed. p. 96. **U**

24. A confession (1) made (2) by an accused person (3) is irre-

Confession caused by inducement, threat, or promise, when relevant in criminal proceeding.

levant (4) in a criminal proceeding (5), if the making of the confession appears to the Court (6) to have been caused by any inducement, threat, or promise (7), having reference to the charge against the accused person (8), proceeding from a person in authority (9), and sufficient, in the opinion of the

Court (10), to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil (11) of a temporal nature (12) in reference to the proceedings against him (13).

(Notes).

General.(1) **Source of substantive and adjective law of confession.**

- (a) The substantive law of confession in India is contained in Ss. 24 -30 of the Evidence Act and the adjective law in Ss. 161, 364 & 533, Crim. Pro. Code. 6 C. W. N. ccx. Y
- (b) The conditions, under which a confession made by an accused person is, admissible in evidence against him, are laid down by the Legislature in the Evidence Act and in the Criminal Procedure Code. L. B. R. (1893--1900), 145 (146). W

(2) **Subsidiary matters pertaining to confessions.**

--are dealt with in Ss. 18, 114 and 133 of the Evidence Act and Ss. 209, 287, 288, 298, 337, 339 and 312 of the Code of Criminal Procedure. 6 C. W. N. ccx. X

(3) **What the section enacts.**

S. 24 declares that confessions caused by inducement, threat, or promise are irrelevant, 6 A. 509 (538), *per Mahmood, J.* See, also, L. B. R. (1897 -1901) (Cr.), 147 (148) & 2 L. B. R. 168 (170). Y

(4) **Exception.**

- (a) Unless, as S. 28 provides, they are made after the impression caused by any such inducement, threat, or promise has been fully removed. 6 A. 509 (538), *per Mahmood, J.* Z
- (b) When the legislature wished to make an exception to the absolute rule in S. 24, it did so by a separate section, viz., S. 28, which declares under what circumstances a confession rendered irrelevant by S. 24 may become relevant. 2 L. B. R. 168 (171). A
- (c) A confession made under an inducement that has not been removed within the meaning of S. 28 is not relevant as a confession under S. 24. *Ibid* p. 173. B

(5) **A rule of relevancy, not a prohibition.**

The rule thus laid down is, speaking strictly, a rule of relevancy, called forth by the abstract principles of evidence, and not a positive prohibition necessitated by exigencies. 6 A. 509 (538), *per Mahmood, J.* C

(6) **Nature of section.**

The section is clearly a general provision and applies to confessions made by persons, whether in police custody or not and whether made to police officers or others. 2 L. B. R. 168 (170). D

(7) **Difference between S. 24 & Ss. 25 & 26.**

- (a) The rules contained in Ss. 24, 28 & 29 belong to a species different from that under which Ss. 25, 26 & 27 fall. 6 A. 509 (539); *per Mahmood, J.* E
- (b) There is a considerable difference in the wording of S. 24 as compared with Ss. 25 and 26. 2 L. B. R. 168 (173), *per Birks, J.* F
- (c) S. 24 merely states that confessions made under inducements are "irrelevant", while Ss. 25 & 26 say confessions made to police officers or by accused or other persons, while in the custody of police officers,

General—(Continued).

"shall not be proved". This would exclude their proof, even though relevant under other sections of the Evidence Act, but for the proviso in S. 27. 2 L. B. R. 168 (173). *per Birks, J.* **G**

(8) Rule in S. 24 independent of S. 27.

(a) The rule laid down by the Legislature in S. 24 read with S. 28 of the Evidence Act is a rule absolutely independent of the question of discovery or no discovery to which S. 27 relates. 6 A. 509 (541) *per Mahmood, J.* **H**

(b) S. 24 of the Evidence Act contains an absolute rule which is not affected by the proviso, made for a different purpose, in S. 27. 2 L. B. R. 168 (171). **I**

(c) S. 24 of the Evidence Act is only a reproduction of the old law, and there is nothing in the Act to show that it intended to alter the old rules. S. 27 cannot, therefore, be taken to govern the old rules. 6 A. 509 (537) (F.B.); *per Mahmood, J.* **J**

(8 a) Relation between Ss. 24 & 27.

(a) Under Ss. 24 to 26, statements of accused persons are irrelevant subject to the provisions contained in Ss. 27 to 29—when such statements are confessions. 16 P.R. 1886 (Cr.). **K**

(b) Notwithstanding the fact that S. 24 of the Evidence Act is in terms applicable only to "confessions," which are distinguished in the Act from a mere admission, yet, reading it with S. 27 of the Act and S. 120 Cr. P. C., 1872, the intention of the Legislature was to reject as inadmissible an admission made by an accused person on the strength of a promise, made by a police officer making the enquiry, that the confessor would get off if he made a disclosure; unless when the admission resulted in the discovery of some fact, when, only in so far as it related to the fact discovered thereby. 8 P.R. 1882 (Cr.) *per Smyth J.* **L**

(c) Where a confession is improperly induced by a police officer, it was held that S. 27 did not qualify the prohibition contained in S. 24 of the Evidence Act. 15 P.R. 1885 (Cr.) **M**

(d) Where a confession becomes irrelevant under S. 24, it does not become relevant by reason of a fact being deposed to as discovered in consequence of information received from an accused person while in police custody. *Ibid.* **N**

(e) In no case could confessions, obtained under the circumstances described in S. 24, be admitted in evidence, whether they led to discovery or not, unless indeed they fell under S. 28 of the Evidence Act, but then the question of discovery would be immaterial. A.W.N. (1882), p. 225; *per Mahmood, J. cited in* 6 A. 509 (535). **O**

(9) Statement irrelevant under one section may be relevant under another.—Relation of S. 8 to Ss. 24 to 30.

(a) The explanations and illustrations to S. 8 show that a statement that is irrelevant under one section may be relevant under another. 2 L.B.R. 168 (173), *per Birks, J.* **P**

(b) The general provisions of the Code are sufficient to show that statements otherwise irrelevant under S. 24 may be admitted in evidence without relying on S. 27 alone. 2 L.B.R. 168 (174), *per Birks, J.* **Q**

I.--"General."—(Continued).

(c) A statement made by an accused person to a witness, who was a Headman, though not relevant as a confession, was held to be relevant, even though the original confession to the police sergeant was given under an inducement which would render it inadmissible under S. 24 of the Evidence Act, under S. 7 of that Act, as the immediate cause of a relevant fact and also under S. 8 as a statement explaining the conduct of the accused. 2 L.B.R. 168 (173). **R**

(d) The question, common to Ss. 24 to 30, of the relation of S. 8 to those sections, *i.e.*, whether confessional statements excluded by Ss. 24 to 30 are admissible in evidence under S. 8, must be taken to have been answered in the negative in Bombay. 5 M.L.J. Art. p. 13. **S**

(e) The conduct of a prisoner in relation to any relevant fact is good evidence according to S. 8 of the Indian Evidence Act; but according to explanation 1, the word "conduct" in the section does not include statements unless those statements accompany and explain acts other than the statements. It is on such a statement that the significance of the act, which it accompanies, in many cases wholly depends. 11 B.H.C.R. 242 (245). **T**

(f) As for instance, when a police officer says to a prisoner, "I must search your house for the stolen property," to which the prisoner replies, "I will give you at once all the valuables I have in the house," and then gives him certain articles, not stolen property, after which stolen jewels are found concealed under his hearth. 11 B.H.C.R. 242 (245). **U**

(g) But if, under cover of an explanation said to have been given by a prisoner of an act in itself ambiguous, or not so obviously connected with a fact in issue as to be relevant, it is sought to introduce a confession of a prisoner to the police, the Evidence Act does not warrant its admission. 11 B.H.C.R. 242 (246). **V**

(h) The giving up by a cultivator of a bill-hook, or the pointing out of a place where *bajri* appears to have been trampled is, however, in itself an unambiguous act. It is in general also insignificant. It needs no explanation, and a confession accompanying it does not explain it but is a collateral matter, whose explanation, where it is excluded, is not prevented by its being connected with matters that are not excluded. 11 B.H.C.R. 242 (246). **W**

(10) Want of objection to inadmissible confession, effect of.

Though no objection was taken by the accused or his pleader to a confession inadmissible under S. 24, that would not render it any the more relevant or admissible. 26 M. 38 (40); See, also, 10 B.H.C.R. 497 (498). **X**

(11) Duty of Judge in deciding upon admissibility of confession—Conjecture or bias not to influence him.

A Judge, who has to decide whether a confession is admissible in evidence, or should be rejected, should use his best endeavours to ascertain whether those conditions are fulfilled and, in arriving at his decision, should be guided by the evidence adduced and such further evidence as he may call for under the powers conferred by the law. He should not be influenced by pure conjecture or personal bias. L.B.R. (1893-1900), 145 (146). **Y**

*General—(Concluded).***(12) Confession not to fill gaps in prosecution evidence.**

The statement of an accused person should not be used to fill up the gaps in the prosecution evidence. 26 C. 49. **Z**

1. "A confession."**(1) 'Confession' not defined in Act.**

(a) The word "confession" is not defined in the Evidence Act. It must be taken as used in its ordinary signification, i.e., as meaning an admission of guilt. U.B.R. (1897-1901) (Cr.) 156 (158). **A**

(b) The word confession is not defined in the Evidence Act. 5 M.L.J. Art. p. 12 (15). **B**

(2) Stephen's definition of term gives its proper meaning in the Act.

Stephen's definition of "confession" may be taken as containing the proper meaning of the term in the Evidence Act, at all events, it is a satisfactory guide for all practical purposes and all the cases that have yet occurred may be explained with reference to it. 5 M.L.J. Art. p. 21. **C**

(3) Stephen's definition.

A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference, that he committed that crime. Confessions, if voluntary, are deemed to be relevant facts as against the persons who make them only. Steph. Dig., 7th Ed., Art. 21, p. 29. **D**

(4) Analysis of Stephen's definition.

The meaning of the 21st article of Stephen's Digest is that confessions are admissions made by a person charged with a crime (1) stating that he committed that crime (2) suggesting the inference that he did so. 5 M.L.J. Art. p. 21. **E**

(5) Qualified rejection of Stephen's definition.

With reference to Stephen's definition of a confession given in his Digest, Art. 21, *Straight, J.* observed that, the Digest, being written in view of a proposal for preparing a Code of Evidence for England, could scarcely be regarded as an authoritative guide in construing an Act passed by the Indian Legislature, though he did not find anything in Stephen's division at variance with his view. 7 A. 646 (647). **F**

(6) Criticism of such objection.

(a) With reference to the observations of Straight, J, in 7 A. 646 (647) making a qualified rejection of Stephen's definition of the term "confession," it may be answered that the general idea of a confession is independent of any particular system of jurisprudence. 5 M.L.J. Art. pp. 16 & 17. **G**

(b) In the absence of explanation of any terms in the Act itself, the English Law is the best guide, 5 M.L.J. Art. pp. 16 & 17. **H**

(c) Stephen's definition is that of the English Law deduced from the numerous cases on the subject. 5 M.L.J. Art. pp. 16 & 17. **I**

(d) 9 B.H.C. 358, which construed the term "person in authority" similarly to the English Law, may be looked on as a precedent for adopting the

1.—“A confession.”—(Continued).

English Law definition of the term “confession.” 5 M.L.J. Art. pp. 16 & 17. **J**

(e) The Evidence Act has largely followed the Digest, the author of the Digest and the Evidence Act being the same almost. 5 M.L.J. Art. pp. 16 & 17. **K**

(f) The definition of ‘confession’ given by Stephen in his Digest of the Law of Evidence, Art. 21, has been generally adopted by Indian Courts. 6 A. 509 (539) & 14 B. 260 (263), referred to in 6 C.W.N. ccx; see, also, 51 P.L.R. 1905, per *Chatterji, J.*; p. 189, *supra*. **L**

(g) The true meaning of the term “confession” is that explained by the Bombay High Court in 6 B. 34, and followed by the Full Bench in 14 B. 260, and which is in full accord with, and in truth, an application of the definition in Stephen’s Digest. 5 M.L.J. Art. pp. 20 & 17. **M**

(7) Consequence of holding that full and complete admissions of guilt only are confessions.

If only full and complete admissions of guilt amounted to confessions, and the term excluded incriminating statements from which an inference of guilt flowed, the result will be, that prisoners will, by the exercise of the commonest ingenuity, be entirely deprived of the safeguard which the Legislature intended to throw round them in Ss. 24 & 26 of the Evidence Act. As soon as the Police learnt the distinction thus sought to be established, they would take particular care to convert every direct admission of guilt, which they had received from the accused, into the form of incriminating statements, short of a “full and complete” admission. 3 B. 12; see 5 M.L.J. Art. p. 19. **N**

(8) ‘Confessions’ a species of ‘admissions’.

(a) Ss. 18 to 31, deal with admissions generally; Ss. 24 to 30 with confessions, as distinguished from admissions. It would therefore appear that confessions are a species of admissions. 5 M.L.J. Art. p. 12 (14). **O**

(b) The word confession occurs under the category of admissions. 5 M.L.J. Art. p. 14 and 6 A. 509 (529), per *Mahmood, J.* **P**

(c) A statement amounting under Ss. 24 to 30 to a confession in a criminal proceeding, is an admission under S. 21, in a civil proceeding. 5 M.L.J. Art. p. 15. **Q**

(d) The expression used in Act XXV of 1861, Ss. 148, 149 & 150 and repeated in Act VIII of 1863, S. 150 with reference to this subject is ‘confession or admission of guilt.’ 5 M.L.J. Art. p. 14. **R**

(e) A confession is a species of which an admission is the genus; a confession in S. 24 means a “confession by an accused person” which it is proposed to prove against him to establish an offence, and the term has the same meaning in S. 25. 5 M.L.J. Art. p. 12 (15), referring to 9 B. 131 (134). **S**

(f) Admissions in reference to crimes are usually called confessions. Steph. Introd. p. 140; see, also, No. 19, p. 189, *supra*. **T**

(9) ‘Confessions,’ what are.

(a) Statements which amount to a direct acknowledgment of guilt are clearly confessions. 5 M.L.J. Art. p. 17. **U**

I.—“A confession.”—(Continued).

(b) A confession is an acknowledgment, in express words, by the accused in a criminal case, of the truth of the main fact charged or of some essential part of it. Wigm. Ev., '05 Ed., S. 821, p. 927. **Y**

(c) An incriminating statement which falls short of an absolute confession, but from which the inference of guilt follows, is a confession, within the meaning of the Evidence Act. 14 B. 260 ; 6 B. 34 ; followed in 2 C.W.N. 702 (707); see, also, 10 C. 1022 (1023), arguendo; see, also, 51 P.L.R. 1905 = 2 Cr. L.J. 230 ; 6 C.W.N. cxx. **W**

(a) Evidence given by a person on oath as a witness in a proceeding having reference to the same or a different matter is admissible against him as a confession, unless his testimony was obtained by any improper inducement. *R. v. Gillis*, 11 Cox. 69, 17 Ir. C.L.R. 534; Phip. Ev., 4th Ed., p. 245; Tay. Ev., 10th Ed., S. 899, p. 635; Wigm. Ev., '05 Ed., S. 830, p. 978. **X**

(c) Where a prisoner, charged with receiving stolen property, on being asked by the police where it was, replied that he had kept it and buried it in the fields, the fact of the receipt and the circumstances of the burial showing that he had received the property and had come by it dishonestly and suggesting the inference that he was guilty, his statement was rightly held to be a confession within the meaning of Ss. 24 to 30. 14 B. 260 (F.B.); See 5 M.L.J. Art. pp. 22 & 23. **Y**

(f) Certain statements made by the accused were held to be clearly in the nature of a confession, “as they suggested the inference that the prisoner committed the crime” to use the language of Stephen’s Digest, and, even if not intended by the accused as a confession of guilt, they were nevertheless considered to amount to an admission of an incriminating circumstance on which the prosecution mainly relied as the most important part of the evidence against the accused, relevant as showing that he had not come by the property honestly, and, therefore, properly within the rules of exclusion regarding confessions made by a person in police custody. 14 B. 260 ; see 5 M. L. J. Art. p. 20. **Z**

(10) ‘Confession’ to be understood in same sense in all sections of Act.

The word confession must be understood in the same sense in all the sections of the Evidence Act which relate to confessions. It must be construed as meaning the same in S. 30 as in Ss. 24, 25 & 26. 7 A. 646 (648). **A**

(11) Distinction in Act between admissions and confessions.

(a) The Evidence Act draws a distinction between admissions and confessions. 10 B. L. R. app. 2 ; 6 C. 530 & 15 C. 595 (607) (F.B.); see 6 C. W. N. cxx. **B**

(b) The case in 6 B. 34 falls far short of holding that admissions and confessions are the same thing. 15 C. 589 (593), per Wilson, J. **C**

(12) Broad distinction between admission and confession.

The broad distinction between an admission and a confession is that the latter is a statement made by an accused person which is sought to be proved against him in a criminal proceeding to establish an offence,

1. —“A confession.”—(Continued).

while under the former term are comprised all other statements amounting to admissions as defined in S. 18. 5 M. L. J. Art. p. 12 (15). **D**

(13) **Statement must be looked to decide whether it is confession of guilt or admission of criminating circumstance.**

In order to determine whether a statement is a confession of guilt or an admission of a criminating circumstance, a court must look to the statement itself. 5 Bom. L. R. 312 (313). **E**

(14) **Effect of adoption of Stephen's definition on Ss. 24 to 30.**

If Stephen's definition of 'confession' be adopted in its entirety, a confession is within Ss. 24 to 30, though made at any time (before or after accusation). 5 M. L. J. Art. p. 21. **F**

(15) **Statements that are not confessions.**

(a) Where a prisoner was charged with theft and dishonestly receiving stolen property, his statement to the police that a certain part of the property had been given him by his sister and that he had bought the other, not being a statement admitting the crime, nor one leading to any inference that he was guilty of the crime charged with, but, if true, being one that showed his innocence of both the crimes was rightly admitted as an admission, not amounting to a confession. 10 B. L. R. App. 2; see 5 M. L. J. Art. p. 21. **G**

(b) A statement admitting crime but pleading compulsion by others is not such a confession as will justify the conviction of any person on its basis. 7 W. R. (Cr.), 8. **H**

(c) The word confession cannot be construed as including a mere inculpatory admission which falls short of being an admission of guilt, in all the sections relating to confessions. 7 A. 646 (648). **I**

(d) A statement made by a prisoner charged with the murder of a boy, implicating another accused, was held not to amount to a confession and to be no more than a statement by a person who admits having witnessed the perpetration of a crime, but denies having participated in it, and alleges that he protested against it. 7 A. 646 (648 & 649). **J**

(e) A statement made in Court by some of the accused inculcating a co-accused, but exculpating themselves, is not a confession. 2 A. L. J. 53 = 2 Cr. L. J. 22. **K**

(f) A statement, not implicating the deponent, is not a confession and is not admissible in evidence. 2 A. L. J. 100 = 2 Cr. L. J. 59. **L**

(g) Where a person stated that he was present at a dacoity as an unwilling witness, and that he did not participate in it, his statement is not a confession. 6 C. W. N. 553 = 29 C. 782 (792). **M**

(h) Where a man, charged with an offence, makes a statement admitting and explaining away something telling against him, he makes no confession but a defence. 6 C. W. N. cex. **N**

(i) Mere admissions of incriminating facts will not amount to a confession, unless those facts and the necessary inferences from them amount to an offence. 1 L. B. R. 133 (136). **O**

I.—“A Confession.”—(Continued).

- (15) Where the confessions before a Magistrate which were not made in answer to any specific charge, were taken weeks before any formal charge was regularly preferred before the Magistrate, and before the witnesses were sent in, they were considered, at best, only as admissions made in the presence of a Magistrate, and admissible in evidence under S. 149, Cr. P. C., 1861. 5 W. R. (Cr.), 6. **P**

(16) Division of confessions.

Confessions are divided into two classes, *Judicial* and *extra Judicial*. Tay. Ev., 10th Ed., § 866, p. 608. **Q**

(17) Judicial confessions, what are.

“*Judicial confessions* are those which are made before the Magistrate or in Court, in the due course of legal proceedings; and it is essential that they be made of the free will of the party, and with a full knowledge of the nature and the consequences of the confessions.” Tay. Ev., 10th Ed., S. 866, p. 608. **R**

(18) Extra-judicial confessions, what are.

(a) “*Extra-Judicial confessions* are those which are made by the party elsewhere than before a Magistrate or in Court; this term embracing not only the express confessions of crime, but all those admissions and acts of the accused from which guilt may be implied. All voluntary confessions of this kind, on being proved like other facts, are receivable in evidence.” Tay. Ev., 10th Ed., S. 867, p. 609; also cited in 6 A. 509 (517), *per Brodhurst, J.* **S**

(b) Where two persons, charged with murder, being threatened with excommunication by a caste punchayet, confessed, the Court observed that, if the confessions made before the punchayet had been shown to have been clear admissions of the accused's guilty knowledge of, or participation in, the offence, made by them in the presence of other persons, and when they were not in the custody of the police, or accused of this offence, they would be extra-judicial confessions, and would, if proved, be admissible against them, subject to the provisions of the Evidence Act as to the admission of confessions. 4 A. 16 (48). **T**

(19) Confessions not necessarily outcome of repentance.

Confessions are not necessarily the outcome of repentance; self-interest is a very powerful spring of human action, and the hope of obtaining a less severe punishment may operate strongly towards inducing a criminal to confess. 1 L. B. R. 238 (248). **U**

(20) Confession is ‘evidence’—Jury to consider.

If a relevant fact is proved and the law expressly authorises its being taken into consideration, *i. e.*, considered for a certain purpose or against persons in a certain situation, the fact in question is “evidence” for that purpose or against such persons, although the result has not been expressed in those words by the Legislature; and, being “evidence,” it must be used in the same way as everything else that is “evidence.” The confession being thus what is called “evidence,” it is clearly matter for the jury to consider. 4 C. 483 (F. B.) = 3 C. L. R. 270. **V**

I.—“A Confession.”—(Continued).

(21) Relevant confessions must strictly comply with law.

- (a) A confession, to be admissible in evidence, must strictly comply with the terms of the law. 3 C.W.N. 378. W
- (b) In deciding whether or not a particular confession is admissible in evidence, the Courts have to be guided by the provisions of the law enacted by the Legislature. 2 Bom. L.R. 761 (764). X
- (c) In India a confession duly recorded and certified under S. 164, Cr. P. C., is admissible in evidence against the person making it, unless shut out by the provisions of S. 24 of the Evidence Act, “to which alone,” as pointed out in 2 B. 61 by Westropp. C.J., “we are at liberty to look for the law of evidence in this country.” 2 Bom. L.R. 761 (764). Y
- (d) Evidence may be given of a confession provided that it be not excluded by an express provision of the law, whether made to a private person, or to a Magistrate otherwise than in the course of an enquiry or other judicial proceedings : it may be proved, and must be proved, if at all, like any other fact. 9 M. 224—2 Weir, 125 (135). Z
- (e) But confessions made by accused persons are not inadmissible under S. 24 of the Evidence Act, or under any other provisions of that or of any other Act merely by reason of the accused persons having been sworn or affirmed. 3 P.R. 1880 (Crim.). A
- (f) When a person charged with giving false evidence in an affidavit has admitted both in his examination and in his defence that he made the statement which is alleged to be false, his conviction is not necessarily illegal by reason of the fact that no evidence of the identity of the accused with the person who made the alleged false statement was adduced. 3 L.B.R. 208 (212) (F.B.)=4 Cr. L.J. 471 (476). B

(22) Circumstances of each case must be weighed in evaluating confessions.

- (a) With regard to confessions, which are such an important factor in criminal trials in this country, no hard and fast rule can be laid down. The circumstances of each case must be weighed. Where there is no apparent reason for doubting the truth of a confession, the presumption is in favour of the truth of the confession and the Courts are bound to act upon it. 15 B. 452 (480) ; referring to 11 B. H. C. R. 137. C
- (b) Where the accused's own confession is the only evidence against him accounting for the commission of the crime with which he is charged, it must be accepted, in so far as it is not inconsistent with reason and other surrounding circumstances. 19 P.W.R. 1907 (Cr). D
- (c) In considering if the confession of an accused person is true or not, the Court should consider if the statement is probable or improbable, if it is consistent or inconsistent with the other circumstances of the case. If what the prisoner says in his own favour is not contradicted by the prosecution, if it is not improbable in itself, if it is not inconsistent with the other ascertained facts, then the reasonable course for the Court to take, is to accept the story as true. L. B. R. (1872-1892), 327 (328). E
- (d) Where an accused person, charged with having committed dacoity, made a confession which was recorded by a first class Magistrate, describing

1.—“A Confession.”—(Continued).

in minute detail events leading up to the gathering of the gang and the actual occurrences at the dacoities, the main details which he gave of the latter being in accord with the details given by the people who lived in the dacoited house, with the confessions of some of his co-accused, with the evidence of the accomplice, and with the evidence of other witnesses, it was held that the confession of guilt on his own part was true. 1 L. R. R. 238 (248). F

- (e) Where a confession was incredible by reason of its intrinsic improbability and of its inconsistency with the other evidence on the record, it was held that the confession could not support a conviction. 1 O. C. Sup. 13 (18). G

(23) Exact words used by accused to be ascertained.

- (a) The exact words, used by an accused person confessing, should be ascertained, and the Court should not merely accept the conclusions at which the witnesses, testifying to the confession, themselves arrived from the answers that the accused gave to questions put by them. 10 B. L. R. 332. H

- (b) It is always essential that the Court should know, as nearly as possible, what were the words used by the supposed confessors and what were the questions or matters in regard to which they were said; for, when taken in this manner, they may not amount to a confession of the guilt believed by the hearers to have been confessed. 4 A. 16 (49). I

(24) Truth of confessions may be tested by other evidence.

Where there is other evidence, a Court may test the truth of a confession with its aid and ignore the exculpatory part. *Empress v. Babaji*, Unrep., referred to in 15 B. 452, *per Candy, J.* J

(25) Tests for appreciating evidence of witnesses and value of confessions not same.

The tests for appreciating the evidence of witnesses cannot appropriately be applied in estimating the value to be attached to a confession. The statements of an accused person are not subjected to an examination on oath compelling his attention to accuracy in details. The credence given to such statements when they are voluntary, rests on the improbability of an accused person deliberately adhering to a self-incriminatory statement which is substantially false. And thus variations in detail are of less importance in considering the effect of a confession, than they would be in considering a deposition incriminating a person other than the deponent. 6 Bom. L.R. 773 (778). K

(26) Questions of fact and law regarding admissibility of confession.

Where a Court decides the preliminary question of the admissibility of a confession, on a consideration of the evidence and surrounding circumstances, the question decided is a question of fact. If, upon the evidence as it stands—taking the evidence to be credible, and apart from any question of the weight to be attached to it,—any question of the admissibility of the confession arises in point of law, it is otherwise. 9 Bom. L.R. 789 (799) (F.B.), *per Chandavarkar, J.* L

(27) Power of Court deciding on relevancy of confession is discretionary.

- (a) The nature and character of the power, which a Court trying a criminal case exercises in admitting in, or excluding from, evidence a confes-

1.—“A Confession.”—(Continued).

sion under S. 24 of the Evidence Act is described, by *West, J.* in the judgment in *Rat. Un. Cr. C. 163 (164)*, as discretionary. 9 Bom. L.R. 789 (800) (F.B.), *per Chandavarkar, J.* **M**

- (b) The admissibility of a confession was a discretion, which was left to the Court to which the evidence was tendered, and it was only in the exceptional case when the Court above had reason to believe that the practice had been obviously abused, and that there had been an entire want of discretion in receiving the confession, that they could interfere. *Rat. Un. Cr. C. p. 162 (164)*, *per West, J.* **N**

(28) Real use of confession.

The real use of a confession is to enable the police to obtain evidence of the facts disclosed thereby and, for this purpose, the presence of a Village Magistrate is not required. *Mad. Pol. Man. Vol. I, p. 96.* **O**

(29) Difference between improper admission of evidence and its improper use after admission.

There is an obvious difference between the improper admission, and the improper use, after admission of any piece of evidence. 9 Bom. L.R. 789 (814), *per Beaman, J.* **P**

(30) Ground on which confessions received.

- (a) The ground on which confessions are admitted in evidence is the presumption that no person will voluntarily make a statement which is against his interest, unless it be true. 6 C.W.N. cexi. **Q**
- (b) The presumption of truth attaching to incriminating statements made by an accused person is based upon the sentiment of mankind that a person will not, as a general rule, make statements against himself unless they are true. 5 M.L.J. Art. p. 19. **R**
- (c) When a person admits guilt to the fullest extent, and exposes himself to the pains and penalties provided for his guilt, there is a guarantee for his truth, and the Legislature provides that his statement may be considered against his fellow-prisoners charged with the same crime. 6 B. 288. **S**
- (d) Where prisoners had confessed in the most circumstantial manner to having killed the deceased, it was held that the finding of the dead body was not absolutely essential to their conviction. 4 W.R. (Cr.), 19 (20). **T**
- (e) A Judge was held to have exercised a proper discretion in not passing a sentence of death in a case where the dead body was not found. 11 W.R. (Cr.), 20. **U**

(31) Voluntary admission of facts by accused, effect of.

Where, when giving his plea or stating his defence, the accused voluntarily admits facts, there appears to be no necessity for the prosecution to call evidence to prove such facts; to do so would only entail needless prolongation of the trial. 3 L.B.R. 208 (212) = 4 Cr. L. J. 471 (476). *per Fox, C.J.* **Y**

(32) Verdict based on voluntary confessions same as based on credible testimony.

Where there is no doubt about the confessions made by accused persons, a verdict based upon them is just as good as a verdict based upon the testimony of credible witnesses. 25 W.R. (Cr.), 25. **W**

*1.—“A Confession.”—(Continued).***(33) General rule regarding confessions.**

- (a) A confession, if proved satisfactorily to be voluntary and genuine, is legal and sufficient proof of guilt. 7 W. R. (Cr.), 41. **X**
- (b) The confession of an accused person is only relevant against himself. 6 W. R. (Cr.), 84. **Y**
- (c) A confession made, not to a police officer, and not improperly obtained, as laid down in S. 24 of the Evidence act, is always admissible against an accused person. 8 O. C. 395; *per Ridges*, O.A.J.C. **Z**
- (d) The general rule is that the confession of one person is wholly inadmissible against any other. But S.30 of the Evidence Act is an exception to this rule. 6 C.W.N. cclxiv. **A**

(34) Corroboration ordinarily unnecessary for conviction.

- (a) A prisoner may be convicted on his own uncorroborated confession. 6 W. R. (Cr.), 73. **B**
- (b) A confession duly made and properly proved is generally a sufficient basis for a conviction without corroboration. *R. v. Unkles*, 1 R. 8 C. L. 50, 58; *Phipp.Ev.* 4th. Ed. p. 242. **C**

(35) But it is not approved practice.

- (a) Notwithstanding that the law sanctions the conviction of an accused person on his bare confession, it is not yet an approved practice to solely rely upon it ordinarily. 3 P.R. 1868 (Cr.). **D**
- (b) Where certain persons were convicted on their confessions, which were not only uncorroborated, but were inconsistent with the proved facts of the case and could not be relied or acted upon, their convictions and sentences were reversed. U.B.R. (1897—1901) (Cr.), 152 (153). **E**
- (c) Experience shows that unfounded confessions are not infrequently made from one motive or another natural to humanity, and that consequently the Courts have to be on their guard against being led astray by such deceptions. U.B.R. (1897—1901) (Cr.), 152 (153). **F**
- (d) The practice in general is to require some support for a confession, some corroboration from facts established outside of the confession, and reasonable consistency with the surrounding circumstances about which there is no doubt. U.B.R. (1897—1901)(Cr.), 152 (153). **G**

(36) Prisoner's statement to be considered as a whole.

- (a) A statement made by a prisoner must be looked at as a whole, and it would not be right to take isolated portions of it, and to consider whether any of them, regarded separately, amounts to an admission of guilt or not. 7 A. 646 (648). **H**
- (b) In the absence of other evidence, the statement of an accused person, if admissible at all, must be accepted as a whole. 29 C.782=6 C.W.N. 558, 24 W.R. (Cr.), 80 & 25 W.R. (Cr.), 15. **I**
- (c) Where the only direct evidence against the accused was his own confession, the court held that, unless the prosecution could show that any part of the confession so far as it exculpated the accused was untrue or violently improbable, it was not fair to act on so much as criminated the accused, omitting all that which went to explain his own conduct and diminish the gravity of the offence, the only fair method in such

I.—“ A Confession.”—(Continued).

a case being to take the confession as a whole. L.B.R.(1872—1892), 324(325). **J**

- (d) A confession must be taken as a whole and considered along with the admitted facts of the case, and the accused must be judged by his whole conduct. The Court is at liberty to disregard any self-exculpatory statements contained in the confession which it disbelieves. Cr. Rul., Bom. H.C. No. 19, 12th April 1888, cited in 15 B. 452 (479). **K**
- (e) Where the prisoner makes a plea of guilty, but pleads in such a manner that it is anything but certain that he intends to admit fully all the ingredients of the charge against him, the Court is bound to accept the accused's statement as a whole, if it was taken as a confession at all. 25 W.R. (Cr.), 23 (24). See also 25 W.R. (Cr.), 15. **L**
- (f) Where a confession contains extenuating as well as incriminating matter, the extenuating portion must be taken into consideration no less than the criminating portion, except where there is evidence to contradict it. 4 P.R. 1872 (Cr.). **M**
- (g) In dealing with a confession, the proper course is to take into consideration the statement as a whole. The Court is not bound to take what a prisoner has said in his own favour to be true, but should weigh it with all the circumstances of the case, and decide whether it ought to be believed or not. It is, therefore, open to the Court to believe one part of the confession and to disbelieve another part. The Court may rely on what charges the prisoner, and may reject that part which is in his favour, if there are sufficient grounds for doing so. L.B.R. (1872—1892), 327 (328) **N**
- (h) Where a conviction rested very much upon an accused person's own confessions, he must have the benefit of whatever palliating circumstances he has alleged in making the confessions. Sind Sadar Court R. (Cr.), 91 (92), (1898). **O**

(37) Qualification of the above rule.

The ordinary rule in dealing with confessions—to take them as a whole, to give the person confessing (supposing there is no other evidence against him) the benefit of any circumstances that may appear in his favour therefrom—cannot apply to statements which are diametrically opposed to each other, but only where the more favourable view is not absolutely inconsistent with the general tenor of the confession. 24 W. R. (Cr.), 80 (81). **P**

(38) Confession to be regarded with caution.

- (a) A plea of guilty, no less than a confession, must be regarded with caution. 47 P.R. 1866 (Cr.). **Q**
- (b) Where the proof in a case is limited to the confession made by an accused person, it is essential that too much stress should not be laid upon it. 31 P.R. 1867 (Cr.). **R**

(39) Relevancy of confessions and depositions made in previous proceedings.

- (a) Where a prisoner made a confession in one case in which he was convicted, his confessions cannot be used against him in another case, unless they are deposed to on oath, either by the person who took them down or by some one else, who heard them. 10 W.R. (Cr.), 56. **S**

I.—“A Confession.”—(Concluded).

- (b) A confession made by the accused in a previous proceeding is admissible as evidence, if there is proof that the person being tried is the same person who made the confession. L.B.R. (1893-1900), 70. **T**
- (c) The deposition made by an accused person before a Magistrate is not relevant against him in a subsequent proceeding without any evidence of his identity. 11 C. 580 (581). **U**
- (d) The depositions made by witnesses in a counter case are relevant against them, when they are tried as accused persons, but the depositions are only evidence against the persons making them. 21 C. 322 : 3 M. 271 & 12 B. 440. **Y**
- (e) Evidence given by a person on oath as a witness in a proceeding having reference to the same or different matter is admissible against him as a confession. *R. v. Chidley*, 8 Cox. 365 ; Phip. Ev. 4th Ed. p. 245. **W**

(40) Waiver not binding in criminal cases.

The contention on the ground of waiver cannot be allowed to prevail in a criminal case. 10 B.H.C.R. 497 (498). **X**

(41) Admissions by pleader appointed by Court to help accused person not binding on him.

Any admissions that may be made by the pleader appointed by the Court to help an accused person in his defence are not binding on him, because the position of a pleader appointed by the Court to defend a prisoner, accused of murder is not the same as that of a pleader whom the accused has authorised to act for him. 2 Bom. L. R. 751 (752). **Y**

*2. —“Made.....”***(1) Confession illegally induced not coming under S. 28—Person immaterial.**

Under S. 24, it does not matter to whom a confession, obtained by illegal inducements, is made, provided the case does not come within the purview of S. 28. 5 M.L.J. Art. p. 23. **Z**

(2) Whether made to person inducing.

It is immaterial whether it be made to the same person who used the undue influence ; 10 B.L.R. Ap. 1, 5 N.W.P. 86, 3 B. 12, 2 A. 260, & 10 C. 775. See 5 M.L.J. Art. p. 24. **A**

(3) Or to any other person.

Or whether it be made to a person other than the one who made the inducement, threat or promise. 9 B.H.R. 358 and 5 N.W.P. 86. See 5 M.L.J. art. p. 24. **B**

(4) A confession illegally obtained will be inadmissible.

(a)—Whether made to the Sessions Judge ; 5 N.W.P. 86. See 5 M.L.J. Art. pp. 23 & 24. **C**

(b) To any Magistrate ; 5 N.W.P. 86, 3 B. 12, 2 A. 260, 10 C. 775. See 5 M.L.J. Art. pp. 23 & 24. **D**

(c) To any police officer ; 5 N.W.P. 86, 3 B. 12. See 5 M. L. J. art. pp. 23 & 24. **E**

(d) Or to any other person, *e. g.*, the Traffic Manager of a Railway ; 9 B.H. C. 358. See 5 M.L.J. art. 23 & 24. **F**

(e) Or the Master of a vessel ; 10 P.L.R. Ap. 1. See 5 M.L.J. Art. pp. 23 & 24. **G**

3.—“*By an accused person.*”**Confessor need not be accused or in custody when confessing.**

- (a) Under S. 24, it does not appear to be necessary that the person who makes the confession should be either accused or in police custody at the time of making the confession. 5 M.L.J. Art. p. 24. **H**
- (b) The section contains no limiting words, and even reading it in connection with the words “having reference to the charge against the accused person” and “in reference to the proceedings against him,” it does not seem necessary that the confession should be made after accusation and arrest, for the expressions above referred to are themselves not restricted to a charge or proceedings actually made or taken at the moment of the employment of the inducement, threat or pressure. 5 M. L.J. Art. p. 24. **J**
- (c) An admission of crime, when fairly made after due warning, is not inadmissible simply because, at the time it was made, no formal accusation had been made against the party making it. 4 W.R. (Cr.), 10. **J**
- (d) The confessions of the accused before the members of the punchayet were made when they were neither accused nor arrested by the police in 4 A. 46; see 5 M.L.J. Art. p. 25. **K**
- (e) The confessing party was not accused by, nor in the custody of, the police, but accused by, and in some sort of custody of, the railway authorities in 9 B. H. C. R. 358; see 5 M. L. J. Art. p. 25. **L**
- (f) Where a person confessing was neither accused by the proper law authorities, nor in the custody of the police, though he was accused by and under the arrest of, the master of a vessel, his confession was rejected under S. 24; 10 B.L.R. App. 1; see 5 M.L.J. Art. p. 24. **M**

4.—“*Is irrelevant.*”**(1) Word “irrelevant” deliberately retained in section.**

The word “irrelevant” in S. 24 seems advisedly retained. There was not the same necessity for excluding statements obtained by improper inducements, if relevant under other sections, as there was in excluding statements made to the Police which might encourage them to torture and ill-treat the persons in their custody. 2 L.B.R. 168 (174); Per *Burks, J.* **N**

(2) High Court precluded from opening question of admissibility of confession decided by trying Judge.

In the absence of any reservation of the point of the admissibility of a confession under clause 25, or any certificate from the Advocate General under cl. 26 of the Amended Letters Patent, the High Court is precluded from opening the question of admissibility which was decided by the Judge presiding at the trial. 9 Bom.L.R. 789 (805); per *Davar, J.* **O**

5.—“*In a criminal proceeding.*”**Confession irrelevant in criminal proceeding relevant as admission in civil.**

- (a) A statement, which amounts to a confession, made under the circumstances described in S. 24, and which is excluded under that section, as such, in a criminal proceeding, may yet be relevant in a civil proceeding as an admission. 5 M.L.J. Art. p. 25. **P**

5.—“In a criminal proceeding.”—(Concluded).

- (b) Where accused persons made statements to the police regarding the ownership of property which was the subject-matter of the proceedings against them, these statements were held to be admissible as evidence with respect to the ownership of the property in an enquiry held by the Magistrate under S. 523, Cr.P.C., 1882, though they might be inadmissible against them at the trial for the offence with which they were charged. 9 B. 131. Q

6.—“If the making of the confession appears to the Court.”**(1) Confession appearing to Court as illegally induced irrelevant.**

S. 24 of the Evidence Act requires that a confession is to be treated as irrelevant if it appears to the court to have been caused by any inducement, threat or promise etc. 9 Bom. L.R. 798 (803); per *Patty, J.* see, also, per *Chandavarkar, J.* at p. 799. R

(2) Word “appear” is important.

The—as importing judicial discretion. It shows that the Court has to decide the preliminary question of admissibility on a consideration of the evidence and surrounding circumstances. 9 Bom. L.R. 789 (799) (F.B.); Per *Chandavarkar, J.* S

(3) Test of admissibility of confessions.

- (a) The question which a Court has to decide when determining upon the admissibility of a confession is, whether it appears to the Court to have been induced by the means mentioned in that section (S. 24). 25 B. 168 (172) = 2 Bom. L.R. 761 (765); See, also, 5 M.L.T. Art. p. 25. T
- (b) S. 24, whilst requiring the inducement to be offered by a person in authority, leaves it entirely to the Court to form its own opinion as to whether the inducement, threat or promise was sufficient to lead the prisoner to suppose that he would derive some benefit or avoid some evil of a temporal nature by confessing. 9 B.H.C.R. 358 (367). U
- (c) S. 24 of the Evidence Act says that a statement is inadmissible only, if the Court considers it to have been made in consequence of “any inducement, threat or promise.” 11 B. H. C. R. 147 (138). Y
- (d) The question as to whether a confession has been induced by the influence of hope or fear, being of a preliminary nature, is addressed to the Judge, who will require the prosecutor to prove *affirmatively*, to his satisfaction that the statement was not made under the influence of an improper inducement and who, should any doubt subsist upon this head, will exclude the confession. *R. v. Warringham*, 2 Din. C.C. 447 and *R. v. Thompson*, 2 Q.B. 12; Tay. Ev., 10th Ed., S. 872, p. 612. W

(4) Confession presumed voluntary, unless contrary proved.

Though it should appear that immediately before an admission was made the prisoner was in the custody of another person, the Court, unless some reason existed for suspecting collusion, would not compel the prosecutor to call such person as a witness or to prove that he did not hold out any threat or inducement. *R. v. Clews*, 4 C. & P. 221; *It. v. Swatkins*, 4 C. & P. 548; Tay. Ev., 10th Ed., S. 882, p. 623 & Field Ev., 6th Ed., p. 99, See, also, 5 M.L.T. Art. p. 25. X

6.—“If the making of the confession appears to the Court.”—(Concluded).

(5) Duty of Judge when confession appears to be illegally induced.

(a) Where, upon weighing all the circumstances, the prisoner's denial and the probabilities, it appears to the Judge that a confession had been improperly induced, no matter how true it may be, he is bound to exclude it. 8 Bom. L.R. 697 = 4 Cr. L.J. 332. **Y**

(b) Though a confession might have been duly recorded under S. 164, Crim. Pro. Code, and though, at time of recording it, it might have appeared voluntary, yet, Courts may reject under S. 24, a confession, where any ground of exclusion specified in that S. is made to appear. But that it purported to be made voluntarily is a matter for consideration of which the accused may be reasonably expected to give some satisfactory explanation. 51 P.R. 1887 (Cr). **Z**

(6) High Court declining to interfere with trying Judge's discretion in deciding on the admissibility of confession.

Where the presiding Judge at a trial decided, on his appreciation of the evidence, that the evidence did not *appear* to him to justify the exclusion of the confessional statements of an accused person, upon any of the grounds mentioned in S. 24, the High Court declined to interfere with the discretion exercised by the trying Judge, on the bare ground that the presiding Judge misappreciated the evidence on the question of admissibility and wrongly exercised his discretion, and held that the confessions could not be excluded from the evidence in the case, but must be considered and their value assessed, as evidence properly admitted, to see whether they were true confessions. 9 Bom. L.R. 789 (801) (F. B.) **A**

(7) Burden of proof on prisoner alleging illegal inducement.

(a) A prisoner, who alleges that a confession was unduly extorted, should adduce some proof of his allegations to the Court. 3 A. 338; see 5 M. L.J. Art. p. 25. **B**

(b) Courts cannot hold that a confession, which the confessing man has stated was voluntarily made, was not so made without some substantial ground for so holding. 1 L.B.R. 238 (249). **C**

(8) Effect of the term “appear” on proof of inducement.

(a) It may be that this section (24) does not require positive proof, within the meaning of S. 3, of improper inducement to justify the rejection of the confession. 2 Bom. L.R. 761 (765) = 25 B. 168. **D**

(b) The use of the word “appears” indicates, it may be argued, a lesser degree of probability than would be necessary if “proof” had been required. 25 B. 168 (172) = 2 Bom. L.R. 761 (765). **E**

(c) A Court might perhaps in a particular case fairly hesitate to say that it was proved that the confession had been unlawfully obtained, and yet it might be in a position to say that such appeared to it to have been the case. 25 B. 168 (172) = 2 Bom. L.R. 761. **F**

(d) Still, although very probably a confession may be rejected on well grounded conjecture, there must be something before the Court on which such conjecture can rest. 2 Bom. L.R. 761 (765) = 25 B. 168 (172). **G**

7.—“To have been caused by any inducement, threat or promise.”

1—GENERAL.

(1) Confessions to be relevant against confessing person must be voluntary.

- (a) The confession of a prisoner which has been proved to have been voluntarily given is evidence against him and a conviction thereon was upheld. 8 W.R. 53 (54) (Cr.). **H**
- (b) A verdict based on voluntary confessions is as good as a verdict based on the testimony of credible witnesses, if there is no doubt about the confessions. 25 W.R. (Cr.) 25 (26). **I**
- (c) Where a prisoner without any pressure having been put upon him came forward and made his statement before the Magistrate, *held* it must be taken to be perfectly voluntary, and that the circumstances of its having been made on solemn affirmation did not render it invalid. 8 B.H.C.R. 103(109). **J**
- (d) A Judge ought to be satisfied that a confession was voluntarily made, before it can be even admissible in evidence. 8 Bom.L.R. 697-4 Cr.L.J. 332, per *Aston, J.* **K**
- (e) A confession both voluntary and true, even standing alone, is virtually conclusive. Per *Beaman, J.* 8 Bom.L.R. 697-4 Cr.L.J. 332 (334). **L**
- (f) Deliberate and voluntary confessions of guilt, if clearly proved, are among the most effectual proofs in law. 9 Bom. L.R. 789 (801) (**F.B.**); Per *Chandavarkar, J., referring to Tay. Ev.* **M**
- (g) “A confession in order to be admissible must be free and voluntary; i.e., must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.” *R. v. Fennel*, L.R. 7 Q.B.D. 150; Wigm. Ev., '05 Ed., S. 826, p. 940. **N**
- (h) “A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and, therefore, it is admitted as proof of the crime to which it refers. But a confession forced from the mind by the flattery of hope or by the torture of fear comes in so questionable a shape when it is to be considered as evidence of guilt that no credit ought to be given to it, and, therefore, it is rejected.” *Warickshall's Case*, 1 Leach, C.C.p. 298; Wigm. Ev., '05 Ed., S. 822, p. 932. **O**
- (i) Deliberate and voluntary confessions of guilt, if clearly proved, are among the most effectual proofs in the law; their value depending upon the sound presumption that a rational being will not make admissions prejudicial to his interest and safety, unless when urged by the promptings of truth and conscience. The degree of credit due to them must be estimated by the jury according to the particular circumstances of each case. *Tay. Ev.*, 10th Ed., S. 865, p. 608. **P**
- (j) A voluntary confession is admissible to whomsoever it may have been made, though it does not appear that the prisoner was warned that what he said would be used against him, nay, though it appears on the contrary that he was not so warned. *R. v. Gibney*, Jeb. C. C. 15 (Ir.); *Tay. Ev.*, 10th Ed., S. 881, p. 622. **Q**
- (k) In assessing the value of a confession as sufficient evidence and finding out whether it is true or false, various considerations do and must

7.—“To have been caused by any inducement, threat or promise.”—(Continued).

1.—GENERAL.—(Continued).

enter, of which one may be, and generally is, whether it was voluntary or not. 9 Bom. L.R. 789 (801) (F.B.), per *Chandavarkar, J.* **R**

- (t) Where certain confessions were admitted in evidence after they had been proved to be voluntarily made and were then considered along with the other evidence, because they were believed to be true and because there was evidence corroborating them, the persons who made them were convicted. 11 Bom. H.C.R. 242, referred to in *Rat. Unrep. Cr. C. 952.* **S**

- (m) If a confession is not voluntary and free, it is irrelevant. 22 C. 50. **T**

- (n) A confession improperly obtained—i.e., by means of hopes and fears caused in ways disapproved by the law—is rejected as evidence. 8 B.H.C.R. 103 (Cr.). **U**

- (o) Under S. 24, a statement is inadmissible only if the Court considers it to have been made in consequence of any inducement, threat or promise. 11 B.H.C.R. 137 (138); See 5 M.L.J. Art. p. 25. **Y**

- (p) A confession, to be admitted at all in evidence, must be proved to have been made voluntarily, and not to have been caused by any of the means mentioned in S. 24 of the Evidence Act read with Ss. 28 & 29 of the same Act; when admitted, it has to be dealt with like any other piece of evidence, and acted upon only if it is believed to be true. Per *Parsons, J.*, in *Queen-Empress v. Balya Dagdu*, Bom. H. C. Cr. Ruff. 3 of 1898, 17th Feb. 1898 and *Rat. Un. Cr. C. 952*; cited in 2 Bom. L.R. Art. p. 163. **W**

- (q) ‘This judgment, which for the first time correctly states the law, we think, we may justly claim as the direct result of our note.’ By ‘Lex’ in 2 Bom. L.R. Art. p. 163. **X**

- (r) The remarks made in *Imperatrix v. Balya Dagdu*, Cr. Ruling 3 of 1898. Bom. H.C., in so far as they may have been intended to prescribe a different practice, cannot be accepted as consistent with S. 24, nor do they appear to have been necessary for the decision of the case in which the disputed confession was accepted and acted upon. 2 Bom. L.R. 761 (765). **Y**

(2) Right of accused to ask jury to disregard Confession, not voluntary, even after Court admits it.

It has been decided, in the American Courts, that, after the Court has ruled that a confession is admissible, the accused may ask to have the jury disregard it, if they think it not voluntary. *Income v. Culver*, 126 Mass. 464; cited in 9 Bom. L.R. 789 (801) (F.B.), per *Chandavarkar, J.* **Z**

(3) Self-Interest often the source of spontaneous Confessions.

- (α) Spontaneous confessions are often induced by a belief that punishment could be avoided and similar hopes; self-interest is the source from which the act comes, and, such being the case, an offender should not receive a less punishment than he ordinarily would receive, merely because, in pursuance of what he considered best in his own interests, he confessed his crime. 1 L.B.R. (288) 245. **A**

7. — "To have been caused by any inducement, threat or promise."—(Continued).

1.—GENERAL.—(Continued).

(b) Uncivilised cultivators are not likely to be aware of the cautious measures which the law prescribes before any man can be deprived of his liberty when he does not admit his guilt, and it is not improbable that such a person when under arrest may think that his fate is certain, and that the only hope for him lies in either obtaining pardon or a less severe punishment by confessing and implicating his fellow criminals. 1 L.B.R. 238 (240). **B**

(1) Unsafe to rely implicitly on statements by persons knowing themselves to be under suspicion.

It is unsafe to implicitly rely on statements made by men who know themselves to be under suspicion, and to whom it is represented that their only hope of escape consists in telling a story by which each may throw the blame chiefly on the other, while the corroborative evidence, which is only forthcoming after the disclosures, is necessarily of a questionable nature, when it follows closely on conventional lines. 1 P.R. (Cr.) 1903.

(5) Voluntary statement, what is.

C

A "free and voluntary statement" was described by Cave, J., as one which was not "preceded by any inducement to make a statement held out by a person in authority". *R. v. Thompson*, 2 Q.B. 12; Steph. Dig. 7th Ed. Art. 22, p. 31; Tay. Ev. 10th Ed. S. 872, p. 612, also, *referred to* in 25 B 168 & 22 C.161. **D**

(6) "Inducement", scope of.

(a) The expression 'inducement' is extensive enough to include torture, though no hard and fast rule as to what constitutes an inducement can be laid down. A.A. & W. Ev. 4th Ed., p. 154. **E**

(b) Various expressions have been held to amount to an "inducement". See 6 C.W.N. cccxxvi. **F**

(c) But the principle has been broadly stated by Erle, J., in *R. v. Garner*, 2 C. & K. 920 (925), as to which see *infra*. **G**

(6-a) Inducement, whether express or implied.

As to whether the "inducement" must be express or implied, see *infra*, under 8, sub-division 7 (a). **H**

(7) Some inducement sufficient to exclude confession.

It was held that "some inducement" was sufficient to exclude a confession. *R. v. Taylor*, 8 C. & P. 734; Wigm. Ev. '05 Ed. §. 825, p. 939. **I**

(8) Whenever and to whomsoever made.

It does not matter whether the accused person is in custody or not, or whether the confession is made, to a police officer or to some one else; if it is made under the influence of an inducement, threat or promise, it is irrelevant. 2 L.B.R. 168 (171). **J**

(9) Confession illegally induced excluded, though successively repeated.

A very strong effect was given to S. 24, by applying it even to a confession made to a police officer, repeated before a Magistrate, and repeated again before the Sessions Judge—a confession which the report shows

7.—“To have been caused by any inducement, threat or promise.”—(Continued).

1.—GENERAL.—(Continued).

had led to discovery. N.W.P. H.C.R. (1873), p. 86; cited in 6 A. 509 (537) by *Mahmood, J.* K

(10) English decisions to guide in deciding what amounts to inducement.

The question what would amount to inducement, threat, or promise, sufficient to give the accused grounds to believe which would appear to him reasonable, that he would gain some advantage, or avoid some evil of a temporal nature, in reference to the proceedings against him, must be answered with reference to the English decisions, owing to the absence in the Act itself of any indication of what the Legislature has deemed sufficient. 5 M.L.J. Art., p. 28; referring to 3 B.H.C.R. 358. L

(11) Requisites of section regarding nature of inducement.

With regard to the nature of the inducement, threat, or promise, rendering a confession irrelevant under S. 24, the requisites are that (1) it must be made with reference to the charge against the accused person, and (2) sufficient to give the accused reasonable hopes of gaining a temporal advantage or avoiding a temporal evil in reference to the proceedings against him. 5 M.L.J. Art., p. 23. M

(12) Personal capacities to be considered in appreciating influence of inducements.

The age, experience, intelligence, and character of the accused must be taken into consideration in appreciating the influence of inducements which will invalidate a confession. U.B.R. (1897-1901) Cr. 147 (149). N

(13) Ground of exclusion of illegally induced confession.

- (a) “The ground on which confessions made by a party accused, under promises of favour or threats of injury, are excluded as incompetent is, not because any wrong is done to the accused in using them, but because he may be induced, by the pressure of hope or fear to admit facts unfavourable to him without regard to their truth, in order to obtain the promised relief or avoid the threatened danger, and, therefore, admissions so obtained have no just and legitimate tendency to prove the facts admitted.” *Com v. Morey*, 1 Gray. 462; per *Shaw, C. J.*, Wigm. Ev. '05 Ed. S. 822, p. 933. O
- (b) The reason of the rule is not that the law supposes that the statement will be false, but that the prisoner has made the confession under a bias and that, therefore, it would be better not to submit it to the jury. *Rex v. Baldry*, 2 Den. C.C. 430; cited in 9 B.H.C.R. 358 (367). P
- (c) “The object of the rule relating to the exclusion of confessions is to exclude all confessions that may have been procured by the prisoner being led to suppose that it will be better for him to admit himself to be guilty of an offence which he really never committed.” *R. v. Court*, 7 C & P. 486; Wigm. Ev. '05 Ed. S. 824, p. 937. Q
- (d) The reason why a confession in such a case is not admissible is that in law it cannot be depended upon as true; for one in such a case may say, and is likely to say, that which is not the truth if he thinks it to his advantage to do so. *R. v. Doyle*, 12 Ont. 354; Wigm. Ev. '05 Ed. S. 822, p. 932. R

7.—“To have been caused by any inducement, threat or promise.”—(Continued). *

1.—GENERAL.—(Continued).

- (e) “It is not because the law is afraid of having truth elicited that these confessions are excluded, but because the law is jealous of not having the truth.” *R. v. Mansfield*; 14 Cox. C.C. 639 *per Williams, C.J.*; Wigm. Ev. '05 Ed. S. 822, p. 932. **S**
- (f) “It is a trite maxim that the confession of a crime to be admissible against the party confessing, must be voluntary; but this only means that it shall not be induced by improper threats or promises, because, under such circumstances, the party may have been influenced to say what is not true, and the confession cannot be safely acted on.” *Scott's Case*, 1 D & B. 58; Wigm. Ev. '05 Ed. S. 822, p. 932; Phip. Ev. 4th Ed., p. 242. **T**
- (g) “No confession of guilt shall be heard in evidence unless made voluntarily; for if made under the influence of either hope or fear, there is no test of its truthfulness.” *State v. Whitfield*, 70 N. C. 356; Wigm. Ev. '05 Ed. S. 826, p. 940. **U**
- (h) The principle upon which a confession is treated as sometimes inadmissible is that under certain conditions it becomes untrustworthy as testimony. Wigm. Ev. '05 Ed. S. 822, p. 931. **Y**
- (i) The test of exclusion is: “Human nature being what it is, were the prospects attending confession, as weighed at the time, against the prospects attending non-confession, such as to have created, in any considerable degree, a risk that a false confession would be made; or was the inducement such that there was any fair risk of a false confession?” Wigm. Ev. '05 Ed. S. 824, p. 937. **W**

(14) Duty of Court under English Law when doubt arises as to admissibility of confession.

In England, when a doubt arises as to the admissibility of a confession, the Court has to decide whether it has been proved affirmatively to be free and voluntary. This is the law laid down in the *Queen v. Thompson*, (2 Q.B. 12) *by Cave, J.* 25 B. 168 (171) = 2 Bom. L.R. 761 (764). **X**

(15) English Law.

- (a) The question regarding the relevancy of a confession is, “Is it proved affirmatively that the confession was free and voluntary, *i.e.*, was it preceded by any inducement to make a statement held out by a person in authority? If so, and the inducement has not clearly been removed before the statement was made evidence of, the statement is inadmissible.” *R. v. Thompson*, 2 Q.B. 12, *per Cave, J.*; Tay. Ev. 10th Ed. S. 872, p. 612. **Y**
- (b) It lies on the prosecution to establish, not upon the accused to negative, the voluntariness of a confession, the prosecution being bound to satisfy itself on that point before putting the statement in. *R. v. Thompson*, 2 Q.B. 12; Phip. Ev., 4th Ed. p. 242. **Z**
- (c) The proposition in the head-note of the report of the case—*R. v. Thomson*—appears, when the whole case is considered, to be too broadly laid down. In the case, it is stated that there was ground for suspicion,

7.—“To have been caused by any inducement, threat or promise.”—(Continued).

1.—(GENERAL).—(Continued).

and, *Care. J.*, who delivered the judgment of the Court, says later on. “I prefer to put my judgment on the ground that it is the duty of the prosecution to prove in case of doubt that the prisoner’s statement was free and voluntary”. *A. A. & W. Ev.* 4th Ed., p. 149. **A**

(16) Indian Law not identical with English Law on this point.

(a) But in India in deciding whether or not any particular confession is admissible in evidence, the Courts have to be guided by the provisions of the law enacted by the legislature. 25 B. 168 (171) 2 Bom. L.R. 761 (764). **B**

(b) S. 24, when fairly construed according to its language, makes it impossible to contend that the law in India is identical with the law in England, as to the admissibility of a confession, as explained in *Queen. v. Thompson*, 2 Q.B. 12. 2 Bom. L.R. 761 (764)–25 B. 168 (172). **C**

(c) To require as the criterion of admissibility, affirmative proof that a duly recorded and certified confession was free and voluntary, would not be consistent with the terms of Ss. 21 & 24 of the Evidence Act, or with the interpretation given to those sections by Nanabhai. J., in 11 B.H.C.R. 137, 25 B. 168 (172). **D**

(17) Inducement must be held out to person in question.

The important thing to note, however, is that unless the inducement was held out, directly or indirectly, to the *person in question*, it cannot exclude the confession; in such a case, that person has himself chosen to allow it to affect him, and to hope that it will be applied to him by the promisor, and thus he is himself responsible by free choice for its effect, and not the promising person, who cannot be said to have held out any inducement to him. *Wigm. Ev.* '05 Ed. S. 854, p. 985. **E**

(18) But it need not be made directly to him.

A promise or threat in order to exclude a confession need not be made *directly to the prisoner*. It is sufficient if it may reasonably be presumed to have come to his knowledge, provided it appears to have caused the confession. *R. v. Thompson*, 2 Q.B. 12; *Philp. Ev.* 4th Ed. p. 244, referring to *Tay. Ev.* S. 885. **F**

(19) Section throws it on party to get rid of confession alleged to be illegally induced.

S. 24, which makes a confession, otherwise unobjectionable, irrelevant if it appears to the Court to have been caused by an inducement, seems to throw it upon the party who has made the confession to get rid of it; which cannot be done by his own unsupported assertions at a subsequent stage of the proceedings. 11 B.H.C.R. 137. See 6 C.W.N. CCXXXVI. **G**

(20) Value of confession obtained by illegal means and by means short of that.

If a confession were obtained by means of an inducement forbidden by law, it would be inadmissible, but if the measures employed fell short of that,

7.—“To have been caused by any inducement, threat or promise.”—(Continued).

1.—GENERAL.—(Continued).

a confession extorted in that way must be unworthy of reliance. U. R. (1897—1901) (Cr.), 41 (45). **H**

(21) Torture and marks of personal violence unnecessary to render confession irrelevant under section.

It is a mistake to suppose that a confession cannot be irrelevant under S. 24 of the Evidence Act, unless it can be alleged that there was torture, leaving marks of personal violence. Under the section, a confession is held to be irrelevant, if the making of it appears to have been caused by any inducement, threat, or promise, etc. 3 Bom. L. R. 122 (125). **I**

(22) Judge, not jury, to decide voluntariness of confessions.

Confessions ought to be excluded unless voluntary; and the Judge, not the jury, ought to determine whether they are so. *Rev. Hannah Moore*, 21 L.J. Mag. Cr. 199; See 9 B.H.C.R. 358 (367). **J**

(23) Bare fact of prisoner denying voluntariness of confession puts Judge on enquiry.

(a) The mere denial by a prisoner of the voluntariness of a confession puts the Judge on enquiry and that enquiry should be conducted with the same care and exactness as the enquiry into any other relevant fact, before it is admitted on the record. 2 Bom. L. R. Art., p. 162. **K**

(b) The mere fact that a prisoner puts in a plea of not guilty and denies having made the confession or explains having made it by allegation of police torture, is enough, in itself, to put a Judge upon enquiry, and he then has to decide before admitting the confession at all, or allowing it to be looked at, whether it has been improperly induced. That is a question for the Court, *i.e.*, the Judge has to answer *in limine*. 8 Bom. L. R. 697 (699), per *Beaman, J.* **L**

(24) Duty of Judge to exclude confession appearing to him improperly induced.

If upon weighing all the circumstances, the prisoner's denial, and the probabilities, it appears to the Judge that the confession has been improperly induced, no matter how true it may be, he is bound to exclude it. 8 Bom. L. R. 697 (699), per *Beaman, J.* **M**

(25) Confession cannot be excluded unless Court considers it illegally induced.

According to the Indian Evidence Act, a confession is inadmissible, only if the Court considers it to have been induced by illegal pressure. 9 Bom. L. R. 789 (799) (F. B.), per *Chandavarkar, J.* See, also, per *Batty, J.*, at p. 804. **N**

(26) But question of voluntariness is only subsidiary in main question of credibility.

But the question as to the voluntariness of a confession comes in, when it is being evaluated, only as a subordinate, though material element, in the main question of the credibility of the proof. 9 Bom. L. R. 789 (801) (F. B.), per *Chandavarkar, J.* **O**

(27) Duty of trying Judge and High Court as Court of review and reference regarding confessions.

(a) What the presiding Judge at a trial has to decide, with regard to confessions, in the exercise of his judicial discretion, is whether the

7.—“To have been caused by any inducement, threat or promise.”—(Continued).

1.—GENERAL.—(Continued).

confessions appeared to him to be *voluntary*. 9 Bom. L.R. 789 (801) (F.B.); per *Chandavarkar, J.* **P**

- (b) What the High Court, as a Court of Review and Reference has to decide, where a confession has been decided by the trying Judge to be voluntary, is, “are the confessions proved to be true?” 9 Bom. L.R. 789 (801), (F.B.), per *Chandavarkar, J.* **Q**

(28) Value of extra-judicial confessions made to bolster up circumstantial evidence.

Little, if any, importance should be attached to an extra-judicial confession often found to bolster up the circumstantial evidence upon which a case depends. 9 C.W.N. 474 (476). **R**

(29) No presumption of illegal inducement of confession without evidence.

But, in the absence of evidence that a confession made by an accused person was induced by illegal pressure, no presumption will arise that such confession was so induced. 11 B.H.C.R. 137; see 5 M.L.J. Art. p. 25. **S**

(30) Statement before Magistrate and Sessions Judge—Statement before Magistrate not to be preferred.

Where a statement is made by an accused person at the Sessions Court subsequently to his making one before the Magistrate, the former statement made before the Magistrate should not be given preference to, in the absence of something to corroborate or show the truth of that statement. 21 W.R. (Cr.) 49; 12 B.L.R. Ap. 15 & 4 C.W.N. 129. **T**

(31) Allegations of improper influences to be duly enquired into by Sessions Court.

- (a) Allegations made in a regular and proper manner to the Sessions Court that a confession before a Magistrate was preceded by intoxication, insanity temporary delusion the influence of fear engendered by previous maltreatment of the police or other persons, or of inducement held out to the confessor of some reward, should receive due attention and be inquired into, and, if the Sessions Court were to refuse to make such enquiry, it would commit a very grave error in law and procedure. 8 B.H.C. R. 126 (137), referred to in 2 Bom. L. R. 761 (766); 25 B. 168. **U**

- (b) It is no legal answer to a demand for an enquiry upon such allegations that the Magistrate had warned the accused that it was optional with him to answer the questions put to him or not, although the fact that such a warning had been given would be a legitimate matter for comment by the prosecutor. 8 B.H.C.R. 126 (137). **V**

(32) Effect of adding a statement improperly induced to a confession.

It is not sufficient to render a confession irrelevant under S. 24 that there may have been added to it a statement which has been improperly induced by a threat or promise. 9 Bom. L.R. 789 (803); per *Batty, J.* **W**

(33) When confession improperly induced will be relevant.

Any part of a confession induced, as described in S. 24, cannot be relevant, except under the circumstances mentioned in S. 28, 2 L.B.R. 168. **X**

7.—“To have been caused by any inducement, threat or promise.”—(Continued).

1.—GENERAL.—(Concluded).

(34) Long detention and long interval between arrest and confession, effect of.

(a) For a case where the confessions obtained from accused persons were held to be far from trustworthy intrinsically owing to the facts that an interval elapsed between their arrest and the time when their statements were made, and that the men were improperly treated, see *U. B.R. (Cr.) (1892—1896)*, 249 (251). **Y**

(b) There is no law, and the intention of the Legislature is nowhere expressed, that a judicial confession is of no probative value or is inadmissible in evidence if the accused who makes it happens to have been arrested and in custody for more than any particular period before he confesses. *L.B.R. (1893-1900)*, 145 (146). **Z**

(35) Admissibility of answers to questions by police depends on circumstances of each case.

The admissibility of answers to questions put by police officers to suspected persons to ascertain the existence of any reasonable ground for arresting them must depend upon the circumstances of each case. *Rogers v. Hawkins*, 67 L.J.Q.B. 526; *Tay. Ev.* 10th Ed. S. 881, p. 622. **A**

(36) Confession made to one constable after interview with another, when relevant.

Where an accused person made a confession to one constable after an interview with another, it was held that the prosecution must show the absence of an inducement from the former as well as from the latter. *R. v. Swatkins*, 4 C. & P. 549; *Wigm. Ev.* 05 Ed. S. 860, p. 991. **B**

(37) Confessions held inadmissible, owing to Police interference.

(a) Under S. 146, Cr. P. C., 1861, a police officer acts illegally and improperly in offering any inducement to an accused person to make any disclosure or confession, and no part of the evidence of the police officer as to the discovery of facts in consequence of such confessions is legally admissible in evidence. 8 W.R. (Cr.) 13 (14); in this connection, see, also, S. 163 & S. 313, Cr. P. C., 1898. **C**

(b) Where the confession of an accused person conflicted with the medical evidence in the case and was probably induced by the police, the Chief Court declined to confirm a capital sentence based upon it. 3 P.R. 1867 (Cr.). **D**

(c) An admission or confession obtained by the police asking questions of a prisoner after he is in custody will not be admissible, the police having no right to ask the questions. *R. v. Garin*, 15 Cox. 656; *Tay. Ev.* 10th Ed. S. 881, p. 622. **E**

(d) Where a constable, after arresting and warning a prisoner, questioned him, and read a statement made by a person afterwards called as a witness for the prosecution, the prisoner's statements in answer were held to be inadmissible in evidence. *R. v. Male*, 17 Cox. 689; *Tay. Ev.* 10th Ed. S. 881, p. 622. **F**

7.--“*To have been caused by any inducement, threat or promise.*”--(Continued).

2.--VARIOUS KINDS OF INDUCEMENT, THREAT OR PROMISE.

(1) Expressions held to constitute inducement, threat or promise invalidating subsequent confessions.

- (a) Where an Honorary Magistrate in the district told the prisoners, “if you confess to the Magistrate, you will get off”, it was held that his position as an Honorary Magistrate gave his statement an air of authority to the prisoners and most probably influenced their after proceedings. 1 W. R. (Cr.), 24; See 6 C.W.N. ccxxxvi. **G**
- (b) “I will get you released, if you speak the truth”. 8 W.R. (Cr.), 13. See 6 C.W.N. ccxxxvi. **H**
- (c) A promise by a police officer that “he would get the prisoner off” is clearly a promise and an inducement that will invalidate a confession. 9 W.R. (Cr.), 16 (17). **I**
- (d) Where the words, “you had better tell the truth” were employed, *Field J.* said, “the use of this language has been repeatedly decided to render a confession inadmissible.” 10 C. 775 (776); see 5 M.L.J. Art. p. 29. **J**
- (e) Where the conviction of an accused person was mainly based upon a confession alleged to have been made by him to a Deputy Magistrate, the confession being prefaced with the note, “After excluding from my presence the police officers who brought him, I warned the accused that what he would say would go as evidence against him, so he had better tell the truth,” *held*, that to tell a prisoner that he had better tell the truth was a violation of the provision of the law, that the use of this language had been repeatedly decided to render a confession inadmissible and that, in consequence of this inducement having been held out to the prisoner, the confession must be rejected. 10 C. 775 (776-777). **K**
- (f) It is no part of the duty of a Magistrate to tell an accused person that anything he may say will go as evidence against him. 10 C. 775 (776-777). **L**
- (g) To tell a prisoner that, “if you confess the truth, nothing will happen to you” will taint a confession and cause it to be excluded from evidence. 5 N.W.P. 86; see 5 M.L.J. Art. p. 29; see 6 C.W.N. ccxxxvi. **M**
- (h) Certain accused persons were sent before a Magistrate to have their statements or confessions recorded. They were warned by the Magistrate before they made their statements, “not to expect any advantage or disadvantage therefrom”. *Held*, that the confessions, made by the accused after this warning had been given to them, were entirely inadmissible in evidence. A.W.N. (1906), 75 = 3 Cr. L.J. 324. **N**
- (i) “Tell me what really happened and I will take steps to get you off”. 3 B. 12; see 6 C.W.N. ccxxxvi. **O**
- (j) The words “you had better pay the money, than go to jail, and it would be better for you to tell the truth” addressed by the travelling auditor of a railway company to a booking clerk charged with defalcation were held to operate as an inducement by the suggestion which they

7.—“To have been caused by any inducement, threat or promise.”—(Continued).

2.—VARIOUS KINDS OF INDUCEMENT, THREAT OR PROMISE.—(Continued).

carried with them that the prisoner would be certainly sent to jail if he did not confess and pay, and that if he did, he would not be sent. 9 B.H.C.R. 358 (369). P

- (k) Where a Magistrate informed the accused that, if he made a full confession in regard to the stolen property, the Court would take it into consideration in awarding punishment, and the accused thereupon confessed, saying that he would produce the stolen property if the promise should be carried out, *held*, having regard to S. 163, Cr. P.C., and S. 24 of the Evidence Act, his confession was made in consequence of an improper inducement and was not voluntary. L.L.R. (1872—1892), 289 (290). Q

- (l) Where the superior officer of an accused person, charged with forging an educational certificate and with having fraudulently used it as genuine, called him up and told him that if the certificate were wrong there was no use in denying it and the accused then made a statement, *held*, that the statement was inadmissible under S. 24 of the Evidence Act, as the superior officer appeared to have suggested to the accused that it would be better to confess. 2 L.B.R. 316 (317) = 1 Cr. L.J. 1124 (1125). R

- (m) The suggestion made to the accused was that it would be better to confess. *Ibid*. S

- (n) Where an accused person had been induced to make his confession by the promise of the Sergeant of the Police, confirmed by an oath, to release him, his confession was held to be inadmissible under S. 24 of the Evidence Act. U.B.R. (Cr.) (1892—1896), 83 (84). T

- (o) The following are examples of statements that have been held to invalidate confessions, the statements containing either a promise or threat :— U

“You had better tell the truth.”

“You had better pay the money than go to jail.”

“If you don't tell the truth, I will send for the constable.”

“If you tell me where my goods are, I will be favourable to you.”

“If you confess the truth, nothing will happen to you.”

“I only want my money ; if you give me that, you may go to the devil.”

“Tell me what you know about it : if you will not, I can do nothing for you.” U.B.R. (1897-1901), 147 (149), (Cr.). Y

- (p) The admission of an accused person, made on the strength of the investigating police officer's promise that the accused would escape, if he made a disclosure, would be irrelevant, under S. 24 of the Evidence Act, read with ss. 120 & 143 of the Crim. Pro. Code, unless where the admission leads to the discovery of some fact. 8 P.R. (1882 (Cr). W

- (q) A Monigar Magistrate said to an accused person, who requested the Monigar not to report against him, “it should have been written

7.—“To have been caused by any inducement, threat or promise”—(Continued).

2.—VARIOUS KINDS OF INDUCEMENT, THREAT OR PROMISE.—(Continued).

yesterday : there is a hue and cry against you : if you speak the truth, we would consult the Head Constable and arrange,” and the accused thereupon made a confession ; held that the arrangement was an inducement intended to make the accused believe that he would be saved from prosecution by being taken as a witness instead of as an accused person if he would confess, and that the confession was irrelevant under S. 21. 26 M. 38 (39). **X**

(r) “Better confess” according to Sir Barnes Peacock, is objectionable, but not “better tell the truth.” 1 B.L.R.O. (Cr.) 22. But see 10 C. 775, where a warning by a Magistrate, “he had better tell the truth,” was held to be objectionable. 6 C.W.N. cccxxvi. **Y**

(s) A confession made in consequence of the accused being told, “It might be better for you to tell the truth and not a lie” was held inadmissible *R. v. Bate*, 11 Cox, 686. **Z**

(t) Where a confession was obtained by saying “If you tell me where my goods are I will be favourable to you,” the confession was held to be irrelevant. *R. v. Cass*, 1 Lea. 293 n ; see 6 C.W.N. cccxxvi ; see also, *Philp. Ev.* 4th Ed., p. 248 ; *Tay. Ev.* 10th Ed. S. 884, p. 624. **A**

(u) Where a constable told the prisoner who was suspected of the murder of her child, that “if she did not tell him where it was, she might get herself into trouble, and that it would be worse for her,” a statement thereupon made by her to the constable was rejected. *R. v. Coley*, 10 Cox, 536. **B**

(v) Where a Magistrate promised an accused person to do all he could, a confession subsequently obtained was held to be inadmissible. *R. v. Cooper*, 5 C. & P. 535 ; *Wigm. Ev.* 05 Ed. S. 836, p. 952. **C**

(w) Where a person was told that what he said might be used in his favour at the trial, Coleridge, J. observed that there could not be a more direct inducement to a man to make a confession. *R. v. Drew* 8 C. & P. 140 ; *Wigm. Ev.* 05 Ed. S. 837, p. 953. **D**

(x) The fact of any person telling a prisoner that it would be better for him to confess would always exclude any confession made to that person. *R. v. Dunn*, 4 C. & P. 543 ; *Tay. Ev.* 10th Ed. S. 874, p. 615. **E**

(y) Where a confession was obtained by saying, “you had better tell where you got the property,” the confession obtained in consequence was held not to be admissible. *R. v. Dunn*, 4 C & P. 543. **F**

(z) Where a constable said, “she had better tell the truth or it would lie upon her”, a confession made by the accused in consequence of that statement was excluded from consideration. *R. v. Enoch*, 5 C. & P. 539 ; per *Parke, J.* ; *Wigm. Ev.* '05 Ed. S. 832, p. 946. **G**

(aa) Where a confession was obtained by saying, “You had better tell the truth, it may be better for you,” held, the confession was not admissible. *R. v. Fennell*, L.R. 7 Q.B.D. 147. **H**

(bb) A confession made in consequence of being told that if a prisoner did not tell the truth, the constable would be sent for to take

7.—“To have been caused by any inducement, threat or promise.”—(Continued).

2.—VARIOUS KINDS OF INDUCEMENT, THREAT OR PROMISE.—(Continued).

- her, was excluded. *R. v. Hearn*, 1 C. & M. 109; Wigm. Ev. '05 Ed. S. 832, p. 946; Phip. Ev. 4th Ed., p. 249. **I**
- (cc) “If you don't tell the truth, I will send for the constable to take you”. *R. v. Hearn*, 1 C. & M. 209 & *R. v. Richards*, 5 C. & B. 318; see 6 C.W.N. cccxxvi. **J**
- (dd) “I only want my money; if you give me that you may go to the devil”. *R. v. Jones*, R. & R. 152, see 6 C.W.N. cccxxvi. **K**
- (ee) Where a confession was obtained by saying, “you had better tell all you know”, the confession so obtained was held inadmissible. *R. v. Kingston*, 1 C. & P. 387. **L**
- (ff) Where the accused's husband was told “to tell the truth” in the presence of the arresting constable, it was held that the confession was excluded on mixed grounds. *R. v. Laughlin*, 2 C. & K. 227; Wigm. Ev. '05 Ed. S. 832, p. 946; Tay. Ev. 10th Ed. S. 873, p. 614; Phip. Ev. 4th Ed. p. 243. **M**
- (gg) Where a person was intimidated, at the time he was induced to confess, to be given into custody, without any offence being then specifically charged against him, but the nature of the charge was stated subsequently, and he made a confession, the confession was held to be irrelevant. *R. v. Luckhurst*, 23 L.J.M.C. 18; Jay. Ev. 10th Ed. S. 879, p. 619. **N**
- (hh) “If you don't tell me, I will give you in charge of the police till you do tell me”. *R. v. Luckhurst*, Dears, C.C. 245; see 6 C.W.N. cccxxvi. **O**
- (ii) A servant in the custody of a constable said to her mistress, “if you forgive me, I will tell the truth.” and the mistress replied, “Anne, did you do it?” A confession made in consequence was held to be inadmissible. *R. v. Mansfield*, 14 Cox, C.39; Phip. Ev. 4th Ed., p. 248. **P**
- (jj) Where a fellow-prisoner in the presence of the arresting constable exhorted an accused person to confess, the confession was held to be excluded. *R. v. Mullen*, 3 Cox. C.C. 507; Wigm. Ev. '05 Ed. S. 829, p. 942; Phip. Ev. 4th Ed., p. 243. **Q**
- (kk) A confession induced by a promise or threat from a person in authority to the effect, “it is of no use to deny it, for there are the man and the boy who will swear that they saw you do it” was held to be irrelevant. *R. v. Mills*, 6 C. & P. 146; Phip. Ev. 4th Ed. p. 247; Tay. Ev. 10th Ed. S. 884, p. 624 see also U.B.R. (1897—1901), Cr. p. 147 (149). **R**
- (ll) A confession procured by telling the prisoner that “I should be obliged to you if you would tell us what you know about it; if you will not, of course, we can do nothing”, was held to be irrelevant. *R. v. Patridge*, 7 C. & P. 551. **S**
- (mm) “The watch has been found, and if you do not tell me who your partner was, I will commit you to prison”. *R. v. Parratt*, 4 C. & P. 570; Tay. Ev. 10th Ed. S. 884, p. 624. **T**

7.--"To have been caused by any inducement, threat or promise."—(Continued).

2.—VARIOUS KINDS OF INDUCEMENT, THREAT OR PROMISE.—(Continued).

- (nn) Where a confession is obtained by a threat to send for a constable if the accused do not give a more satisfactory account, the confession made in consequence was held inadmissible. *R. v. Richards*, 5 C. & P. 318. **U**
- (oo) Where a constable told an accused person that he had better not add a lie to the crime of theft, it was held that the confession was vitiated. *R. v. Shepherd*, 7 C. & P. 579; *Wigm. Ev.* '03 Ed. S. 838, p. 954. **Y**
- (pp) Where a prisoner was told by a person in authority that, if she would confess the crime, she would have her liberty, her confession was held to be inadmissible. *R. v. Simpson*, 1 Moo. C. C. 410; *Wigm. Ev.* '05 Ed. S. 836, p. 952. **W**
- (qq) A confession obtained by telling the prisoner that he had better split, and not suffer for all of them, was held to be irrelevant. *R. v. Thomas*, 6 C. & P. 353. **X**
- (rr) Where the employer of a prisoner told his brother, "it will be the right thing for him to make a clean breast of it," held, not only that this inducement would exclude but that it might be inferred to have reached the prisoner. *R. v. Thompson*, 2 Q.B. 12; *Phip. Ev.* 4th Ed. p. 249. **Y**
- (ss) If a confession be procured by a threat to take the defendant before a Magistrate if he do not give a more satisfactory account, a confession made in consequence would not be admissible. *R. v. Thomson*, 1 Leach, 291. **Z**
- (tt) "If you are guilty, do confess; it will perhaps save your neck; you will have to go to prison. Pray tell me, if you did it." *R. v. Upchurch*, 1 Moo. C. C. 465; see 6 C.W.N. ccxxvi; *Phip. Ev.* 4th Ed., pp. 247 & 248. **A**
- (uu) Where a confession was made in consequence of a statement—"it would have been better if you had told at first," it was held inadmissible. *R. v. Walkley*, 6 C. & P. 175; *Phip. Ev.* 4th Ed. p. 248. **B**
- (vv) A confession obtained by saying, "It will be best for you if you will tell how it was transacted," was held not to be relevant. *R. v. Warringham*, 2 Den. 447. **C**
- (ww) Where an accused person asked, "If I tell the truth, shall I be hung?" and received the reply, "No, nonsense, you will not be hung," a confession made in consequence was held to be inadmissible. *R. v. Winsor*, 4 F. & F. 363; *Phip. Ev.* 4th Ed., p. 248; *Tay. Ev.* 10th Ed. S. 873, p. 614. **D**
- (xx) If it be said to the defendant that it will be better or worse for him if he do or do not confess, a confession made in consequence would not be relevant. 2 East (P. C.) 659. **E**

(2) Other invalidating agencies and influences.

- (a) An admission made by a prisoner, through the persuasions and promises of immunity of the police, ought not to be received in evidence, as being in direct contravention of S. 146, *Crim. Pro. Code*, 1861. 9 **F**
W. R. (Cr). 16 (17).

7.—“To have been caused by any inducement, threat or promise.”—(Continued).

2.—VARIOUS KINDS OF INDUCEMENT, THREAT OR PROMISE.—(Continued).

- (b) A confession induced by promising immunity from prosecution of another case is not admissible against the confessor. 12 P.W.R. 07 (Cr.) = 5 Cr. L.J. 437. **G**
- (c) Where a prisoner was stated to have made a confession immediately after he, along with others, had been threatened by a witness with a loaded rifle, *held*, that the statement of the witness to whom the prisoner was alleged to have confessed was inadmissible in evidence, it being immaterial that the threat was not made to extort a confession, but to suppress an attempt at mutiny. 10 B.L.R. Ap. 1. **H**
- (d) Where an accused person was illegally arrested without a warrant, a confession subsequently made was held to be irrelevant. *R. v. Ackroyd*, 1 Lew. C.C. 49, Phip. Ev. 4th Ed. p. 245. **I**
- (e) Where a confession was obtained by false pretences and fraud, it was held not to be voluntary and not to be admissible in evidence. *Cook v. The State*, 40 Am. St. R. 756; Tay. Ev. 10th Ed., S. 881, p. 621. **J**
- (f) Where an accused person made a confession under circumstances which caused him to infer that it would be better for him to confess, *held*, his confession was not voluntary. L.B.R. (1893—1900), 52(54). **K**
- (g) When there is no judicial proof of the guilt of an accused person, it is illegal to rely upon an unreliable or suspicious confession, or a confession which is open to the grave suspicion of having been produced by the ill treatment of the police. 21 P.W.R. (1907) (Cr.). **L**
- (h) Where a Magistrate, as a prosecutor, holds out promises to prisoners as an inducement to them to confess, he acts without due discretion. 1 W. R. (Cr.) 24. **M**
- (i) Where the band bill offering a reward for evidence was hung up from the Magistrate's office and its contents were known to the accused, who was desirous of giving evidence, his statements subsequently made were excluded. *R. v. Blackburn*, 6 Cox. 337; Wigm. Ev. '05 Ed. S. 835, p. 951. **N**
- (j) Where there was every reason to believe that the statements of an accused person were made in consequence of inducements or promises within the terms of S. 24 of the Evidence Act, it was held that he could not be convicted on his own statements. 21 C. 642 (660). **O**
- (3) Expression “tell the truth” is not equal to inducement to confess falsely.
- (a) But it can hardly be said that telling a man “to be sure to tell the truth” is advising him to confess what he is really not guilty of. *R. v. Court*, 7 C & P. 486; Wigm. Ev. '05 Ed. S. 832, p. 947, see also 9 B.H.C.R. 358 (367). **P**
- (b) It seems to have been supposed at one time that saying ‘tell the truth’ meant in effect ‘tell a lie.’ *R. v. Reeva*, L.R. 1 C.C.R. 363; Wigm. Ev. '05 Ed. S. 832, p. 947. **Q**
- (c) Telling a person that he *had better tell the truth* is very different from telling him that he *had better confess*, when you do not know whether he is innocent or guilty. 1 B.L.R.O. Cr. 15. **R**

7.—“To have been caused by any inducement, threat or promise.”—(Continued).

2.—VARIOUS KINDS OF INDUCEMENT, THREAT OR PROMISE.—(Continued).

(4) Technical nature of “you had better”.

The words “you had better”, seem to have acquired a sort of technical meaning. *Per* Kelly, C.B., in *K. v. Jarvis*, L.R. 1 C.C.R. 96; *Phip. Ev.* 4th Ed. p. 210. **S**

(5) Explanation of the expression “you had better”.

The assurance that “you had better confess” is an exhortation which might turn the balance, in the breast of a guilty person, between silence and confession; but with an innocent man that is too extraordinary a supposition to justify any evidentiary rule of exclusion. Nevertheless, this has always been held to be a vitiating inducement under the rule that “any inducement however slight”, is sufficient to exclude. *Wigm. Ev.* 5th Ed. S. 838, p. 951. **T**

(6) Facts held not to constitute illegal inducement, etc.

(a) A confession induced by a conditional promise with reference to the charge has been held, though not uniformly, to be admissible if the prisoner has violated the condition. *R. v. Hurley*, 2 Stark, *Ev.* 3rd Ed. 13n; *Phip. Ev.* 4th Ed., p. 244. **U**

(b) Fear alone, without threats, will not make a confession inadmissible *R. v. Rome*, 137 Sess. Pap. C.C.C. 220; *Phip. Ev.* 4th Ed., p. 244. **Y**

(c) A confession made when drunk was held to be relevant. *R. v. Spilsbury*, 7 C. & P. 187; *Tay. Ev.* 10th Ed. S. 881, p. 620. **W**

(d) A confession induced by a promise of secrecy will not be excluded from evidence. *R. v. Shaw* 6 C. & P. 372; *Phip. Ev.* 4th Ed. p. 244. **X**

(e) It is admissible and proper to warn a prisoner, in general terms, that any confession he may make will be used against him at the trial, and can do him no service. *R. v. Histed*, 19 Cox. 16 (Hawkins, J.) *Tay. Ev.* 10th Ed. S. 882, p. 622. **Y**

(f) Where an accused person was merely exhorted to speak the truth, held, that a mere exhortation of the kind could not be construed into an inducement, threat, or promise, and, least of all, into an inducement to make a false confession and that it was not enough to reject evidence of a confession, not otherwise improperly induced. 9 P.R. 1894 (Cr.). **Z**

(g) A confession induced by moral or religious exhortation, as by a Chaplain, will not be excluded. *R. v. Gilham*, 1 Moo. C. 186; *Phip. Ev.* 4th Ed., p. 244. **A**

(h) A confession induced by moral or religious exhortation by persons other than a Chaplain, will not be excluded. *R. v. Jarvis*, L.R. 1 C.C.R. 96; *Phip. Ev.* 4th Ed., p. 244. **B**

(i) Where a police officer read over to an accused the statements taken by him from other accused, and then told him, “I know the whole thing now,” and the prisoner thereupon made a statement in consequence of which he was arrested and taken before a Magistrate, before whom his confession was recorded. held, that it was impossible to hold that the

7.—“To have been caused by any inducement, threat or promise.”—(Continued).

2.—VARIOUS KINDS OF INDUCEMENT, THREAT OR PROMISE.—(Continued).

confession was not free and voluntary, and that a confession recorded under such circumstances was perfectly admissible. 3 Bom. L.R. 404 (406). **C**

(j) Where the question was whether the words used by a Subdivisional Magistrate, “it is of no use your trying to get out of it, you were seen with a pair of shoes,” to an accused person charged with criminal breach of trust were sufficient, under S. 24 of the Evidence Act, to invalidate his confession, *held*, though the language used, interpreting it most favourably to the accused, might be considered sufficient to overcome the mind of an uneducated and inexperienced boy, it was not sufficient to overcome the mind of a man of the age, experience, education, and position of the accused so as to induce him to make a confession which, he must have well known, would, at the very least, have led to his expulsion from Government service, and, therefore, the confession was held not to be invalidated. U.B.R. (Cr.), (1897—1901), 147 (149). **D**

(k) Where a constable told a prisoner that he need not say anything to criminate himself, but that his statement would be used against him, *held* that this was no inducement. *R. v. Baldry*, 2 Den 430; Steph. Dig. 7th Ed. Art. 22, p. 30. **E**

(l) Where a confession was made by an accused person after a constable in the jail told him that his accomplice had been taken into custody—which was not the fact—but afterwards, on being cited as a witness for the prosecution, the accused denied all knowledge of the case, the confession was held to be relevant against him when he was afterwards tried for the offence itself. *R. v. Burley*, 2 Stark Ev. 13 n; Tay. Ev. 10th Ed. S. 881, p. 621. **F**

(m) Where a turnkey promised to post a letter, given to him by a prisoner and addressed to the latter's father, containing a confession, but the turnkey, instead of posting it as promised, sent it on to the prosecutor *held* that the confession was a voluntary one, the manner in which the letter came into the hands of the prosecutor being immaterial. *R. v. Derrington*, 2 C. & P. 418; Tay. Ev. 10th Ed. S. 881, p. 620. **G**

(n) Where a prisoner asked of the jail Chaplain whether any offer of pardon had been made to him and the Chaplain replied that there had, but that he could offer no inducement to the prisoner and that any confession must be voluntary, whereupon the prisoner signed a confession before the justice, stating he had received no promise or inducement from any one, *held*, the confession was relevant. *R. v. Dingley*, 1 C. & K. 637; Phip. Ev. 4th Ed., p. 249. **H**

(o) Where a person charged with murder made a confession on the jail Chaplain reading the Communion Service to him and exhorting him, upon religious grounds, to confess his sins, such a confession was held to be voluntary. *R. v. Gilham*, 1 Moo. C.C. 186; Steph. Dig. 7th Ed. Art. 22, p. 32. **I**

7.—“*To have been caused by any inducement, threat or promise.*”—(Continued).

2.—VARIOUS KINDS OF INDUCEMENT, THREAT OR PROMISE.—(Continued).

- (p) Where a Magistrate, after the examination of the witnesses, told the prisoner “Be sure you say nothing but the truth, or it will be taken against you, and may be given in evidence against you at your trial,” a statement made by the accused in consequence, was held to be relevant. *R. v. Holmes*, 1 C. & K. 248. **J**
- (q) Where one of the employers of an accused person took him into his private room and said “I think it right that I should tell you that, besides being in the presence of my mother and myself, you are in the presence of two police officers, and I should advise you that to any questions that may be put to you, you will answer truthfully, so that, if you have committed a fault, you may not add to it by stating what is untrue,” and then after showing the prisoner a letter which he denied having written said “take care, we know more than you think we know,” held that a confession made after this was relevant, the Court being of opinion that the last words used by the master amounted only to a caution. *R. v. Jarvis*, L.R. 1 C.C. 96; see *Tay. Ev.* 10th Ed. S. 872, p. 613 & 3 Bom. L.R. 404 (406). **K**
- (r) Where a constable told a prisoner suspected of having stolen the purse of the prosecutrix, “Now is the time for you to take it back to her,” it was held that these words did not render irrelevant a statement subsequently made to the constable by the prisoner, as the words imported no promise or threat to the prisoner to induce him to confess. *R. v. Jones*, 12 Cox, 241 (C.C.R.). **L**
- (s) “I hope you will tell, because Mrs. G. can ill afford to lose the money”. This expression being an admonition on moral or religious grounds, a confession made in consequence was held to be admissible. *R. v. Lloyd*, 6 C. & P. 393; *Phil. Ev.* 4th Ed., p. 248. **M**
- (t) “As a general rule, an exhortation to tell the truth ought not to exclude a confession.” *R. v. Moore*, 2 Den. C.C. 523; *per Erle, J.* *Wigm. Ev.* 10th Ed. S. 832, p. 947. **N**
- (u) Where one prisoner had said to another in the presence of the prosecutor “you had better tell Mr. W. the truth”, a confession subsequently made was held to be admissible; here the prosecutor’s assent could hardly have been implied. *R. v. Parker*, 8 Cox, 465; *Phil. Ev.* 4th Ed., p. 243. **O**
- (v) Where the mother of a little boy, in custody on a criminal charge, told him in the presence of another boy, also charged, and a policeman, “you had better as good boys tell the truth,” held, the confession made in consequence was admissible in evidence. *R. v. Reeve*, L.R. 1 C.C.R. 362; *Tay. Ev.* 10th Ed. S. 872, p. 613. **P**
- (w) Where a confession was induced by neighbours, who had nothing to do with the case, and officiously interfered and admonished the prisoner to tell the truth and consider his family, the confession was held to be admissible. *R. v. Row, R. & R.* 153. *Tay. Ev.* 10th Ed. S. 875, p. 616. **Q**

7.—“To have been caused by any inducement, threat or promise.”—(Continued).

2.—VARIOUS KINDS OF INDUCEMENT, THREAT OR PROMISE.—(Concluded).

(N.B.—The decision does not appear to be more than a decision on the facts of the particular case. *Tay. Ev.* 10th Ed. S. 875, p. 616). **R**

(x) Where a prisoner was told, “I am very sorry for you, you ought to have known better, tell me the truth whether you did it or not,” and the defendant replied, ‘I am innocent,’ whereupon the other said ‘don’t run your soul into more sin, but tell me the truth’, a statement made in consequence was held relevant. *R. v. Sleeman*, Dears. & Bell, 249; *Tay. Ev.* 10th Ed. S. 872, p. 613. **S**

(y) Where a prisoner asked of a witness, with whom he was in conversation, whether he had better confess, and the witness replied that he had better not, but he might say, what he had to say, to him, for it should go no further, a statement made in consequence by the prisoner was held to be relevant. *R. v. Thomas*, 7 C. & P. 345. **T**

(z) Where a prisoner under 14 years of age accused of murder was told, “Now kneel down, I am going to ask you a very serious question, and I hope you will tell me the truth in the presence of the Almighty,” a statement made in consequence was held to be relevant. *R. v. Wild*, 1 Moo. C.C. 452; *Tay. Ev.* 10th Ed. S. 872, p. 613. **U**

(aa) Where a Magistrate told a prisoner that his wife had already confessed everything and that there was a sufficient case against him to send a bill before the Grand Jury and asked him what he had to say and the prisoner made a confession subsequently, it was held to be relevant as the Magistrate’s statement merely amounted to a caution. *R. v. Wright*, 1 Lew. 48 & see, also, *R. v. Long*, 6 C. & P. 179, *Philp. Ev.* 4th Ed., p. 249. **V**

3.—TENDER OF PARDON AND ITS LEGAL EFFECT UPON CONFESSIONS.

(1) Hope of pardon and becoming approver should not be offered to suspected men as inducement.

Without any certainty that the facts of a crime could not otherwise be ascertained, the too common course of trying to induce suspected men to bid against each other as to which should make the fullest disclosure in the hope of obtaining a pardon and being allowed to turn approver should not be encouraged. 4 P.R. (Cr.), 1903. **W**

(2) Grant of pardon is a serious step to be taken on ample grounds.

The grant of a pardon to a man who implicates himself and others in a murder is not a mere incident in a case to be lightly agreed to as a means of saving further trouble, but is a serious step to be taken only on ample grounds and with clear recognition of the risk, which it involves, of allowing an offender to escape just punishment at the expense of possibly innocent men. 4 P.R. (Cr.), 1903. **X**

(3) Withdrawal of pardon also a serious step.

But where the circumstances justify that step, the withdrawal of a pardon is an equally serious measure, the necessity for which cannot

7.—“To have been caused by any inducement, threat or promise.”— (Continued).

3.—TENDER OF PARDON AND ITS LEGAL EFFECT UPON CONFESSIONS.—(Continued).

ordinarily be determined until the trial has been completely held.
4 P. R. (Cr.), 1903. Y

(4) Tender of pardon by Local Government is no illegal inducement, etc.

The tender of a pardon by the Local Government, though of doubtful validity in law, can in no way be regarded as an ‘inducement or threat illegally held out to an accused person to disclose or withhold any matter within his knowledge.’ 5 C.L.J. 224—5 Cr. L.J. 142 (145). Z

(5) Confessions made under promises and hope of pardon held relevant.

(a) A confession made under a promise of pardon may be relevant under S. 339, Cr.P.C. 2 A. 260 & 1 B. 610, referred to in 6 C.W.N. ccxxxv. A

(b) Where a Magistrate attempted to induce a confession by promising an accused person to try to get him a pardon if he should confess, and afterwards news from the Secretary of State to the Magistrate that no pardon could be granted was communicated to the accused person, who subsequently made a confession, the confession was held to be voluntary. *R. v. Clewes*, 1 C & P. 221; Steph. Dig. 7th Ed. Art. 22, p. 32. B

(c) Where a prisoner made a confession in the mere hope and with the view of being permitted to turn King’s evidence, it would not be sufficient to exclude its being used against him; to exclude it, it must be shown that a hope of pardon was held out by some person in authority and that the prisoner acted upon it. *R. v. Berigan*, Ir. Cir. R. 177; Tay. Ev. 10th Ed. S. 881, p. 621. C

(d) Where a person has forfeited his pardon after giving evidence in the preliminary enquiry, it is not necessary that he should be examined as a witness in the Sessions Court. Consequently, his incriminating statement made before the Magistrate is relevant against him, although he has not been so examined. U.B.R. (1907), 4th Quarter, Crim. Pro. Code, 7 (10), following 24 M. 321. D

(6) Confessions made under promises and hope of pardon held not relevant.

(a) A statement made by a prisoner under a promise of pardon is no evidence against him. 8 W.R. 53 (54) (Cr.). E

(b) The confession of an accused person made before a Magistrate is irrelevant under S. 24 of the Evidence Act, when the police told him that he would get a pardon if he would make a confession, and he made that confession under the hope of obtaining pardon. 1 A.L.J. 110 (112). F

(c) Where a police constable admitted that he told his prisoner that he would ask the Magistrate to pardon him, if he told the truth about this and other cases, held that there was a direct inducement proceeding from a person in authority, which was sufficient to give the prisoner grounds, which appeared to him reasonable, for supposing that he would be pardoned if he confessed, and that the confession was bad under S. 24 of the Evidence Act. L.B.R. (1872—1892), p. 896 (397). G

7.—“*To have been caused by any inducement, threat or promise.*”—(Continued).

3.—TENDER OF PARDON AND ITS LEGAL EFFECT
UPON CONFESSIONS.—(Continued).

- (d) Where a Magistrate tendered a pardon to an accused person, alleged to have been concerned with other persons in the commission of certain offences—none of which was exclusively triable by the Court of Sessions—and such person was made an approver and examined as a witness for the prosecution, *held*, that his statement was irrelevant and inadmissible with reference to S. 344 of the Crim. Pro. Code, 1872, and S. 24 of the Evidence Act. 2 A. 260 (262). **H**
- (e) An accused person made a detailed confession to a Magistrate implicating himself and others. It was duly recorded. Subsequently, before the committing Magistrate, he admitted the statement to be correct, but stated that he made it, as the Police Superintendent and the Magistrate had told him that the District Magistrate had promised him a pardon, and the Magistrate to whom the confession was made also admitted that. *Held*, under S. 24 of the Evidence Act, the confession was inadmissible owing to the inducement which the Magistrate held out, it being immaterial that the Magistrate to whom the confession was made had no authority for what he said, and though what he said did not amount to a promise of pardon. 1 P.R. 1899 (Cr.). **I**
- (f) Though, when the committing Magistrate told an accused person that he could not get the pardon which the Magistrate, before whom the accused made the confession on his making a promise of pardon, had promised, the accused adhered to his original confession without however repeating it, *held* he was under the influence of the inducement. 1 P.R. 1899 (Cr.). **J**
- (g) A pardon given to an approver was withdrawn before the trial was completed. A statement made by the approver was held not to be relevant against him, or against any body with whom he was being jointly tried, as such statement was inadmissible under S. 24 of the Evidence Act, in spite of the special provision of S. 339, cl. 2, Cr. P.C. 1898. 4 P.R. 1903 (Cr.). **K**
- (h) The deposition of an accused person, jointly tried with another, before a Magistrate, where the former was offered a pardon under the provisions of S. 337 of the Crim. Pro. Code, was held to be inadmissible as a confession because, *inter alia*, it was irrelevant under S. 24 of the Evidence Act, it having been made after the tender of pardon. 22 C. 50 (73). **L**
- (i) Where a pardon is revoked at any stage before the final trial and where proceedings are in consequence taken against an approver before he has had the full opportunity which the law requires of giving his evidence at that trial, no part of his earlier statement as an approver can be utilised against himself, much less against any one with whom he is being jointly tried. 24 P.R. (Cr.), 1902; referred to in 4 P.R. (Cr.), 1903. **M**
- (j) A confession, made by a person charged with the murder of another, in consequence of a notification, issued by the Secretary of State, promising a reward and pardon to any accomplice who would confess,

7.—“To have been caused by any inducement, threat or promise.”—(Continued).

3.—TENDER OF PARDON AND ITS LEGAL EFFECT UPON CONFESSIONS.—(Concluded).

which was brought to the knowledge of the accused, who, under the hope of being pardoned, made it, was held not to be voluntary. *R. v. Poswell, Car & Marsh*, 584; *Steph. Dig.* 7th Ed. Art. 22, p. 32. N

4.—CONFESSIONS SUBSEQUENTLY RETRACTED.

(1) Suspicious character of confessions retracted at trial.

(a) Confessions which are supposed to be the offspring of penitence and remorse, and which nevertheless are repudiated by the prisoner at the trial, must always be open to suspicion. *R. v. Thompson*, 2 Q.B. 12 (18); *referred to* in 22 C. 164 & 25 B. 168; see, also, 1 L.B.R. 238 (248). O

(b) It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory, but when it is not clear and satisfactory, the prisoner is not infrequently alleged to have been seized with the desire born of penitence and remorse to supplement it with a confession, a desire which vanishes as soon as he appears in a Court of Justice. *Ibid.* cited in 1 L.B.R. 238 (248). P

(2) Retraction of confessions often follows confession.

The fact that the retraction of a confession follows the confession immediately as a matter of course is an endless source of anxiety and difficulty to those who have to see that justice is properly administered. 6 A. 509 (543) (F. B.). Q

(3) Retracted confession should carry no weight.

A retracted confession should carry practically no weight as against a person other than the maker, it is not made on oath, it is not tested by cross examination, and its truth is denied by the maker himself who has thus lied on one or other of the occasions. 5 C.W.N.670 (671)=28 C. 689(691). R

(4) Retraction of confessions and assertion of ill-usage should not be taken as invariably untrue.

It would be a most perilous doctrine for the subject were Courts to sanction the supposition that the retraction of confessions and assertion of ill-usage as their producing cause, are so invariably untrue as to warrant Courts of Justice in rigidly closing their ears and refusing to entertain or investigate that assertion. 8 B H.C.R.126(138). S

(5) Retracted confessions require corroboration.

(a) Retracted confessions require corroboration before they can be admissible. 12 B.L.R.App.15. T

(b) A confession made before a magistrate, though subsequently retracted in the Sessions Court, is relevant against the maker—8 W.R.(Cr.) 40—but it is unsafe to convict without corroboration. 2 C.L.R.192. U

(c) Where the accused were convicted solely upon their confessions before the Magistrate, *held*, there being absolutely no corroboration whatever of

7.—“To have been caused by any inducement, threat or promise.”—(Continued).

4.—CONFESSIONS SUBSEQUENTLY
RETRACTED.—(Continued).

those confessions, and there being admitted misconduct on the part of the police and the confessions being also subsequently retracted, the conviction of the prisoners was illegal. • 2 C.L.R. 132(133). **Y**

(d) Where a confession of the accused, charged with offences under Ss. 372 and 373 of the Penal Code, was adduced in evidence of the existence of the guilty knowledge or intention required under the sections, the Court, considering the circumstances under which the confession was made and subsequently retracted, held it unsafe to find the existence of the guilty knowledge or intention solely upon the basis of that confession, although the confession of the accused affords the most direct evidence of the existence of such an intention. 22 C. 164(172). **W**

(e) When a statement in the nature of a confession is repudiated before the Sessions Court, it has long been settled in the Calcutta High Court that it is never safe to rely upon a statement so made, unless materially corroborated. 4 C.W.N. 129 = 27 C. 295; cited in 4 C.W.N. cxxvi, and in 1 L.B.R. 238(246). **X**

(f) The very fullest corroboration is necessary in a case of retracted confession, far more than would be demanded for the sworn testimony of an accomplice on oath. 5 C.W.N. 670(671). **Y**

(g) And a conviction based upon an uncorroborated and retracted confession of an accomplice is improper and bad. 5 C.W.N. 670. **Z**

(h) A confession, though made voluntarily by an accused person before a Magistrate and subsequently retracted, is not sufficient by itself to justify a Court of Sessions in acting upon it. *Queen-Empress v. Balya Dagdu*, Bom. H.C.Cr. Rul. No. 3 of 1898. Rat. Un. Cr.C., p. 952 **A**

(i) It is unsafe to rely and act upon the retracted confessions of an accused person unless, upon a consideration of the whole evidence in the case, the Court is in a position to come to the unhesitating conclusion that the confessions were true; that is, unless there is reliable independent evidence to corroborate the statements. 18 A. 78 (81). **B**

(j) It is not safe to convict an accused person on his retracted confession, standing by itself uncorroborated. 3 P.W.R. 1907 (Cr.). **C**

(k) Where the accused made a detailed confession before the Committing Magistrate, but, when his examination was read over to him, retracted his confession on the ground that it was the consequence of ill-treatment, held that, there being no admissible confession on the record and nothing to corroborate the evidence of the approver on any material part of the case, his conviction and sentence should be reversed. 9 B.H.C.R. 341 (345). **D**

(l) An accused person made a confession after he had been under arrest for 7 days. There was reason to believe that he made the confession in consequence of a pardon tendered to him. He subsequently retracted the confession before the Sessions Court, saying that he made the confession as he was threatened and confined, but did not mention

- 7.—“*To have been caused by any inducement, threat or promise.*”—(Continued).

4.—CONFESSIONS SUBSEQUENTLY RETRACTED.—(Continued).

any pardon having been offered to him. *Held*, there must have been some motive for the accused changing his mind and confessing, after he had been under arrest for 7 days, and that his confession, recorded under S. 164, Cr. P.C., was inadmissible under S. 24, Evidence Act. L.B.R. (1893–1900), 7 (9). **E**

- (m) An accused person, long after the occurrence of a dacoity, made a statement in the nature of a confession before the police—twice repeated before a Magistrate—accusing all the co-accused, but alleging that, much against his will, he was induced to accompany the robbers to the scene of the crime witnessed by him and that he took no part in it. Before the Sessions Court, he said he was tortured by the police till he consented to denounce the persons named to him, and that they promised to get him off if he would do so. *Held*, that the statement was inadmissible, as an inducement of some kind must have been used before he would make the statements which he did before the Magistrate. S.C. 153. (Oudh) see, also under S. 30, *infra*. **F**

- (n) Where an accused person made a confession before a Deputy Magistrate which he subsequently retracted before the Sessions Court, and the confession was not corroborated by any witness for the prosecution upon some material points, *held* it was unsafe to found a conviction upon a retracted confession, not corroborated upon material points by credible and independent evidence. 1 O.C. Sup. 13. **G**

- (o) Where the statement of a person in the capacity of an approver had been made under a condition not fulfilled, *viz.*, that he should be examined at the trial, if the prosecution was not prepared to treat him as a witness, preferring to deal with him as a co-accused, his retracted statement would be irrelevant under S. 24 of the Evidence Act, notwithstanding the special provision of cl. 2 of S. 339, Cr.P.C., 1898. 4 P. R. 1903 (Cr.). **H**

- (p) Where certain accused persons had been convicted upon a confession made by one of the co-accused, which confession had been made before a third class Magistrate and retracted at the enquiry, their conviction was set aside. 140 P.L.R. 1905. **I**

- (q) A girl of 15 was suddenly charged with murder and was kept in the custody of the police for some time. She complained that she was beaten and on the next day confessed before a Magistrate, but subsequently retracted that confession. *Held*, having regard to the circumstances under which the confession was made, it was not trustworthy. 6 C. W.N. 340. **J**

- (r) Where a prisoner had withdrawn all the confessional statements made by her, it was *held* to be necessary to examine the evidence and see if there was reliable independent evidence to corroborate, to a material extent and in material particulars, the statements contained in the withdrawn confessional statements. If no such corroborative evidence existed, then the contradictory statement of the prisoner remained and doubt existed as to which statement was true, and the confessional

7.—“To have been caused by any inducement, threat or promise.”—(Continued).

**4.—CONFESSIONS SUBSEQUENTLY
RETRACTED.—(Continued).**

statements could not be relied on against the prisoner. 10 M. 295 (309) ; cited in 1 L.B.R. 238 (245). **K**

- (s) The fact that, after the first confessional statement, a prisoner made several others subsequently to the same effect, including the confessional statement made at the trial, cannot be accepted as a corroboration of the prior statement, as such subsequent statements themselves required corroboration as they were withdrawn. The motive which induced the prisoner to make the first confessional statement may have induced her to make all those made subsequently. 10 M. 295 (310). **L**

(6) Bombay High Court treated value of retracted confession as a matter of prudence.

The Bombay High Court, while fully conscious of the need of caution in dealing with retracted confessions, has refrained from laying down any binding rule, but treated the value of a retracted confession more as a matter of prudence than of law. Per *Jardine, J.* 19 B. 728 (730). **M**

(7) Retracted, but voluntary, confession may be acted upon.

Where a retracted confession is proved to have been quite voluntarily made, it can be acted upon along with the other evidence in the case. 19 B. 728 (731). **N**

(8) Retracted confession relevant if Court satisfied of its voluntariness and truth.

- (a) A confession of an accused made before a Magistrate, though retracted before the Sessions Judge, is admissible as evidence provided the Sessions Judge is satisfied that it was voluntarily made. 6 W.R. 81(Cr.).
- (b) The mere fact that a confession has been subsequently retracted will not make it inadmissible against the accused. But before a Court can act upon such a confession it must be satisfied as to its truth. 18 A. 78 (81) ; cited in 1 L.B.R. 238 (245), per *For J.* **O**

(9) Duty of Judge when he believes confessions subsequently withdrawn to be true.

- (a) If a Judge believes that a confession made by a prisoner, although subsequently withdrawn, contains a true account of that prisoner's connection with the crime, the Judge is bound to act, as far as that prisoner is concerned, on that confession which he believes to be true. 20 A. 133 (134) ; cited in 1 L.B.R. 238 (246). **P**
- (b) A prisoner may be convicted on his own confession without any corroborating evidence, and, even when a confession has been retracted, if a Judge believes that that confession contains a true account of that prisoner's connection with the crime, he is bound to act, so far as that prisoner is concerned on the confession he believes to be true. 4 A.L.J.R. 310 (318), per *Knox, J.* referring to 20 A. 133. **Q**

(10) Retracted confession need not be supported by independent reliable evidence.

- (a) There is no rule of law that a retracted confession must be supported by independent reliable corroborative evidence in material particulars. 18 C.P.L.R. 107. **R**

7.—“To have been caused by any inducement, threat or promise.”—(Continued).

**4.—CONFESSIONS SUBSEQUENTLY
RETRACTED.—(Continued).**

- (b) There is no rule of law that a retracted confession must be supported by independent reliable evidence, corroborating it in material particulars. 19 B. 728; *cited in* 23 B. 316 (317). **S**
- (c) Where a Sessions Judge told the jury that in the case of retracted confessions, “the law is that you are to look for corroboration in the independent evidence. If that supplies such corroboration that you can confidently say ‘the confessions must be absolutely true,’ you can act upon them, otherwise not”; this was held to be a clear misdirection. 23 B. 316 (317). **T**
- (d) There is no rule of law that retracted confessions cannot be treated as evidence, unless corroborated in material particulars by independent evidence. 23 B. 316; 20 A. 133 & 25 B. 168. **U**
- (e) A conviction based upon a retracted confession is not illegal and a High Court ought not ordinarily to interfere with such a conviction in revision. L.B.R. (1893–1900), 70 (72), *referring to* 14 B. 331. **Y**
- (f) It cannot be laid down as an absolute rule of law that a confession made and subsequently retracted cannot be accepted as evidence of guilt without independent corroborative evidence. 21 M. 83, *referred to in* 1 L.B.R. 298 (246) & 23 B. 316 (317). **W**
- (g) It is not an absolute rule of law that, where a confession is made and subsequently retracted, it cannot be regarded as evidence of guilt without independent corroborative evidence, notwithstanding a subsequent denial, it is sufficient for a conviction without corroboration. 16 P.R. 1903 (Cr.). **X**

(11) Subsequent retraction of confession not enough to show unlawful inducement.

A mere subsequent retraction of a confession which has been duly recorded and certified by a Magistrate is not enough in all cases to make it appear to have been unlawfully induced. 25 B. 168 (172) = 2 Bom. L.R. 761 (765). **Y**

(12) Duty of Judge regarding retracted confessions.

A Judge should, in the first instance, see whether a retracted confession is voluntary or has been improperly induced. 8 Bom. L.R. 697 (698) = 4 Cr. L.J. 332, per *Beaman, J.* **Z**

(13) Depositions read under S. 288, Cr.P.C., and retracted at trial, are not material corroborations.

Depositions read under S. 288, Crim. Pro. Code, 1882, and retracted at the trial are not by themselves material corroboration and, where they are the only corroboration, a conviction cannot be grounded upon such evidence only. 12 M. 123 = 2 Weir, 376, *referring to* 12 B.L.R. App. 15. **A**

(14) Retracted deposition no corroboration of retracted confession.

The retracted deposition of a witness does not in itself afford sufficient corroboration of a retracted confession. 13 C.P.L.R. 107. **B**

7.—“*To have been caused by any inducement, threat or promise.*”—(Continued).

4.—CONFESSIONS SUBSEQUENTLY RETRACTED.—(Continued).

(15) **Value of confession repeated more than once and retracted at late stage.**

It is obvious that a confession, in itself reasonable and probable must, if repeated more than once and retracted only at a late stage in the proceedings, have greater weight attached to it than a confession made once only and retracted after a short interval. 21 M. 83 (88). **C**

(16) **Value of retracted confessions depends upon its particular circumstances.**

(a) Every case of a confession once made but subsequently withdrawn must be decided upon its own circumstances and not upon the amount of credibility which was attached in other cases to confessions made. 20 A. 133 (134); cited in 1 L.B.R. 238 (246). **D**

(b) The weight to be given to a retracted confession must depend upon the circumstances under which the confession was originally given, the circumstances under which it was retracted, including the reasons given by the prisoner for his retraction. The question which should have been put to the jury was, not whether the confessions were corroborated by independent evidence, but whether having regard to all the circumstances connected with the confessions, it was more probable that the original confessions, or the statements retracting them, were true. 21 M. 83, (88), referred to in 1 L.B.R. 238 (246) and 23 B. 316 (317). **E**

(c) Where a Sessions Judge concluded that certain confessions were voluntary and true as there was no evidence of ill-treatment by the police and as they were repeated before the committing Magistrate nearly a month after they had been made and recorded, the High Court observed that there was undoubtedly a great deal of force in that reasoning, but where a confession was retracted it was the duty of a Court called to act upon it, especially in a case of murder, to enquire into all the material points and surrounding circumstances and satisfy itself fully that the confessions could not but be true. 3 Bom. L.R. 441 (441). **F**

(d) Where the accused retracted their confessions, alleging that they had been beaten and forced to confess, but did not allege that any threat, promise or inducement having relation to the matter with which they had been charged was held out to them, held that the confessions were relevant, but that, in considering their value as evidence, the circumstances under which they were taken and the probabilities of the case should also be taken into account and that corroboration was necessary where there was suspicion about the confessions. 1 Cr. L.J. 222 (223). **G**

(e) The circumstances under which the confession was originally made and retracted, as well as the accused's reasons for his retraction must be taken into consideration in estimating the weight to be attached to such a confession. 16 P.R. 1903 (Cr). **H**

7.—“*To have been caused by any inducement, threat or promise.*” — (Continued).

4.—CONFESSIONS SUBSEQUENTLY RETRACTED.—(Continued).

(17) Relevancy of retracted confessions.

- (a) Where a confession was full of detail, very circumstantial, based upon it, in the opinion of the Court, the impress of truth and there was nothing in evidence to suggest that it was false in any particular and was made before a District Magistrate who would take care, so far as he could, that no advantage was taken of the prisoner, *held*, the accused were rightly convicted upon it, though the confessions had been retracted. 20 A. 133 (135). **I**
- (b) Where the accused, when examined before the committing Magistrate, made a clear and full confession, in every way borne out by the evidence of the prosecution witnesses, but for the first time before the Court of Session alleged that that confession was the result of threats and hopes held out to him, *held* that, there being no evidence whatever of any such influence having been used, the confession was admissible in evidence, though the jury found him not guilty. 11 B. H. C. R. 137 (138), see 5 M. L. J. Art. p. 25. **J**
- (c) The only evidence against two persons accused of murder were their confessions which, taken together, conclusively proved the guilt of both, but which were subsequently retracted; they were not coerced as there was no proof that the confessions had been extorted or induced by the police; *held*, that the accused were rightly convicted of murder, inasmuch as the confessions were sufficiently corroborated in material particulars by other witnesses. 19 M. 182. **K**
- (d) Where a confession, though subsequently retracted, was full and circumstantial and believed by the Court to be true and where the story was corroborated, in an important particular, and where a material fact was not accounted for otherwise than in accordance with the confession, *held*, the conviction should be confirmed. Sind. Sadar. Court. R. (Cr.), p. 12 (14), (1898). **L**
- (e) Where an accused person made a confession before a Magistrate, which was, on her being committed to the Sessions, retracted, *held* that her former admission was evidence against her under S. 366 of the Code of Criminal Procedure, 1861. 8 W. R. (Cr.), 40. **M**
- (f) Where an accused person in the first confession stated that he bit off his wife's nose in a quarrel on account of her infidelity, but, before the committing Magistrate and Sessions Court, said he did so in self-defence, as she caught hold of his private parts, *held* that, under the circumstances, the original confession was voluntarily made and substantially true; and that the plea of self-defence unsupported by evidence was evidently an after-thought. 1 Cr. L. J. 591 (592). **N**
- (g) A prisoner retracted his statement when read over to him and said that he was compelled by force to make it. The Judge, without making any enquiry or taking any evidence on the point, submitted the statement of the prisoner to the Jury as a confession and further told them that that they might fairly infer from the prisoner's intentions that the

7.—“*To have been caused by any inducement, threat or promise.*”—(Continued).

4.—CONFESSIONS SUBSEQUENTLY
RETRACTED.—(Concluded).

confession was a true one. *Held*, that the Judge misdirected the jury and that he should have charged them not to accept the prisoner's statement before the Magistrate as a confession. 4 W.R. (Cr.), 1 (2). O

5.—CONFESSIONS TO MAGISTRATES—RECORDING OF
CONFESSIONS.

(1) **Necessity of judicial record of circumstances under which confessions are received by Magistrates.**

Confessions are so often obtained in this country by undue influence that, in order to give weight to those recorded under S. 119, Cr. P.C., 1861, there should always be made a judicial record of the special circumstances under which such confessions were received by the Magistrate, showing in whose custody the prisoners were, and how far they were free agents. 5 W.R. (Cr.), 6. P

(2) **Ss. 164, 355—363 and 364, Cr. P. C.**

(a) Where statements are recorded in the course of a police investigation, under Ch. XIV, Cr. P. C., 1882, by a Magistrate, not being a police officer, the provisions of S. 164, Cr. P.C., must be observed, and statements of witnesses should be recorded in the manner provided by Ss. 355—363, and confessions or admissions of accused persons as provided by S. 364, Cr. P. C., 2 C.W.N. 702; see, also, 6 C.W.N. cxi. Q

(b) S. 164 of the Code of Criminal Procedure refers to S. 364 of that Code and the latter section explicitly requires questions and answers to be recorded. 1 L.B.R. 340 (343). See, also, Ss. 163, 164, 343, 364 and 533, Cr. P.C., 1898. R

(3) **Duty of Magistrates in recording confessions and rules to be observed by them.**

(a) Magistrates should not record confessions unless they really believed that they were voluntarily made. 25 B. 168 (172). S

(b) S. 122, Cr. P.C., 1872, provides that confessions taken down by Magistrates shall not be recorded, unless, upon an enquiry, the Magistrate has reason to believe that it was made voluntarily, and also that there shall be a memorandum to that effect by the Magistrate. 24 W.R. (Cr.), 42 (43). T

(c) In the case of Magistrates acting under S. 164, Crim. Pro. Code, there can be no question that they must be affirmatively satisfied of the voluntariness of the confession and that, when in doubt on this point, they ought not to record or give the certificate. 2 Bom. L.R. 761 (766)—25 B. 168 (172). U

(d) A Judge, in taking down the evidence of a witness to a confession, alleged to have been made by an accused person, should insist upon the witness stating the actual words used by the accused; the witness's idea of the import of those words not being sufficient. 22 P.R. 1885 (Cr.). Y

7.—“To have been caused by any inducement, threat or promise.”—(Continued).

5.—CONFESSIONS TO MAGISTRATES—RECORDING OF CONFESSIONS.—(Continued).

- (e) By S. 205, Cr. P. C., 1861, a Magistrate was bound to attest the record of the examination of a prisoner and of the prisoner's confession by his signature, and to certify under his own hand that it was taken in his presence and in his hearing and that it contained accurately the whole of the statement made by the accused person. 15 W.R. (Cr.), 63. **W**
- (f) In order that a confession, recorded under S. 122, Cr. P.C., 1872, may be relevant, it must not only bear a memorandum that the Magistrate believed it to be voluntary, but also a certificate, under S. 346 of that Code, that it was taken in the hearing and presence of the Magistrate, and contains an accurate account of the entire statement of the accused. 1 B. 219. **X**
- (g) A confession was made before a Magistrate, but not properly recorded according to the provisions of the Crim. Pro. Code. The High Court sent back the case to the Sessions Judge for taking any evidence that might be forthcoming to prove the alleged confession before the Magistrate, which, as recorded, was irrelevant as not being taken according to the requirements of the Crim. Pro. Code. 2 B.H.C.R. 397 (398). **Y**
- (h) Where the confession of an accused person was taken down in a narrative form by the Magistrate instead of in the form of questions and answers, and where the Magistrate omitted to state his belief re the voluntariness of the confession, the Court of Sessions was directed to examine the Magistrate as to whether he believed the confession to have been voluntary or not. S. C. 102 (Oudh). **Z**
- (i) A Judge, in fact, is hardly justified in treating a confession made by a prisoner before a Magistrate as a mere piece of evidence which a Jury may deal with in the same way as they would with the evidence of a witness of doubtful veracity. If a prisoner has confessed before a Magistrate, the attention of the Jury should be drawn to the question whether there was any reason to suppose that that confession was made under any undue influence; and, if there is no reason to suppose anything of the kind, the Jury should be told so, and advised that they may act upon it. 13 W.R. 42 (43) (Cr.). **A**
- (j) A Magistrate under S. 164, Crim. Pro. Code, 1882, must show all the questions put to and answers given by the accused, must put them down in writing in the exact words, must satisfy himself that the confession is voluntarily made and must formally certify to these things under his own hand. U.B.R. (1897—1901) (Cr.), 41 (43). **B**
- (k) It is the imperative duty of a Magistrate, before recording a confession, to carefully examine the accused person and, to the best of his ability, ascertain that he is not wishing to speak owing to inducement, threat, or promise, but that his confession is purely voluntary. 4 Cr.L.J. 385 (387) = 3 L.B.R. 213. **C**
- (l) A Court would not be justified in placing reliance upon the statements made by the accused before the committing Magistrate, unless it was

7.—“*To have been caused by any inducement, threat or promise.*”—(Continued).

5. CONFESSIONS TO MAGISTRATES—RECORDING OF CONFESSIONS.—(Continued).

corroborated by other facts proved conclusively in the case. 2 C.W.N. clxxx. **D**

- (m) If a document framed under S.164 of the Crim. Pro. Code, 1882, is inadmissible owing to a non compliance with the provisions of the law, the Court must proceed under S.533, if the defects are cured by the provisions of that section; if not, no proof of the confession can be given. 17 C. 862 (868). **E**

- (n) Where it appeared that a Magistrate might have questioned the accused as to the length of time he was in police custody before recording his confession, but did not write down such questions and answers, *held*, that, in the absence of any such record, it was the duty of the Sessions Judge, before holding the confession to be relevant under S. 24 of the Evidence Act, to have sent for the Magistrate to satisfy himself on the point. 3 Bom. L.R. 122 (124) = 25 B., 543 (546). **F**

- (o) Where the confessing accused had been for 10 days in detention by the police, obviously the first question, which a Magistrate should put in order to satisfy himself that the confession will be a voluntary one, is, how long has the accused person been in the custody of the police. 3 Bom. L.R. 122 (124) = 25 B. 543 (546). **G**

- (p) Where a confession is not supported by the evidence of witnesses, a Judge must examine it very carefully to see whether it gives those details which indicate that it is a natural narrative of what took place in the presence of the man making it and is not at variance with any evidence in the case which is believed and is not merely a parrot-like repetition of a story put into the man's mouth. 20 A. 133 (131-5); also cited in 1 L.B.R. 238 (246). **H**

- (q) Where there is a mere suspicion of insanity, a Magistrate is not justified in refusing to record the statement of the accused person under S.164, Cr.P.C., 1882, for such a statement may be subsequently useful to the accused as evidence that he was not in his right mind, even though it might contain an admission that he had caused death. 3 P.R. 1894 (Cr.). **I**

- (r) When recording confessions and incriminating statements made by accused persons in preliminary enquiries, Magistrates should always state whether the accused had been brought up from police custody, or from the jail, and whether the police officers who made the enquiry were present in Court, while the accused were making their statements. The Magistrate should be as careful of the interests of the accused as of those of the prosecution, his duty being to ascertain the truth of the case—to endeavour that the innocent may not be convicted as well as that the guilty may not escape unpunished. 1 C.P.L.R. 115. **J**

- (s) Inquiries into how confessions came to be made should be full and exhaustive, for although ignorant uneducated men, who have no legal assistance in their defence may at first assign manifestly false reasons for their having confessed, it sometimes happens that the

7.—“*To have been caused by any inducement, threat or promise.*”—(*Continued*).

5.—CONFESSIONS TO MAGISTRATES—RECORDING OF CONFESSIONS.—(*Continued*).

real occurrences leading up the confessions, and the real reasons for them are disclosed during the course of the close enquiry and it is then for the Court to consider whether such occurrences affect the admissibility of the confessions as evidence. 1 L.B.R. 238 (249), *per Fort, J.* C. K

- (t) The wording of sub-S. 3 of S. 161 of the Code of Criminal Procedure contemplates that the Magistrate shall hear the confession first without making a record, that he shall then put questions with a view to ascertaining whether the prisoner has confessed voluntarily, and then if he has reason to believe after such questions that the prisoner has confessed voluntarily, he may record the confession writing out in full every question put by him and every answer given by the accused, and following the provisions of S. 164 of the Code. 3 L.B.R. 173 (174). L
- (u) In cases sent to Magistrates, in order that the confession of accused persons may be recorded under S. 164, Cr. P. C., the Magistrates should invariably satisfy themselves that the confessions are voluntary, by all means in their power, including the examination of the bodies of the accused whenever feasible, and the accused person's consent to such examination. The record of confessions should distinctly show whether bodily examination has been made or not, and, if not made, whether the omission was due to reluctance on the part of the accused. In the event of such examination revealing *prima facie* grounds for suspecting violence, the Magistrates should have such accused persons examined by a medical officer. *Ide* Bombay Government Gazette, 1900, Part I, p. 919; see 2 Bom. L.R. Art. p. 157. M
- (v) It is the imperative duty of the Magistrate before recording a confession to carefully examine the accused person and to the best of his ability ascertain, that he is not wishing to speak owing to any inducement, threat, or promise, but that his confession is purely voluntary. This is especially necessary in this country where the police are so prone to induce prisoners to confess, and where evidence is so frequently manufactured. 3 L.B.R. 213 (214)=4 Cr. L.J. 385. N
- (w) It is the duty of the Court to institute an enquiry into the circumstances under which a prisoner makes a confession, where it is made in an early stage of the case and is retracted at a later stage on the ground that he had been compelled to make it, through the ill-treatment of the police. L.B.R. (1872-1892), 423 (424). O
- (x) An accused person who is committed to the Court of Sessions should not be called upon to plead until he is placed on his trial before the Sessions Court and the Sessions Judge should not admit in evidence a plea of guilty by the accused to a charge framed by the Magistrate who tried him. L.B.R. (1893-1900), 52 (53). P
- (y) A deposition made before the committing Magistrate by the Magistrate, who recorded a defective confession, to the effect that the accused did make the statement will not be evidence of the fact in the Sessions

7.—“*To have been caused by any inducement, threat or promise.*”—(*Continued*).

5.—CONFESSIONS TO MAGISTRATES—RECORDING OF CONFESSIONS.—(*Continued*).

Court; except where the recording Magistrate's presence at the Sessions Court cannot be obtained without unreasonable delay or expense, the Sessions Judge himself must examine the recording Magistrate. 5 C. 958. **Q**

(2) *Held* the course adopted by the police in taking the accused before two different Magistrates, first having a confession recorded by a Magistrate who was not enquiring into the case, and immediately afterwards having the accused examined as a witness by the committing Magistrate, was irregular and improper. L. B. R. (1893-1900), 7 (9). **R**

(aa) The practice of taking prisoners before Magistrates, not having jurisdiction in the case, for the purpose of getting a confession recorded, is not generally desirable, but such a confession is legally admissible in evidence, when duly proved. 7 B. H. C. R. 56 (57) (Cr.). **S**

(bb) An investigation was made by the Calcutta Police in the Town of Calcutta into a case of murder. S. 161, Cr.P.C., 1882, was held not to apply to a statement made by an accused person in the course of that investigation. 15 C. 595 (606). **T**

(4) **Defect of confession recorded by a Magistrate, how cured.**

The defect of a confession recorded by Magistrate under S. 122 of the Crim. Pro. Code, who omitted to record the certificate required by S. 346, can be cured, if at all, only on the Sessions Judge taking evidence that the accused made the statement. 5 C. 958-6 C.L.R. 353. **U**

(5) **Accused to prove that his voluntary admission was untrue.**

Where the record of a confession showed that an accused person stated before the Magistrate that he had come before him to make a voluntary statement, *held* that, though neither that statement nor the record of the Magistrate's belief that the confession had been voluntarily made was conclusive proof that it was so made, yet, having made the admission that it was so made, it lay upon the accused to adduce, if not actual evidence, at least some well founded and probable reason for the Court's coming to the conclusion that what he admitted was not in reality the fact. 1 L.B.R. 238 (218). **V**

(6) **Examination of accused to be taken down in language used by him—Modifications of rule.**

(a) The examination of an accused person must be recorded in the language in which it is delivered and, as far as possible, in the words used by the accused. 24 W.R. (Cr.), 54 (55). **W**

(b) A confession made before a Magistrate should be taken down in the language in which it was made, and the Magistrate's certificate as required by S. 205, Cr.P.C., 1861, is essential to make it evidence. 4 N.W.P.H.C. 16. **X**

(c) The law requires that ordinarily the statement of an accused person should be recorded in the language in which it was made, the object being to represent the very words and expressions used so as to ensure

7.—“ To have been caused by any inducement threat or promise.”—(Continued).

5.—CONFESSIONS TO MAGISTRATES—RECORDED OF CONFESSIONS.—(Continued).

accuracy, and prevent misrepresentation or misconstruction of what was said. 21 C. 642 (660). **Y**

- (d) The object of the law is to ensure that what professes to be a confession shall be freely made and shall be put upon the record in the very language used by the person making it. so that there may be no mistake as to the precise meaning. U.B.R. (1897—1901) (Cr.), 41 (44). **Z**
- (e) Though the law requires that the whole of the statement made by a prisoner should be accurately recorded as nearly as possible in the very words used by him, yet it does not require that it should be recorded in a foreign language unknown to the Court or Magistrate, the use of which makes it necessary to have recourse to an interpreter. The language in which that statement is conveyed to the Court by the interpreter is the language in which it should be recorded. 5 C. 826 (829). **A**
- (f) The provisions of S. 164, read with S. 364, Cr.P.C., 1882, are imperative as to the language in which the confession is to be recorded, and S. 533 does not contemplate or provide for any non-compliance with the law in this respect. It is clear from the two sections first mentioned that the confession is to be recorded in the language in which it was made, or if that is not practicable, in the language of the Court or English. 17 C. 862 (870). **B**
- (g) If such a record is not practicable, the law directs that the statements shall be recorded in the language of the Court or in English. 21 C. 642 (660). **C**
- (h) If a second translation is made and the statement be recorded as so understood, the accuracy which the law contemplates is made more remote. 21 C. 642 (660). **D**
- (i) In the absence of any evidence to the contrary, the Court should presume that the proceedings of the Magistrate were conducted in accordance with law; and that, in the absence of anything to show that it was practicable for the officers of his Court to record a confession in the language, in which it was made, it could be fairly held that the Magistrate found it impracticable and adopted the alternative allowed by law of recording the confession in the Court language. 18 C. 549 (555). **E**
- (j) A confession made in the language, which happened to be the mother tongue of a Magistrate, was recorded by the Court officer in the language of the Court and the memorandum required by law was made by the Magistrate in English. *Held*, that no presumption could arise from the nationality of the Magistrate that he must have sufficient acquaintance with the language in which the confession was made to enable him to record it in that language. 18 C. 549 (555). **F**
- (k) If the accused was examined in a language which the Magistrate understood and was able to write, then the English record of the examination is inadmissible, and no evidence can be admitted to prove what

7.—“*To have been caused by any inducement, threat or promise.*”—(Continued).

5.—CONFESSIONS TO MAGISTRATES—RECORDING OF CONFESSIONS.—(Continued).

statement was made by the accused. L.B.R. (1893—1900), 70 (71), referring to 17 C. 862 & 9 M. 224. G

- (l) Where a statement, made by an accused person in the Manipuri language and communicated in Bengali to the Magistrate, was recorded in English by the Magistrate, and there was also a record in the Manipuri language and both the records differed, *held*, that the Manipuri document should be regarded as the proper record and the only evidence in the case. If the Manipuri statement had not been made, the Magistrate would not have strictly complied with the provisions of S. 364 of the Code in recording the statement in English. 21 C 642. H
- (m) A Magistrate recorded a confession, under S. 164, Cr.P.C., 1882, in English, instead of in the language of the accused, though it was not impracticable to record it in that language, *held* that S. 533 could cure the error in the record of the confession; S. 533 was held to be sufficiently wide to include a failure to comply with the provision of S. 364 regarding the language in which the accused's statement should be recorded. S. C. 277, Oudh following A.W.N. (1892), 60. I
- (n) It is a wrong view that the scope of S. 533, Crim. Pro. Code, 1882, is limited to any particular kinds of non-compliance with S. 364, that a neglect to sign the confession or the certificate, or to certify the facts requiring to be certified, would be “an omission” curable by S. 533, but that a neglect to record the examination in the prisoner's own language would be an “infraction” or “direct violation,” not curable by the plainest evidence that the prisoner had not been injured as to his defence on the merits. Neither the language nor the object of S. 533 justify that distinction. 21 B. 495 (501), dissenting from 17 C. 862; per *Strachey, J.* J
- (o) An accused person was examined in Mahrattce, but the questions and answers were recorded in English. The Magistrate deposed that each question and answer, when recorded, was interpreted to the accused in Mahrattce and that he affixed his mark at the end of the record. *Held*, that though the Magistrate's procedure might have been irregular, the statement was admissible in evidence under S. 533, the irregularity not having prejudiced the accused. 21 B. 495 (502). K
- (p) An objection against the admissibility of a confession that it was not recorded in the language in which the accused was examined, but in English, was ignored on the ground that the evidence of the Committing Magistrate who said that there was no *mohurrir* with him at the time when the confession was recorded and that he could not write the vernacular well showed that the provisions of S. 364, Crim. Pro. Code, 1892, had been sufficiently complied with and that the confession was admissible. 22 C. 817 (819), *dislg.*, 17 C. 862. L
- (q) Where a Magistrate, in recording a confession put the questions to the accused in the vernacular and the accused answered in the same vernacular but the Magistrate recorded the statement in English, it,

7.—“To have been caused by any inducement, threat or promise.”—(Continued).

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however, appearing that the answers were correctly recorded, that after the examination was concluded the Magistrate read it out sentence by sentence and the Sberistedar translated it into the vernacular, and that the accused then admitted it to be correct, held that, having regard to S. 533, Crim. Pro. Code, the statement was admissible in evidence and that the error had not prejudiced the accused as to his defence on the merits. 4 Bom. L.R. 785 (787). **M**

(7) Object of giving Magistrates power to question the accused.

The power to put questions to the accused is not given to force him to make incriminating admissions after searching examination. The examination referred to in S. 364, Cr. P.C., 1882, is subject to the purpose referred to in S. 342, viz., to enable the accused to explain any circumstances appearing against him. 10 M. 295 (315), referring to 1 M.H.C.R. 199 & 6 C. 96. **N**

(8) Putting of questions held improper.

(a) The procedure of a Magistrate in putting questions to and obtaining answers from the accused when there was no evidence on the record against them was held to be illegal, rendering the record of such examination inadmissible in evidence. 9 M. 224 (229). **O**

(b) It is improper on the part of a Government Official to question an accused person who is in custody charged with a serious offence with a view to eliciting admissions from him. Such procedure is in accordance with French Law, but it is not in accordance with English Law. A confession thus obtained could not possibly be treated as a voluntary confession such as may be recorded under S. 164, Cr.P.C., L.B.R. (1893—1900), 52 (54). **P**

(c) It is unfair to put accused persons through severe examinations. Their examination should be conducted with the object of enabling them to explain matters appearing in evidence against them and not of endeavouring to prove the charge against them by their admissions and contradictory statements. 5 C.P.L.R. 9 (Cr.). **Q**

(d) Where an accused person was examined by a Magistrate and answered the questions put to him, his answers were held to be inadmissible; *Wilde, C.J.*, observing, “I reject it upon the general ground that Magistrates have no right to put [such] questions to a prisoner. The law is so extremely cautious in guarding against anything like torture that it extends a similar principle in every case where a man is not a free agent in meeting an enquiry; the accused might think himself bound to answer for fear of being sent to gaol.” *R. v. Pettit*, 4 Cox. (Cr.), 164; Wigm. Ev., '05 Ed., S. 848, p. 969. **R**

(e) The very putting of questions has been held to be improper and to involve a compulsion. *R. v. Berriman*, 6 Cox. Cr. 388; Wigm. Ev., '05 Ed., S. 848, p. 970. **S**

(f) And an answer given by the prisoner to a question put to him by a Magistrate was rejected by *Erle, C.J.*, *Ibid*; cited in 1 B.L.R. O. (Cr.), 15. **T**

7.—“*To have been caused by any inducement, threat or promise.*”—(Continued).

5.—CONFESSIONS TO MAGISTRATES—RECORDING OF CONFESSIONS.—(Continued).

(9) But may sometimes be put.

- (a) When an accused person has made an absolute confession of guilt, and shows a disposition to tell the whole story of the crime, there is no objection to questions being put as to points he has omitted, and, in such cases, questions put to test the truth of the story are calculated rather to benefit the accused than the prosecution; for, if the confession be found to be untrue, it will not be acted upon. *Sind Sadar Court R. (Cr.), 26 (27), (1898).* U
- (b) It is in cases where an accused person denies his guilt, that care has been taken to confine his examination to the purpose of enabling him to explain circumstances appearing against him. *Sind Sadar Court R. (Cr.), 26 (27), (1898).* V
- (c) The fact that questions are put to an accused person making a confession does not render that confession inadmissible on the ground that it was not duly taken. 1 L.B.R. 340 (344); *Thirkell White, C. J.* W

(10) Relevant recorded confessions.

- (a) A confession duly recorded and certified under S. 164, Cr.P.C., 1898, is admissible in evidence against the person making it unless shut out by the provisions of S. 21 of the Evidence Act, “to which alone” as pointed out by Westropp, C.J., in 2 B. 61 “we are at liberty to look for the law of evidence in this country.” 25 B. 168 (171). X
- (b) S. 122, Cr.P.C., 1872, corresponding to S. 164 of the present Code, which requires a Magistrate to endorse upon a confession that he believed it was voluntarily made, did not apply to the case of confessions taken by the Magistrate who was actually investigating the case and examining the witnesses preparatory to commitment: but to a case where some other Magistrate took a confession and forwarded it to the Magistrate engaged in inquiring into the case with the endorsement of his belief that the confession was voluntarily made. (Evidence of the confessions held admissible and conviction upheld). 23 W.R. (Cr.), 16. Y
- (c) S. 122 of the Cr.P.C., of 1872, contemplates and provides for cases in which the confessions are recorded by a Magistrate other than the one by whom the case is inquired into or tried. 5 C. 954 (F.B.), followed in 5 A. 253. Z
- (d) S. 122 Crim. Pro. Code, 1872, corresponding to S. 164 of the present Code, applied to a confession made to a Magistrate other than the Magistrate by whom the case has to be enquired into or tried, but who may not even have jurisdiction to enquire into or try it, and to a confession while the case is still under investigation by the police, or before such investigation has commenced; it did not apply to a confession recorded by a Magistrate under Ch. XV or XVII of the Crim. Pro. Code. Confession held admissible as being under Ss. 193 & 194 of that Code. 5 C.L.R. 238 (240). A
- (e) The object of Section 122 Cr. P. C., 1872,—164 of the present Code—was to enable any Magistrate, other than the Magistrate by whom the case

7.—“*To have been caused by any inducement, threat or promise.*”—(Continued).

5.—CONFESSIONS TO MAGISTRATES—RECORDING OF CONFESSIONS.—(Continued).

was enquired into or tried, who might be conveniently near at hand, to record a confession promptly. Where, therefore, a Magistrate failed to comply with all the requirements of the law in having omitted to cause the accused to affix her mark to her statement, *held* that the Magistrate acted under S. 346 and that the confession was relevant, the error not having prejudiced her. 6 C. L. R. 288 (293). **B**

(f) S. 346, Crim. Pro. Code, 1872, would appear to apply only to examinations of the accused taken on inquiries as distinguished from investigations and trials, and dealt only with statements and confessions made in the course of a preliminary enquiry and was not applicable to confessions recorded under S. 122 Crim. Pro. Code, 1872. 10 B. H. C. R. 166 (175). **C**

(g) A confession does not become irrelevant merely because the memorandum required by law to be attached thereto by the Magistrate taking it has not been written exactly in the form prescribed. 3 A. 338. **D**

(h) The properly attested confessions of prisoners before a Magistrate are sufficient for their conviction without corroborative evidence, and notwithstanding a subsequent denial before the Sessions Court. 12 W. R. (Cr.), 49. **E**

(i) Though the statements taken by a Magistrate from the accused may be admissible in evidence, they would not suffice for a conviction, unless the Court were satisfied that they were voluntarily made and were true in fact. 9 M. 224 (225), per *Parker, J.* **F**

(j) A confession to a Magistrate, before the Magisterial enquiry commenced, consisted of two portions, in one of which there was a note which certified that the statement above recorded was read over to, and admitted by, the accused to be correct, but was not signed by him. The other portion contained a different account, wherein the accused denied his guilt. The entire statement contained a certificate at the end and was in accordance with S. 364, Cr. P. C., 1882. *Held*, the first portion of the record was admissible in evidence, subject to all just exceptions under S. 24 of the Evidence Act or otherwise, as an accurate record of a statement made by an accused person before a Magistrate, if the Magistrate should depose that the record was a statement recorded by him and admitted by the accused to be correct, and that the absence of the signature of the accused from the record was no bar to its reception. 36 P. R. 1887 (Cr.) (F.B.). **G**

(k) In the same case, it was held that the record did not purport to be a confession by any accused person taken in accordance with law, as it did not bear the certificate prescribed by S. 164 of the Code for a confession, and could not, hence, be relevant under S. 80 of the Evidence Act upon its bare production, except as to its latter portion; and before the earlier portion was received in evidence, some independent evidence was essential. 36 P. R. 1887 (Cr.) (F.B.). **H**

7. —“*To have been caused by any inducement, threat or promise.*”—(Continued).

5.—CONFESSIONS TO MAGISTRATES—RECORDING OF CONFESSIONS.—(Continued).

- (l) The mere absence of questions in a prisoner's statement does not render it inadmissible. 12 C. L. R. 120 (121). I
- (m) It is not necessary that the English memorandum as required by S. 364 (3), Crim. Pro. Code, 1882, should be made in respect of a confession under S. 164, where the accused is not prejudiced by it. Such a confession was held to be relevant. 14 C. 539, referring to *Titu Maya v. The Queen*, reported in a note to 8 C. 616. J
- (n) A confession recorded by a clerk under S. 164 of the Code in the presence of a Magistrate in the form of a narrative, without the questions being recorded, would not be illegal, if the accused was not prejudiced by it, and the same would be the case, as regards confessions taken under S. 364, while the case was being heard before the Magistrate, recorded in a narrative form. 14 C. 539. K
- (o) Confessions taken without the prescribed formalities would not be inadmissible in evidence. If necessary, evidence might be taken that such a confession had been duly recorded, though the Magistrate's procedure might have been irregular. 11 M. 5. L
- (p) Where a document containing a confession is signed by the accused person or owned by him to be correct, it cannot be rejected simply by reason of its not being attested by the accused or by the Magistrate, or of there being no certificate or memorandum, or of questions and answers not being recorded, when the examination had been taken in the form of questions and answers. 21 P.R. (1881) (Cr.). M
- (q) Where the formalities required by Ss. 122 & 346, Cr. P.C., 1872, were not observed, they were considered to be matters for observation going to the weight and value of the document as evidence, and not objections against its relevancy as a written admission by the accused. 21 P.R. 1881 (Cr.). N
- (r) Where a confession is recorded by a Magistrate without the formalities prescribed by Ss. 122 and 346, Cr. P.C., 1872, the record will become relevant on proof, by the Magistrate's testimony, that the document was signed by the accused person as accurate, on being shown or read over to him, in the presence of the Magistrate and acknowledged by the accused to be correct. 21 P.R. 1881 (Cr.). O
- (s) Where certain persons accused of offences under the Official Secrets Act, 1889, made certain statements to an Assistant Magistrate, *held*, that they were not inadmissible, either because they were recorded under S. 164, Crim. Pro. Code, or because they were made while some of the accused were in police custody, or again because they were not confessions of guilt, or were made when they were accused of a different offence, *viz.*, theft, where they were fully proved and there was nothing to show that they should be excluded under S. 24 or under S. 26 of the Evidence Act, and that the statements were rightly received as admissions on the part of the accused. 1 L.B.R. 133 (135). P

7 —“To have been caused by any inducement, threat or promise.”—(Continued).

5.—CONFESSIONS TO MAGISTRATES—RECORDING OF CONFESSIONS.—(Continued).

- (t) Though a Magistrate may become disqualified from dealing with a case by reason of some previous action taken by him, the character of the evidence and its admissibility cannot be affected. A confession freely and voluntarily made to a Magistrate and recorded under S. 164, Cr. P.C. is admissible in evidence. 3 C.W.N. 387. Q
- (u) Statements and confessions recorded by a Presidency Magistrate before the commencement of the trial and in the course of a police investigation, though not taken under S. 164, Cr.P.C., are admissible in evidence against the prisoner. 21 B. 495; 15 C. 595, *followed*. R
- (v) Where a constable advises a prisoner to confess and then takes him before a Magistrate, who warns him not to inculcate himself, the confession is relevant. 9 B.H.C.R. 370; *R. v. Lingate*, cited in 3 Russ. See 6 C.W.N. cccxxvi. S
- (w) The fact of the confession of an accused person having been recorded in a narrative form, and not in the form of questions and answers as required by S. 346 of the Cr. P.C. would not affect its admissibility in evidence, if the accused had not been prejudiced by the error. 8 C. 616. T
- (x) The omission of a Magistrate to have recorded in the vernacular the questions asked in the examination of the accused person does not necessarily render that examination irrelevant. 8 C. 618 (Foot-note) — 1 C.L.R. 1 (F.B.). U
- (y) The bare fact that an accused person who was questioned was not cautioned will not in itself make the evidence irrelevant. *R. v. Millar*, 18 Cox, 54; Tay. Ev., 10th Ed., S. 881, p. 622. V
- (z) A Magistrate in taking the confession of an accused person under S. 122, Crim. Pro. Code, 1872, omitted to take it in writing with the formalities prescribed by S. 346; *held* that the confession was not absolutely inadmissible in evidence and that evidence might be taken that such a confession had been duly recorded, though the Magistrate's procedure had been irregular. 2 M. 5. (7). W
- (aa) A confession made to a Magistrate does not become inadmissible in evidence, by reason merely of the memorandum, required by law to be attached thereto by the Magistrate taking it, not having been written in the exact form prescribed. 22 M. 15. X
- (bb) A conviction of a prisoner by a Deputy Magistrate based mainly upon a confession made by the prisoner in Court to such Deputy Magistrate was upheld, although the record of the confession had not been attested as required by S. 346, Cr. P. C., 1872, since the Magistrate was competent on the admission of the accused to sentence him without any further record. (S.324) 3 C. 756. Y

(11) Recorded confessions held to be not relevant.

- (a) Where a Magistrate, while in his capacity of prosecutor, held out promises to the prisoners as an inducement to them to confess, he was held to have acted, without due discretion. 1 W.R. (Cr.), 24. Z

7.—“*To have been caused by any inducement, threat or promise.*”—(Continued).

5.—CONFESSIONS TO MAGISTRATES—RECORDING OF CONFESSIONS.—(Continued).

- (b) A Deputy Magistrate was held to have been wrong in acting as a Magistrate in the case in which he was himself prosecutor, and in taking the confession of the prisoners before himself; the confessions were therefore taken no account of. 3 W.R. (Cr.), 29. A
- (c) A confession not recorded in accordance with the provisions of S. 346, Cr.Pro. Code, 1872, was held to be inadmissible as evidence. 24 W.R. (Cr.), 29. B
- (d) The reception as evidence against an accused person of a confession, which ought not to have been proved and which is not in accordance with the law, and the grounding of a case of dacoity against him upon such confession were held to be irregularities which prejudiced or injuriously affected the accused. 21 W.R. (Cr.), 42 (14). C
- (e) Where a confession was not taken in the manner provided in S. 346, as prescribed by S. 122, Cr.P.C., 1872, and was, hence, defective, held that these omissions could not be rectified under the authority contained in the last clause of S. 316 by taking the evidence of the Recording Officer that the prisoner duly made the statement recorded. 4 C. 696 (678), following 10 B.H.C.R. 166. D
- (f) A confession not taken down by the recording officer from the lips of the accused, but written out afterwards from recollection, was excluded. *R. v. Sexton*, Chetwynd's Suppl. to Burn's Justice, quoted in Joy, Confessions 19; Wiggin, Ev., '05 Ed., S. 804, p. 912. E
- (g) A defect in a confession taken under S. 122, Cr.P.C., 1872, cannot be remedied, as in the case of an examination of a prisoner under S. 346, by evidence taken at the Sessions. 5 C.L.R. 209 (210). F
- (h) Where confessions recorded under S. 122, Cr.P.C., 1872, are defective from the omission of the Magistrate to record the certificate required by S. 346, and the defect cannot be cured by taking evidence under the last clause of S. 346, held, that the confession was inadmissible in evidence. 6 C.L.R. 353 (354). G
- (i) Where a confession was taken down in conformity with S. 164, Cr.P.C., 1882, if it appeared to be inadmissible under S. 24 of the Evidence Act, it was held to be liable to be rejected, and more so, a confession irregularly recorded. 52 P.R. 1887 (Cr.). H
- (j) Where the Magistrate admitted that he did not question an accused person as to the voluntary nature of his confession before recording it, and it appeared from the record that each man was only once asked at the end of his statement whether he confessed voluntarily or was induced to do so, this was held, not to be a sufficient compliance with the provisions of S. 164 (3) Cr.P.C. but a fatal defect rendering the retracted confession of the accused entirely inadmissible in evidence. 3 L.B.R. 213 (214). I
- (k) Where a Court, other than a Court in British India, recorded a confession, alleged to have been made by the prisoners but not certified in accordance with S. 122 (or 164), Crim. Pro. Code, held that, even if it were

7.—“To have been caused by any inducement, threat or promise.”—(Continued).

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certified, it was doubtful if it could be used as evidence against the prisoner, unless it was sworn to like confessions made to private individuals, the Code of Criminal Procedure being applicable to British Courts only. 2 Weir, 125. J

(l) The provisions of S. 164, Cr. P. C., 1882, are imperative and S. 533 will not render a confession admissible where no attempt at all has been made to conform to its provisions. It is of immense importance to have the exact words of the prisoner recorded in his own language. 9 M. 224 (227). K

(m) Where the record of a confession was not signed by the accused or owned by him to be correct after it was shown or read over to him, the document could not be relevant against him but might be used under S. 159, Evidence Act, to refresh the Magistrate's memory regarding the statement of the accused. 21 P. R. (1881) (Cr.). L

(n) A statement by an accused person recorded by a Magistrate after a verbal warning from the Magistrate to the accused to the effect that his statements would be evidence against him and that he should speak the truth was held not to be relevant, as such warning was calculated to hold out an inducement to the accused to confess. 10 C. 775. M

(o) An accused person was charged with murder jointly with another and was convicted by the Sessions Judge upon his own confession. Upon a full consideration of the circumstances under which it was made and of the various statements made by the accused before the police and the Magistrate, it was held that the confession was not such a spontaneous admission of his guilt as would justify a Court in acting upon it and that, there being no other evidence, his conviction should be reversed. 22 C. 50 (77); see, also, 22 C. 164 (172). N

(p) Where a confession was not taken in due form as provided by Ss. 45, 122, & 346 of the Crim. Pro. Code of 1872 in that it was not recorded in the form of question and answer and was not completed by an endorsement under the hand of the Magistrate to the effect that it had been voluntarily made, held, that, even though it had been admitted on the record without objection in the Court below as supplemented and rectified by the evidence of the Magistrate who had taken it and who stated that it had been duly made by the prisoner, the statement in question was inadmissible in evidence. 10 B.H.C.R. 497 (498), following 10 B.H.C.R. 166. O

(q) It was held to be illegal for a Magistrate to convert an accused person into a witness, except when a pardon had been lawfully granted, under S. 347, Cr. Pro. Code, 1872. Where such a person, to whom a pardon had been granted in the case of an offence not solely triable by the Court of Session, gave evidence, it was held not to be relevant, that person not having been acquitted, discharged or convicted. 1 B. 610. P

(r) A confession upon which the necessary certificate is not recorded the time, or, at any rate, on the day the confession was reduced to

7.—“*To have been caused by any inducement, threat or promise.*”—(Continued).

5.—CONFESSIONS TO MAGISTRATES—RECORDING OF CONFESSIONS.—(Continued).

writing, is bad, and cannot be admitted in evidence. 6 B. 288 (291). Q

(s) Though there was no reason to suppose that a statement recorded at the police station—the accused having been in prolonged and illegal detention in police custody and the objectionable course being taken of sending for a Magistrate, instead of sending the prisoner to a Magistrate—When made, whatever it was, was not properly made, still the High Court, in drawing attention to all these points, strongly condemned the proceedings taken. 21 C. 642 (661). R

(t) A confession made by an accused person taken by a Magistrate, having no jurisdiction to commit the accused, was held to be defective for want of the signature of that accused, rendering the imperfect record of the confession inadmissible in evidence against her. 10 B.H.C.R. 166 (178) referring to 15 W.R. (Cr.) 63, & 7 W.R. (Cr.), 49. S

(12) Admissibility of oral evidence to prove imperfectly recorded confessions.

(a) Where a document containing the statement or confession of an accused person is not signed by her and the document becomes inadmissible, oral evidence is not admissible to prove that a confession was made by the accused and the terms of that confession. 10 B.H.C.R. 166 (178 & 181), followed in 1 B. 219 (223). T

(b) The imperfect record of a confession, taken under the terms of S. 122, Crim. Pro. Code, 1872, cannot be repaired by secondary evidence. 4 C. 696 (698), following 10 B.H.C.R. 166. U

(c) Although the record of confession is not admissible in evidence owing to the failure to obtain the mark or signature of the accused, parol evidence may be given of the terms of the confession, and those terms, if and when proved, may be admitted and used as evidence in the case against the accused under S. 533, Crim. Pro. Code, 1882. 23 B. 221 (228). V

(d) Where a confession or other statement of an accused person is duly made, i.e., made in accordance with the provision of the law, but in recording it those provisions have not been complied with, oral evidence is admissible to prove that the confession or other statement was duly made. 2 C.W.N. 702 (714), referring to S. 533 of the Crim. Pro. Code. W

(e) From the terms of S. 503, Cr.P.C., it seems that even oral evidence of the terms of a confession would be admissible. Per *Thirkell White, C.J.*, 1 Cr.L.J. 1126 (1127)—2 L.B.R. 317. X

(13) Effect of S. 80 of the Evidence Act on recorded confession.

(a) The law allows certain presumptions as to certain documents, and, on the strength of these presumptions, dispenses with the necessity of proving by direct evidence what it would otherwise be necessary to prove. 1 B. 219 (222). Y

7.—“*To have been caused by any inducement, threat or promise.*”—(Continued).

5.—CONFESSIONS TO MAGISTRATES—RECORDING OF CONFESSIONS.—(Continued).

- (b) One of these presumptions relates to confessions. S. 80 of the Evidence Act provides that, whenever any document is produced before any Court, purporting to be a statement or confession by any prisoner or accused person, taken in accordance with law, it shall be presumed that such statement or confession was duly taken. *Ibid.* **Z**
- (c) As a necessary basis for this presumption, the document must show all the facts of which it would otherwise be necessary for the Court to be satisfied by direct evidence, before the confession could be used against the accused—the facts being, the accuracy of the record, the presence of a Magistrate, and the voluntary nature of the confession. *Ibid.* **A**
- (d) S. 80 of the Evidence Act does not render admissible any particular kind of evidence, but only dispenses with the necessity for formal proof in the case of certain documents taken in accordance with law. 9 M. 224 (227). **B**
- (e) S. 80 merely gives legal sanction to the maxim “*Omnia proesumuntur rite esse acta*” with regard to documents taken in the course of a judicial proceeding. 9 M. 224 (227). **C**
- (f) The statements as to which S. 80 of the Evidence Act says that certain presumptions shall be drawn are statements or confessions taken in accordance with law. 9 M. 224 (227). **D**
- (g) S. 80 raises three presumptions in favour of a document purporting to be a deposition or a confession taken in accordance with law:—(1) That such document is genuine, (2) that it is true, and (3) that the statement is duly taken; and so long as the other conditions mentioned in the section are fulfilled, these presumptions will arise of themselves in regard to any such document. 6 C.W.N. cxxvi. **E**
- (h) A document purporting to be a confession taken in accordance with law and showing on its face that it was taken by any Judge or Magistrate, will be presumed to be *genuine*; the statement as to the circumstances under which the document was taken, purporting to be made by the person signing it, will be presumed to be *true*; and the statement or confession will be presumed to have been duly taken. And *no formal proof* thereof is necessary. 21 W.R.5 (Cr); 18 C. 129; 1 B. 219; 12 A. 595; & 22 B. 235. See 6 C.W.N. ccxvi. **F**
- (i) Where the confession of an accused person was recorded by a District Magistrate in the form of question and answer and took rather the shape of cross-examination and was properly certified and there appeared to be no circumstances which would make it inadmissible under S. 24, Evidence Act, *held* that the Court was bound to make the presumptions specified in S. 80 of the Evidence Act in respect of the document purporting to be the confession of the accused, and that the confession was properly admitted in evidence under S. 80 of the Evidence Act. 1 L.B.R. 340 (343). **G**

7.—“*To have been caused by any inducement, threat or promise.*”—(Continued).

5.—CONFESSIONS TO MAGISTRATES—RECORDING OF CONFESSIONS.—(Continued).

- (j) Where a confession of an accused person was recorded by a Magistrate under Ss. 122 & 346, Cr.P.C., 1872, the document was held to be relevant without further proof under S. 80 of the Evidence Act. 21 P.R. 1881 (Cr.). **H**
 - (k) If a document has not been taken in accordance with law, S. 80 does not operate to render it admissible, 9 M. 224 (227). **I**
 - (l) A confession does not bear the certificate, which S. 164, Cr.P.C. which requires to be appended to all confessions recorded by a Magistrate during the course of a police investigation, is not taken in accordance with law and could not be admitted under S. 80 of the Evidence Act, without proof of its having been made. 7 C.W.N. 220 (221). **J**
 - (m) If the statements of the accused, recorded by a Deputy Magistrate, were recorded by him as an Executive Officer, it was held that they would not be admissible under S. 80 of the Evidence Act. 9 M. 224 (227—8). **K**
 - (n) Under Cr.P.C., 1861, the examination of the prisoners is to be received in evidence, and the attestation of the Magistrate (which is to be received without formal proof, unless the Court doubt its genuineness) is *prima facie* proof of the circumstances. 14 W.R. (Cr.) 9 (10). **L**
- (14) **S. 91 of the Evidence Act.**
- (a) S. 164, Crim. Pro. Code, 1882, provides that, when a confession is made to a Magistrate, when the police had commenced an investigation under Ch. XIV of the Code and the prisoner was in their custody and the confession was recorded in the presence of a police officer by a Magistrate purporting to act under the section, the confession shall be recorded and signed in a specified manner. It is a matter, therefore, required by law to be reduced to the form of a document, and, under S. 91 of the Evidence Act, the only evidence which could be given in proof of such matter is the document itself. 17 C. 862 (867). **M**
 - (b) Where a confession taken under S. 122, Cr.P.C., 1872, is not admissible in evidence, oral evidence is not also admissible under S. 91 of the Evidence Act to prove that such a confession was made or the terms of that confession. 10 B.H.C.R. 166. **N**
 - (c) Oral evidence is not admissible to prove the fact of a confession where the confession itself is inadmissible. 1 B. 219 (223). **O**
 - (d) Where the record itself of the statements made by a prisoner was inadmissible in evidence, secondary evidence of the contents of those statements was held to be inadmissible under S. 91 of the Evidence Act. 9 M. 224 (229), referring to 10 B.H.C.R. 166 & 1 B. 220. **P**
 - (e) Where a Magistrate, in taking the confession of the accused, omitted to cause him to sign or mark the confession, held it was a very serious piece of carelessness, making the confession inadmissible as evidence, and, even under S. 91 of the Evidence Act, secondary evidence of what the prisoner said was excluded. 11 B.H.C.R. 44 (45), referring to 19 B.H.C.R. 166. **Q**

7.—“*To have been caused by any inducement, threat or promise.*” —(Concluded).

5.—CONFESSIONS TO MAGISTRATES—RECORDING OF CONFESSIONS.—(Continued).

(f) S. 533, Crim. Pro. Code, 1882, modifies, as regards confessions, S. 91 of the Evidence Act. It provides that when, on the tender of a confession recorded under S. 161, it is found that the provisions of that section and of S. 361 have not been fully complied with, the Court shall take evidence that the accused person duly made the statement recorded. That section does not authorise the Court to proceed as if there had been no recorded confession, or to treat such confession as non-existent: It clearly means that the evidence which is to be taken shall be evidence that the accused person duly made the particular confession which was recorded and tendered. 17 C. 862 (867, 868). **R**

8.—“*Having reference to the charge against the accused person.*”

(1) **Inducement, etc., must be with reference to charge against the accused.**

(a) The words “having reference to the charge against the accused” read with the words “in a criminal proceeding” occurring before, and the words “in reference to the proceedings against him” occurring subsequently, imply that the inducement, threat, or promise must be with reference to the charge of an offence in the criminal courts of the country; and the language is wide enough to admit of the construction that the charge need not have been framed nor any criminal proceedings commenced, when the confession was made. 5 M.L.J. Art., p. 26. **S**

(b) The object of the person who uses the illegal means must be to obtain a confession of having committed an offence which is at the time, or will be in future, the subject of a charge and proceeding in the criminal Courts, with the intent that the confession may be used in the subsequent criminal proceedings. 5 M.L.J. Art. p. 26. **T**

(c) Two persons charged with murder made certain confessions before a caste panchayet in consequence of a threat of ex-communication alleged to have been held out to them. It was held that the members of the panchayet were not in authority over the accused persons within the meaning of S. 24 and that there was no threat, inducement, or promise made to them, *having reference to any charge* against the accused person. 4 A. 46 (48). **U**

(d) A confession made, immediately after the prisoner with others had been threatened by a witness, to whom the statement was made, with a loaded rifle, was held to be inadmissible, *I'hear. J.*, observing that it was immaterial that the threat was not for the purpose of extorting the confession, but in order to suppress an attempt at mutiny. 10 B.L.R. Ap. 1. **Y**

Note.—(The correctness of this ruling is doubtful. A.A. & W. Ev., 4th Ed., p. 156).

(2) **‘Charge’ means criminal charge.**

The ‘charge’ means here a ‘criminal charge,’ or a charge of an offence in a criminal proceeding. 5 M.L.J. Art., p. 25. **W**

8.—“Having reference to the charge against the accused person.”—(Continued.)

(3) Words used should create hope of bettering present position by confessing.

(a) In every case it is for the Judge to decide whether the words were used in such a manner and under such circumstances as to induce the prisoner to make a confession of guilt, whether such confession were true or no. *R. v. Gardner*, 1 Den. C. C. 331; Wigm. Ev., '05 Ed., S. 824, p. 937; Tay. Ev., 10th Ed., S. 884, p. 624. **X**

(b) A promise or threat, to render a confession irrelevant, must *relate to the charge*—i.e., must reasonably imply that the prisoner's position with reference to it will be made better or worse according as he confesses or not. Phip. Ev., 4th Ed., p. 244, referring to Tay. Ss. 879--881 & Steph. Dig. Art. 22. **Y**

(4) Inducement relating to collateral matter, effect of.

(a) Where a confession has been obtained by an inducement relating to some collateral matter unconnected with the charge, it will not be excluded from evidence. Phip. Ev., 4th Ed., p. 244, referring to Tay. Ev. S. 880. **Z**

(b) A confession made in consequence of a promise to strike off the prisoner's handcuffs was held to be admissible in evidence. *R. v. Green*, 6 C. & P. 655, Phip. 4th Ed., p. 247, Tay. Ev., 10th Ed., S. 880, p. 620; Wigm. Ev., '05 Ed., S. 835, p. 931. **A.**

(c) A confession made by an accused person on the promise of the gaoler to allow him to see his wife, if he would tell where the property was, was held to be voluntary. *R. v. Lloyd*, 6 C. & P. 393, Steph., Dig., 7th Ed., Art. 22, p. 32. **B**

(d) Where the accused said to a constable, "if you will give me a glass of gin, I will tell you about it"; and he was given two, a confession made in consequence of this was excluded. *R. v. Sexton*, Chetwynd's Suppl. to Burn's Justice, quoted in Joy, Confessions, 17; Wigm. Ev., '05 Ed. S. 839, p. 955; Tay. Ev., 10th Ed., S. 880, p. 620; Phip. Ev., 4th Ed., p. 247. **C**

(5) Effect of inducement as to one crime on confession of another crime.

(a) An inducement to confess regarding one crime will not invalidate a confession as to another and different one. *R. v. Warner*, 3 Russ. Cr., 6th Ed., 489 (n); Phip., Ev., 4th Ed., p. 244.; Tay. Ev., 10th Ed., S. 891, p. 620. **D**

(b) Except where the two offences are so blended together as to form in fact but one transaction. *R. v. Hearn*, C. & M. 109; Tay. Ev., 10th Ed., S. 891, p. 620; Phip., Ev., 4th Ed., p. 244. **E**

(c) A person was charged with setting fire to her master's house. Shortly after the fire, some of the master's goods were found hidden in the garden of the house. The master told the servant, "if you don't tell me the truth about the things found in the garden, I will send for a constable." The servant confessed having set fire to the house. *Heid*, that the confession was inadmissible, as the threat was made with regard to a crime, which, though different, formed part of the transaction of the first. *R. v. Hearn*, 1 C. & M. 109; Phip. Ev. 4th Ed., p. 249. **F**

8.-- "Having reference to the charge against the accused person."—(Continued).

(6) Effect of inducement made to one person upon another who confesses.

(a) A promise or threat made to one prisoner will not render a confession made by another, who was present and heard the inducement, irrelevant. *R. v. Jacobs*, 4 Cox. 54; Phip. Ev. 4th Ed., p. 244; Wigm. Ev. 5th Ed. S. 854, p. 985. **G**

(b) A and B, apprentices, were charged with robbing their master. The master had told A, in the presence of B, that if he did not confess, a constable would be sent for. A then admitted that both of them had robbed their master; whereupon B said: "You are a liar; I only took one handkerchief." B's confession was held to be admissible, as the threat was not made to him; but A's was not. *R. v. Jacobs*, 4 Cox. 54; Phip. Ev., 4th Ed., p. 249. **H**

(c) For a case where a confession by one prisoner was received, notwithstanding that an inducement had been held out to an accomplice which might have reached the prisoner. See *R. v. Bate*, 11 Cox. 686; Phip., Ev., 4th Ed., p. 249. **I**

(d) Where a superior clerk in the Post Office told the postman's wife, (the postman being in custody at the time for opening and detaining a letter) "do not be frightened; I hope nothing will happen to your husband beyond the loss of his situation;" a subsequent confession by the prisoner was held to be inadmissible, it appearing that the wife might have told the husband the substance of this statement. *R. v. Harding*, 1 Arm M. & O. 340; Tay. Ev., 10th Ed., S. 885, p. 625. Phip. Ev., 4th Ed., p. 249. **J**

(7) Inducement need not be express, but may be implied.

(a) An inducement, promise or threat need not be express, but may be implied from the conduct of the person in authority, the declarations of the prisoner, or the circumstances of the case. *R. v. Gillis*, 11 Cox. 69; Phip. Ev. 4th Ed., p. 244. **K**

(b) An accused person volunteered to a constable a statement implicating himself and others, and being asked if he would repeat it to a superintendent said, "No." They then went to the superintendent and thence to a Magistrate, before whom, without caution or inducement, the accused made a similar information on oath. Some days later, on this information being read over in the presence of his confederates, the accused said, "I came here to save myself." He was not then in custody, nor was any charge made against him, nor any caution given, the Magistrate regarding him as an approver. Subsequently, he refused to testify against his confederates and was tried and convicted. Held that the statement and informations were irrelevant, being made under the hope of being treated as an approver, and not being validated by the accused person's breach of promise. *R. v. Gillis*, 11 Cox, 69; Phip., Ev., 4th Ed., p. 250. **L**

(c) Confessions made some days after arrest may also often be true, but such confessions will, in almost every instance, not have been made voluntarily, but have been extorted by maltreatment, or induced by

8.—“Having reference to the charge against the accused person.”—(Concluded).

promises of pardon on being made a witness for the Crown. 9 A. 528 (566), per *Brodhurst, J.* **M**

9.—“Proceeding from a person in authority.”

(1) Confession induced by person in authority irrelevant.

(a) S. 24 declares that any confession made by an accused person is irrelevant if made under an inducement from some one in authority. 2 L.B.R. 168 (170); see, also, 6 C.W.N. cxi. **N**

(b) It does not matter whether the accused person is in custody or not, or whether the confession is made to a police officer or to some one else; if it is made under the influence of an inducement, threat or promise, it is irrelevant. 2 L.B.R. 168 (171). **O**

(2) No definition of term “person in authority” in Act.

No definition or illustration is given in the Evidence Act of the expression “person in authority.” 9 B.H.C.R. 358 (368); see, also, 5 M.L.J. Art., p. 27. **P**

(3) English decisions to guide in construing term.

The expression is well-known to English lawyers on a question of this nature; and, though, as the rules of evidence, which were in force at the passing of the Evidence Act, were repealed, the English decisions on the subject cannot be regarded as authorities, they may still serve as valuable guides. 9 B.H.C.R. 358 and 368; see, also, 5 M.L.J. Art., p. 27. **Q**

(4) Term not to be used in restricted sense.

(a) Where it was contended that a “person in authority” meant a person having control over the prosecution of the accused, it was held that the term was not to be used in any restricted sense. 9 B.H.C.R. 358. **R**

(b) Too restricted a meaning should not be placed on the words “a person in authority.” 9 C.W.N. 474—2 Cr. L.J. 255 (258). **S**

(5) Character of person offering inducement to be considered.

Before a confession is rendered inadmissible under S. 24, regard must be had as well to the character of the person from whom the improper pressure originates, as to the nature of the inducement, threat or promise. 5 M.L.J. Art., p. 23. **T**

(6) It must be that of one in authority.

With respect to the character of the person, whose pressure would render a confession inadmissible under S. 24, the condition is that he must be a ‘person in authority’. 5 M.L.J. Art., p. 23. **U**

(7) Test of authority.

(a) The test would seem to be, had the person authority to interfere in the matter; and any concern or interest in it would appear to be held sufficient to give him that authority. 9 B. H. C. R. 358 (369); See, also, 10 B. 232, argument. **Y**

9.—“Proceeding from a person in authority.”—(Continued).

- (b) To render a confession inadmissible, the inducement must have been held out by a person in authority—i. e., some one engaged in the *arrest, detention, examination, or prosecution* of the accused; or by some one acting in the presence, and without the dissent of such a person. *R. v. Pounteney*, 7 C. & P. 302; Phip. Ev., 4th Ed., p. 243. **W**
- (c) The expression ‘person in authority’ applies to a person who has control over the prosecution of the accused (*R. v. Hannah Moore*, 2 Den. C. C. 522) or a prosecutor, *R. v. Jenkins*, R. & R. 492) or his attorney (*R. v. Croydon* 2 Cox, 67). **X**
- (d) According to English law, any person having authority over the accused in connection with the prosecution is a person in authority within the meaning of the rule. Field. Ev., 6th Ed., p. 96. **Y**

(8) Indian and English law.

- (a) In India the inducement which renders a confession inadmissible must be one proceeding from a person in authority. See Whitley Stokes, Anglo Indian Codes, Vol. II, p. 827. See, also, Field. Ev. 6th Ed., p. 97. **Z**
- (b) In England, it seems enough if the inducement is held out by any one in his presence and he by his silence sanctions its being made. See Whitley Stokes, Anglo Indian Codes, Vol. II, p. 827; see, also, Field. Ev., 6th Ed., p. 97. **A**
- (c) The question whether the section by the use of the words “proceeding from” enacts a different rule from that of the English Law, according to which it seems enough if the inducement be held out by any one in the presence of the person in authority and he by his silence sanctions its being made, is answered by Messrs. Amir Ali and Woodroffe in the negative. A. & W. Ev., 4th Ed., p. 156. **B**
- (d) A confession made by a person who had read a proclamation by the Government offering a pardon to an accomplice who gave evidence, and induced by it, was not admitted in evidence. *R. v. Boswell*, C. & Marsh. 584; Tay. Ev., 10th Ed., S. 881, p. 621. **C**

(9) Ground of exclusion of confession induced by person in authority.

- (a) As the authority possessed by the persons who make or sanction the inducement is calculated both to animate the prisoner’s hopes of favour, on the one hand, and, on the other, to inspire him with awe, and, in some degree, to overcome the powers of his mind, the law assumes the possibility, if not probability, of his making an untrue admission, and, consequently, withdraws from the consideration of the jury any declaration of guilt which the ‘prisoner, under these circumstances, may be induced to make. Tay. Ev. 10th Ed. S. 874, p. 614. **D**
- (b) The admission of such evidence would naturally lead the inferior agents of the Police, while seeking to obtain a character for activity and zeal, to harass and oppress unfortunate prisoners in the hope of wringing from them a reluctant confession. Tay. Ev., 10th Ed., S. 874, p. 615.

(10) Inducement by person having no authority.

E

- (a) Whether an inducement, threat, or promise proceeding from a person having *no authority* renders a confession inadmissible, is a question upon which the English decisions have not been uniform. The weight.

9.--“Proceeding from a person in authority.”—(Continued).

of authority appears to be in favour of the admissibility of such a confession. That it would be admissible under the above section, there appears to be little doubt, as the confession is declared to be irrelevant only when made in consequence of an inducement, threat, or promise, proceeding from a person in authority. *Field. Ev.*, 6th Ed., p. 97. **F**

(b) Any confession was held to be receivable by *Patteson, J.*, unless some inducement has been held out by a person in authority, and, with reference to the particular facts of the case before him, to have added that he would have admitted in evidence the statement made by the prisoner to an indifferent person, had the inducement been offered by such person alone. *R. v. Taylor*, 8 C. & P. 734; *Tay. Ev.*, 10th Ed., S. 875, p. 616. **G**

(c) A promise or threat held out by an indifferent person, who has officiously interfered, without any sort of authority will *never* operate to exclude a confession, made to *any other person* who has not himself sanctioned the inducement. *R. v. Gibbons*, 1 C. & P. 97; *Tay. Ev.*, 10th Ed., S. 877, p. 617. **H**

(d) An exhortation, admonition, promise or threat, proceeding from some one who has no concern in the apprehension, prosecution, or examination of the prisoner, but interferes without any authority, will not be sufficient to render a confession inadmissible. *R. v. Rowe*, R. & R. 153. **I**

(11) Confession induced by person in authority, but not made to him, irrelevant.

A confession induced by a person in authority, though not made to him, will not be received in evidence. *R. v. Blackburn*, 6 Cox. 333; *Philp.*, *Ev.*, 4th Ed., p. 221. **J**

(12) Confession made to, but not induced by, person in authority, relevant.

Where a confession is made to, but not induced by, a person in authority, it is relevant. *R. v. Gibbons*, 1 C. & P. 129; *Philp.*, *Ev.*, 4th Ed., p. 241. **K**

(13) Instances of persons held to be in authority.

(a) A travelling auditor of a railway company was held to be a person in authority, as regards one of its booking clerks, within the meaning of S. 24. 9 B.H.C.R. 358 (269). **L**

(b) Where a threat was alleged to have been made by “every body connected with the Municipality,” it was said it would have rendered the confession irrelevant, should the fact of the threat have been proved. 11 B.H.C.R. 137. **M**

(c) Where a prosecutor asked the defendant for the money which he had taken, and before it was produced, said, “I only want my money, and if you give me that, you may go to the devil if you please,” upon which the defendant took part of the money from his pocket, and said that was all he had left, *held*, the evidence was inadmissible. *R. v. Jones*, R. & R. 152; and *R. v. Parrell*, 4 C & P. 570. **N**

(d) Where a *panchayet* was assuming an authority and was leading the accused to believe that he had that authority, a Court would be justified in holding that he was “a person in authority,” within the meaning of S. 24 of the Evidence Act. 9 C.W.N. 474 (476). **O**

9.—“*Proceeding from a person in authority.*”—(Continued).

- (e) The master of a vessel was held to be a person in authority. 10 B.L.R. App. 1. **P**
- (f) A police *patel* was held to be a person in authority. 3 B. 12. **Q**
- (g) So also, any other police officer is a person in authority. 5 N.W.P. 86. **R**
- (h) A constable or other officer, in whose custody the accused is, will be held to be a person in authority. *R. v. Shepherd*, 7 C. & P. 579; *R. v. Gillis*, 11 Cox. 69; *Phip.*, Ev., 4th Ed., p. 243. **S**
- (i) Or, in cases of felony, perhaps the private person who arrests. 3 Russ. Cr. 502n; *Ros. Cr. Ev.*, 40; *Phip. Ev.*, 4th Ed., p. 243. **T**
- (j) Or the prosecutor. *R. v. Jenkins*, *Rus. & Ry.* 492; *Ibid.* **U**
- (k) Or the prosecutor's wife. *R. v. Upchurch*, 1 Moo. C. C. 465. *Ibid.* **Y**
- (l) The wife of one of the prosecutors, and concerned in the management of their business, was held to be a person in authority. *Queen v. Warringham*, 2 Den. C.C. 447 (n); cited in 9 B.H.C.R. 358 (369); *Phip. Ev.*, 4th Ed., p. 243. **W**
- (m) Or the prosecutor's attorney. *R. v. Croydon*, 2 Cox. 67, *Ibid.* **X**
- (n) Or the master or mistress of the prisoner, where the offence has been committed against the person or property of either, but otherwise not. *R. v. Moore*, 2 Den. 522, *Ibid.* **Y**
- (o) Or a Magistrate whether acting in the case or not. *R. v. Clewes*, 4 C. & P. 221. *Ibid.* **Z**
- (p) Or the Magistrate's clerk. *R. v. Drew*, 8 C. & P. 140, *Ibid.* **A**
- (q) Or a coroner. *R. v. Waltho*, *Times*, June 17, 1905. *Ibid.* **B**
- (r) So, also, a Magistrate or a Sessions Judge is a person in authority. 2 A. 260, & 10 C. 775. **C**
- (s) A Monigar who was acting as such in regard to an inquiry into a dacoity was held to be a “person in authority” within the meaning of S. 24. 26 M. 38 (40). **D**
- (t) An accused person was convicted mainly upon a confession made before a Myook, which he retracted before the Sessions Court. *Held*, that the prisoner had not been properly convicted on such evidence. L.B.R. (1872-1892), 497 (498), following 12 M. 123. **E**
- (u) Under the American Law, prosecuting and arresting officers, Magistrates, jailors and all persons, in positions similar to the above, have been held to be persons in authority. *Vaughan*, 17 Gratt, 576. **F**

(14) *Instances of persons held not to be in authority.*

- (a) Where a confession was alleged to have been obtained by an inducement proceeding from the members of a Panch, *held*, the members of the Panch were not persons in authority so as to render the confession made to a Magistrate and repeated to the Committing Magistrate irrelevant, under the provisions of S. 24 of the Evidence Act, 4 Bom. L.R. 785 (788). **G**
- (b) Where an accused person made a confession of his guilt to the Medical Officer of his Regiment, who told the accused that it would be better for him to tell the truth as to how he came about certain wounds, *held* that the Medical Officer was not a person in authority in respect of any proceedings which might be contemplated or taken against the

9.—“Proceeding from a person in authority.”—(Concluded).

accused who made the confession, and that the Medical Officer's representation could only mean that, on medical grounds, it would be for the accused's benefit if he told the truth about the cause of his wounds. 8 Bom. L.R. 507 (512). **H**

(c) Where the accused made his confession of guilt to the Commissioned Officer of his Regiment who stated to the accused that he had already obtained information from another person and promised secrecy if he told the truth, *held* that the Commanding Officer was not shown to be in authority in relation to the proceedings that were to be taken against the accused, and that the alleged deception and inducement were covered by the provisions of S. 29 of the Act. 8 Bom. L.R. 507 = 4 Cr.L.J. 49. **I**

(d) The members of a punchayet sitting to consider whether two persons should be ex-communicated for having committed a murder were held not to be in authority within the meaning of this Act. 4 A. 46 (48). **J**

(e) But *Tyrrel, J.*, gave no reason for so holding; according to the test laid down in 9 B.H.C.R. 358, a punchayet appears to be a “person in authority.” A punchayet had as much authority in the matter of social ostracism as a Judge has in the matter of the prosecution, and it is analogous to a Court. Hence the view of *Tyrrel, J.*, hardly seems right, unless a different construction be placed upon the term “person in authority.” 5 M.L.J. Art., p. 27. **K**

(f) Where an accused person, charged with having abetted another person in the commission of offences under S. 3 (1) (b) under the Official Secrets Act, 1889, made statements in reply to a demand by the Deputy Commissioner for an explanation of his conduct, *held* that they were not excluded by S. 24 of the Evidence Act, as it was not suggested what grounds the Deputy Commissioner's order could give the accused for supposing that he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. 1 L.B.R. 133 (135). **L**

(g) It was held that the wife of a constable was not a person in authority. *R. v. Hawdick*, 1 C. & P. 98n; Phip., Ev., 4th Ed., p. 244; Wigm. Ev., '05 Ed., S. 829, p. 941; Tay., Ev., 10th Ed., S. 877, p. 617. **M**

(h) A mistress not being a person in authority, a confession made in consequence of an inducement held out by her is a voluntary confession. *R. v. Moore*, 2 Den. C.C. 522; Steph. Dig., 7th Ed., Art. 22, p. 32. **N**

(i) The master or mistress of a prisoner is not a person in authority, if the offence of which the prisoner is accused was not committed against them. *Field, Ev.*, 6th Ed., p. 97. **O**

10.—“And sufficient in the opinion of the Court.”

Court to decide sufficiency of inducement.

(a) S. 24, whilst requiring the inducement to be offered by a person in authority, leaves it entirely to the Court to form its own opinion as to whether the inducement, threat, or promise was sufficient to lead the prisoner to suppose that he would derive some benefit, or avoid

10.—“And sufficient in the opinion of the Court.”—(Concluded).

some evil, of a temporal nature by confessing. 9 B. H. C. R. 358 (367). P

- (b) It is admitted that confessions ought to be excluded unless voluntary, and the Judge, not the jury, ought to determine whether they are so. *Rex v. Hannah Moore*, 21 L. J. M. C. 199; cited in 9 B. H. C. R. 358 (367). Q

- (c) It does not turn upon what may have been the precise words used; but, in each case, whatever the words used may be, it is for the Judge to consider, before he admits or rejects the evidence, whether the words used were such as to convey to the mind of the person addressed an intimation that it will be better for him to confess that he committed the crime, or worse for him if he does not. Per *Erle, J.*, in *R. v. Garner*, 2 C. & K. 920 (925); cited in 6 C. W. N. cccxxvi. Wigm. Ev., '05 Ed., S. 824, p. 937. R

11.—“To give the accused person . . . evil.”

(1) Liberal construction of expression by Courts.

The Courts have construed these words liberally in favour of prisoners. 5 M. L. J. Art., p. 28. S

(2) Inducement, etc., must be sufficient to give accused grounds for hoping benefit to himself.

- (a) A threat, to come under S. 24 of the Evidence Act, must be sufficient to give the accused grounds for supposing that by making the confession he would gain an advantage. U. B. R. Cr. (1897-1901) 147 (149). T

- (b) The proper question regarding the admissibility of a confession is whether the inducement held out to the prisoner was calculated to make his confession an untrue one. *Rex v. Thomas*, 7 C. & P. 345, followed in *Rex v. Court*, 7 C. & P. 486; cited in 9 B. H. C. R. 358 (367). Per *Cobidge, J.* U

- (c) To exclude a confession made under the influence of a promise or threat, the promise and threat must be of a description that may be presumed to have such an effect on the mind of the defendant as to induce him to confess. *R. v. Rowe*, R. & R. 153. V

- (d) “The real question is whether there has been any threat or promise of such a nature that the prisoner would be likely to tell an untruth from fear of the threat or hope of profit from the promise.” *R. v. Reason*, 12 Cox. Cr. 229; Wigm. Ev., '05 Ed., S. 824, p. 938. W

- (e) One element in the consideration of the question as to their being voluntary is whether the threat, or inducement was such as to be likely to influence the prisoner. Perhaps it would have been better to have held that in all cases the Judge determined that point upon his own view of all the circumstances, including the nature of the threat or inducement, and the character of the person holding it out together, not necessarily excluding the confession on account of the character of the person holding out the inducement or threat. *Rex v. Hannah Moore*, 21 L. J. Mag. Cr. 199, per *Parke, B.*; cited in 9 B. H. C. R. 358 (367). (The rule as laid down in the section appears to be worded in accordance with the above suggestion. Per *Sargent, C.J.*) X

11.—“To give the accused person....evil.”—(Concluded).

- (f) The rule is that, if any worldly advantage be held out or any harm threatened, the confession must be excluded. The reason is, not that the law supposes that the statement will be false, but that the prisoner has made the confession under a bias and that, therefore, it would be better not to submit it to the jury. *R. v. Baldry*, 2 Den. C.C. 430, cited in 9 B.H.C.R. 358 (367). Y

12.—“Of a temporal nature.”

- (1) “Temporal” is opposed to “spiritual” or “religious.”

The word—5 M.L.J. Art. p. 29.

- (2) Inducement must be temporal.

(a) The inducement must be one of a temporal kind, for hopes of a spiritual nature merely do not come within the purview of the principle which excludes confessions obtained by improper influence. (Inducement offered by clergyman). *R. v. Gilham*, 1 Moo. C. C. 196; Tay. Ev., 10th Ed., S. 872, p. 613. Z

(b) A prisoner under 14 years of age accused of murder was told, “now kneel down, I am going to ask you a very serious question, and I hope you will tell me the truth in the presence of the Almighty”. A statement thereupon made was held to be relevant. (Inducement offered by some other person than a clergyman). *R. v. Wild*, 1 Moo. C. C. 452; Tay. Ev., 10th Ed., S. 872, p. 613. A ?

- (3) English and Irish Law as to penitential confessions.

The law in England and Ireland—unlike that which prevails in Scotland, America, and in countries subject to the Roman Law—does not regard penitential confessions to a priest in the light of privileged communications. Tay. Ev., 10th Ed., S. 879, p. 619. B

- (4) Inducement, not temporal.

(a) Confessions obtained by holding out the hope of forgiveness from God may be relevant under the section. 5 M.L.J. Art., p. 29. C

(b) Ex-communications threatened by the Pope of Rome would be a religious evil. A confession made under such a threat would be relevant under S. 24. 5 M.L.J. Art., p. 29. D

(c) Confessions of sins made to priests would not be inadmissible under S. 24. 5 M.L.J. Art., p. 29. E

(d) The threat employed in 1 A. 46 was ex-communication from caste for life, an evil probably temporal. 5 M.L.J. Art., p. 29. F

13.—“In reference to the proceedings against him.”

- (1) “Proceedings” mean “criminal proceedings”.

(a) “Proceedings” mean criminal proceedings, and the phrase must be read as qualifying the words “advantage” and “evil.” 5 M.L.J. Art. p. 29. G

(b) “Proceedings,” it may be noted, have been held to mean criminal proceedings. 1 L.B.R. 133(135). H

- (2) Advantage or evil must be with reference to proceedings against the prisoner.

(a) The—viz., that, by confessing, the prisoner will not be sent to jail. 9 B.H.C.R. 358. I

13.--"In reference to the proceedings against him."--(Concluded).

- (b) That he will get off. 3 B. 12. & 9 W. R. (Cr.) 16 (17) ; also 1 W. R. (Cr.) 24. J
- (c) That nothing will happen to him. 5. N.W.P. 86. K
- (d) That he will be pardoned. 2 A. 260 & 8 W. R. (Cr.) 53 (54). See, also, 22 C. 50 (73) & 1 A.L.J. 110. L
- (e) That he will receive a more lenient sentence, that he will, in consequence of confessing, become Queen's evidence, and the like. 5 M.L.J. Art., p. 29. M
- (f) The decision in 4 A. 46 may also have been put on the ground that no advantage was offered or evil threatened with reference to the Criminal proceedings against the prisoner. The evil threatened, "ex-communication for life", was with reference to further social intercourse between the accused and his brethren, but did not allude to any escape from criminal prosecution, or mitigation of punishment at their trial. 5 M.L.J. Art., p. 30. N

See, also, the cases cited on 'Confessions' under Ss. 17 and 21. See, also, the articles in 5 M.L.J. p. 12, 2 Bom. L.R. pp. 157 & 217, and 6 C.W.N. ccx., where the entire law of 'Confessions' will be found ably discussed and grouped. O

- 25. No Confession (1) made to a police-officer (2) shall be Confession to a Police officer not to be proved. proved (3) as against (4) a person accused of any offence. (5)

(Notes).

(General).

(1) Ss. 25, 26 and 27 taken from Crim. Pro. Code, 1861.

- (a) Ss. 25, 26 and 27 were transferred to the Evidence Act *verbatim* from the Code of Criminal Procedure, Act XXV 1861. Steph. Introd., p. 140. P
- (b) These sections, *viz.*, 25, 26 and 27 were embodied in the Indian Evidence Act with some alteration from the Crim. Pro. Code (Act XXV of 1861), 6 A. 509 (512) (F.B.), per *Oldfield, J.*; see, also, per *Brodhurst, J.*, at p. 514, and per *Mahmood, J.*, at p. 524. Q
- (c) These three sections, have, with very slight alterations, been brought into the Evidence Act from Act XXV of 1861, the first Code of Criminal Procedure, and are to be found in Ss. 148, 149 and 150 of that Code. 6 A. 509 (514) (F.B.), per *Brodhurst, J.* R

(2) S. 148, Act XXV of 1861, Cr. P.C.

No confession or admission made to a police officer shall be used as evidence against a person accused of an offence. See 6 A. 509 (512) (F.B.), per *Oldfield, J.* S

(3) Ss. 25 & 26 make no material changes.

—in the language of the Cr. P.C., Act XXV of 1861, from which they were embodied in the Evidence Act. See 6 A. 509 (512) (F.B.), per *Oldfield, J.* T

(General).—(Continued).

(4) Sections connected with one another.

Ss. 148, 149 & 150, Cr. P.C., 1861, there stand in the same order towards each other as do Ss. 25, 26 & 27 in the Evidence Act and, from their context and contents, these three sections are strongly connected one with the other. 6 A. 509 (514) (F.B.); per *Brodhurst, J.* U

(5) Sections 25 & 26 different from English Law.

(a) Ss. 25, 26 & 27, differ widely from the law of England, and were inserted in the Act of 1861 in order to prevent the practice of torture by the police for the purpose of extracting confessions from persons in their custody. Steph. Intro., p. 140. Y

(b) Ss. 25 and 26 of the Evidence Act are apparently peculiar to this country and the safeguards in India, in favour of accused are, in some sense, more pronounced than in England. 2 C.W.N. 702 (707); per *Maclean, C.J.* W

(6) Indian Law unreasonable.

On this subject of the exclusion or admissibility of confessions to a police officer, nothing can be more unreasonable than the hard and fast line that is often attempted to be drawn in this country. 4 A. 198 (203); per *Stuart, C.J.* X

(7) Construction of section—Loose view.

(a) The provision in S. 25 is not to be understood in any absolute sense and under all circumstances whatever. 4 A. 198 (203); per *Stuart, C.J.* Y

(b) Though S. 25 of the Evidence Act provides that no confession made to a police officer shall be proved as against an accused person, nothing could be more impolitic or obstructive than to take it to mean to apply to all statements, however voluntarily made to a police officer. 4 A. 198 (203); per *Stuart, C.J.* Z

(c) S. 25 ought to be read and understood in connection with the other sections which follow it, particularly S. 28 (?—probably S. 27), for taken by itself and applied indiscriminately, it is simply irrational and absurd. 4 A. 198 (203), per *Stuart, C.J.* A

(d) Such a naked application of the section is also plainly opposed to the law of evidence as supplied by the Courts in England, a good illustration of which is supplied by what is called *Baldry's case*, as referred to in Roscoe's Evidence in Criminal cases, 4th Ed., by Power, 1858, p. 40. 4 A. 198 (203); per *Stuart, C.J.* B

(e) In *Baldry's case*, the confession, which the Court of Appeal unanimously held to have been rightly received in evidence at the trial, was made to the police constable, who, having apprehended the prisoner on a charge of murder, said to him that 'he need not say anything to criminate himself, as what he did say would be taken down and used as evidence against him', and, thereupon, the prisoner made the confession. 4 A. 198 (203); per *Stuart, C.J.* C

(f) Though, in this country, it might be fairly argued that such a confession as was made in *Baldry's case* did not come within the implied exceptions to S. 24, and was distinctly struck at by S. 25, however unreasonably, yet, statements by police officers embodying and including what may be understood as a confession or admission of guilt by an accused

(General.) —(Continued).

person are not wholly inadmissible, but may be received and applied so far as they prove merely corroborative circumstances and not an absolute confession of guilt. 4 A. 198 (203 & 204); per *Stuart, C.J.* **D**

(8) Construction of Ss. 25 & 26—The strict view.

(a) It is manifest that the prohibition laid down in these two sections, 25 & 26, must be strictly applied, and any relaxation of it in accordance with the proviso to S. 27 should be sparingly admitted and only to the extent of so much of the accused's statements, as directly and distinctly relates to the fact alleged to have been discovered in consequence of it. 4 A. 198 (201), per *Staught, J.* **E**

(b) The provisions of Ss. 25, 26 & 27 of the Evidence Act, must be strictly construed. 6 A. 509 (513). **F**

(c) The terms of S. 25 are imperative. A confession made to a police officer, *under any circumstances*, is not admissible in evidence against a prisoner. 1 C. 207; referred to in 1 L.B.R. 65 (66). **G**

(9) How section should *not* be read.

The section is not to be read as if it ran, "no confession made to a police officer investigating a case." 1 C.L.R. 21 (22). **H**

(10) Proper construction of section.

The proper construction is one that excludes confessions to a police officer under any circumstances, or to any one else, when the person making it is in a position to be influenced by a police officer, unless the free and voluntary nature of the confession is secured by its being made in the immediate presence of a Magistrate, in which case the confessing person has an opportunity of making a statement, uncontrolled by any fear of the police. 1 C.L.R. 21 (22), referred to in 26 C. 569 (570). **I**

(11) Reason for exclusion of confession to police even in Magistrate's presence.

A comparison of Ss. 25 & 26 leaves no doubt that confessions to a police officer even though made in the presence of a Magistrate, would be wholly inadmissible for the simple reason that the saving clause contained in S. 26 does not exist in S. 25. 6 A. 509 (532) (**F.B.**); per *Mahmood, J.* **J**

(12) Ss. 25 & 26 different.

The two sections laid down two clear and definite rules. 6 A. 509 (532) (**F.B.**), per *Mahmood, J.*, *dissentient*. **K**

(13) Ss. 25 & 26 do not overlap each other.

—for then there would obviously be no necessity for framing two separate sections to lay down one and the same proposition of law. 6 A. 509 (532) (**F.B.**); per *Mahmood, J.*, *dissentient*. **L**

(14) Scope of section.

(a) A confession made to a police officer is not relevant, save as provided by S. 27 of the Act. 1 C.L.R. 21. **M**

(b) Under Ss. 24—26, the statements made by accused persons are irrelevant, subject to the qualifications contained in Ss. 27—29, when such statements are confessions. 10 P.R. 1886 (Cr.). **N**

(General).—(Continued).

(15) Object of section.

(a) The humane object of S. 25 is to prevent a confession obtained from an accused person by means of any undue influence from being received in evidence against him. It is an enactment to which the Court should give the fullest effect, and there is no sufficient reason for reading the 26th section so as to qualify the plain meaning of the 25th. 1 C. 207 (214 & 215), referred to in 26 C. 569 (570). See Steph. Introd., p. 140. cited *supra*. O

(b) The obvious intention of the Legislature in passing the provisions contained in Ss. 25 and 26 of the Evidence Act was to deter the police from extorting confessions, by rendering such confessions absolutely inadmissible in proof, unless made in the immediate presence of a Magistrate; per *Straight, J.* 4 A. 198 (204). P

(c) The rules contained in Ss. 25, 26 and 27 of the Evidence Act were not originally treated in British India as, strictly speaking, rules of evidence, but rather as rules governing the action of police officers, and as matters of criminal procedure. 6 A. 509 (521) (F.B.), per *Mahmood, J.*, dissentient. Q

(d) The Legislature had in view the malpractices of police officers in extorting confessions from accused persons in order to gain credit by securing convictions, and those malpractices went to the length of positive torture; the Legislature, in laying down such stringent rules, regarded the evidence of police officers as untrustworthy, and the object of the rules was to put a stop to the extortion of confession, by taking away from the police officers the advantage of proving such extorted confessions during the trial of accused persons. 6 A. 509 (523) (F. B.) per *Mahmood, J.* R

(e) It is with the object of discountenancing and preventing the very objectionable practice of police officers extorting confessions through pressure and compulsion that the Legislature has, in the interests of accused persons, provided a safeguard in S. 25, which renders a confession made to a police officer, *absolutely* irrelevant. 6 C. W. N. cexi. S

(16) Analogous law.

Similar to S. 25 is the provision in S. 102 of the Cr. P. C.; no statement made by any person to a police officer in the course of an investigation under this chapter shall, if taken down in writing, be signed by the person making it, nor shall such writing be used as evidence. 5 Bom. L. R. Art., p. 203. T

(17) Relation of S. 8 to Ss. 25 & 26.

(a) The special provisions in Ss. 25 and 26, being unambiguous, are not cut down by S. 8; '*Generalia specialibus non derogant.*' 14 B. 260 (267). U

(b) Explanation 1 to S. 8 does not render admissible, as evidence, any statement which Ss. 25 and 26 exclude, and is not to be construed as if it were a proviso to those sections. 14 B. 260 (266), per *Jardine, J.* Y

(c) Statements made by accused persons to a police officer, while in police custody, are not relevant, under S. 8, Expl. I of the Evidence Act, as evidence of 'conduct.' S. 8, in so far as it renders admissible a statement as included under 'conduct,' must be read together with

(General).—(Concluded).

Ss. 25 and 26 and cannot admit, as evidence, a statement which would be rejected by those sections. 14 B. 260. **W**

(d) According to Expl. 1 of S. 8, the word 'conduct' does not include statements, unless those statements accompany and explain acts other than statements. 11 B.H.C.R. 242 (245); see, also, 5 M.L.J. Art., p. 13. **X**

(18) Point to be borne in mind with reference to section.

The Evidence Act does not intend to suggest or sanction the process of attaching, by a more or less forced connexion, to any act that a prisoner could do, a statement relevant to a crime charged against him, but only to make those statements admissible, which are the essential complement of acts done or refused to be done, so that the act itself or the omission to act acquires a special significance as a ground for inference with respect to the issues in the case under trial. It is important that this should be borne in mind, as otherwise prisoners will, by the exercise of the commonest ingenuity be entirely deprived of the safeguard which the Legislature intended to throw round them in Ss. 24 to 26 of the Evidence Act. 3 B. 12 (17). **Y**

(19) Applicability of section to Upper Burma.

The words, "who is not a Magistrate" shall be inserted after the expression "police-officer" in S. 25 of the Evidence Act, in its application to Upper Burma. See S. 4, of the Burma Laws Act (XIII of 1898). **Z**

(20) Ruling of 1867 no guide to the law as enacted in Evidence Act.

The Code of Criminal Procedure of 1861 contained sections, 148, 149 & 150, almost identical with Ss. 25, 26 & 27 of the Evidence Act, 1872. But there does not seem to be in that Code a section corresponding to S. 24 of the Evidence Act, nor is there any statutory provision to the effect of that section in the Indian Acts, relating to evidence, in force before the Evidence Act of 1872. Therefore, a ruling of 1867 cannot safely be taken as a guide to the law as it stands enacted in the Evidence Act now in force. 2 L.B.R. 168 (169). **A**

(21) Plea of not guilty enough to put Judge on enquiry.

The mere fact that a prisoner puts in a plea of not guilty and denies having made the confession or explains having made it by allegation of police torture is enough in itself to put a Judge upon enquiry as to whether it has been improperly induced. 8 Bom. L.R. 697 = 4 Cr. L.J. 332. **B**

(22) Reference to English authorities.

The true meaning of the sections bearing on this subject, 'confessions,' can best be learned from the beginning of Vol. II of Taylor on Evidence, and the reports of cases referred to in paragraphs 796, 797, 803, 807, 824 and 825. 3 B. 12 (17); (now contained in Vol. I, pp. 605 to 640 & Ss. 862 to 907). **C**

I.—"No confession."**(1) 'Confession,' meaning of.**

(a) Confession, in S. 25, means, as in S. 24, a confession made by an accused person which it is proposed to prove against him to establish an offence. B. 131 (134). **D**

1.—“**No confession.**”—(Continued).

(b) The word confession must be construed as meaning the same in S. 30 as in Ss. 24, 25 & 26. It must not be understood as including a mere inculpatory admission which falls short of being an admission of guilt. 7 A. 646 (648). **E**

(c) The view of the law favouring the exclusion of incriminating statements made by an accused person to a police officer may render it necessary to construe the word “confession” in different ways in S. 25 or S. 26 and in S. 30. L.B.R. (1893–1900), p. 42 (15). **F**

(2) **Confessions may be divided into two classes.**

Confessions made in open Court and confessions out of Court. 5 Bom. L.R. Art., p. 200. **G**

(3) **Confessions in open Court.**

Where confessions are made in open Court by the accused that he is guilty of the offence with which he is charged, the Court may consider it as the most satisfactory evidence of the guilt of the accused; such a confession is, in other words, a plea of guilt and a prisoner may be convicted on his own uncorroborated confession. 5 Bom. L.R. Art., p. 200, referring to 6 W.R. 73 (Cr.). **H**

(4) **Confessions out of Court.**

Confessions made out of Court are admissible in evidence only under specified conditions, as mentioned in Ss. 24 to 30 of the Indian Evidence Act. 5 Bom. L.R. Art., p. 200. **I**

(5) **Motives inducing confessions.**

Confessions are more often induced by these motives—fatalism, despair, want of tenacity of purpose—than they are by torture and bad usage. In the matter of confessions, the tenacity of humanity all the world over is not the same. Per *Duthoit, J.*, in 6 A. 509 (550); (*contra*, per *Straight, C. J.*, the tendency of humanity in this matter is pretty much the same all the world over. *Ibid*). **J**

(6) **Retracted confessions—Their cause.**

(a) When a man's confession has been made and he is transferred to the Magistrate's lock-up, the petty indulgences which the police allow to a confessing prisoner cease his mind recovers its balance, his fellow prisoners prove to him how foolish he has been, and the confession is retracted. 6 A. 509 (551) (**F.B.**), per *Duthoit, J.*, see, however, remarks of *Straight, C.J.*, at p. 513, to which the above is probably meant as a reply. **K**

(b) In taking into consideration retracted confessions and in estimating their value, the possible malpractices on the part of the police are to be borne in mind; still more should they be borne in mind by Magistrates before whom accused persons are brought with a view to having their confessions recorded; possibly abuses of this kind might be rendered ineffectual if such Magistrates exercised more care than is sometimes the case in ascertaining whether the confessions of the accused persons coming before them have been in reality the outcome of their own desire and have not been the result of inducement or compulsion on the part of the police. 1 L.B.R. 238 (247). **L**

1.—“No confession.”—(Concluded).

(7) Confession made before commencement of enquiry.

A confession made to a committing Magistrate, in Court, three weeks before the commencement of the enquiry and before any evidence had been taken, and stated by the confessor to have been voluntarily made, to which the memorandum required by S. 104, Cr.P.C., was attached, was held not to be excluded by S. 25 and that S. 26 of the Evidence Act, and the latter part of S. 29 of the Act appear to point to such a confession being taken cognisance of. 3 A.W.N. 238. M

2.—“Made to a Police Officer.”

1.—GENERAL.

(1) Meaning of term “police-officer.”

(a) In construing S. 25, which was intended as a wholesome protection to the accused, the expression “police officer” should not be read in a technical sense, but in its widest and most popular signification. 1 C. 207 (216). N

(b) The terms of S. 25 are imperative and a confession made to any police officer, the term “police officer” always having been interpreted in its widest sense in the High Courts in India, and, under any circumstances, is to be excluded. 6 C.W.N. cexi. O

(c) The provisions of S. 25 of the Evidence Act, declaring that no confession made to a police-officer shall be proved as against a person accused of any offence, apply to every police-officer, the Court declining to restrict it to officers of the regular police force. 26 C. 569 (570)=3 C. W.N. 393, referring to 3 B. 12; 1 C.L.R. 21 & 1 C. 207 (F.B.); see, also, 6 C.W.N. cexlvi. P

(2) No distinction between police-officer and person vested with powers of such an officer.

In interpreting S. 25 of the Evidence Act, it is not possible to distinguish between a police officer and a person vested with all the powers of a police officer. The same distrust, which the Legislature attaches to confessions made to police officers, must necessarily attach to men in the inferior position of village *gaungs*, who wield all the powers of a police officer. L.B.R. (1872—1892), p. 479 (481). Q

(3) Confession to police-officer acting in different capacity.

A confession is not taken out of S. 25 by the fact that it was made to a person not in his capacity of a police officer, but as an acting Magistrate and Justice of the Peace, 5 M.L.J. Art., p. 33, referring to 1 C. 207. R

(4) Broad ground for rejecting confessions to Police.

(a) Unauthenticated confessions made to the police are liable to be not only extorted, but occasionally invented, and grave danger is likely to be run if the Courts be allowed to attach any value whatever to them as evidence. Per *Straight*, C. J. 6 A. 509 (544). S

(b) The broad ground for not admitting confessions made to a Police officer is to avoid the danger of admitting false confessions, but the necessity for the exclusion disappears in a case provided for by S. 27, when the

2.—“Made to a Police Officer.”—(Continued).

1.—GENERAL.—(Continued).

truth of the confession is guaranteed by the discovery of facts in consequence of the information given. 6 A.509 (513) (F.B.); per *Oldfield, J.* T

(c) The provisions of Ss. 25 & 26 obviously proceed on the assumption that confessions made to the police by accused persons while in their custody or not, or to third persons while in their custody, unless, in the latter case, they were guaranteed by the presence of a Magistrate, were valueless as evidence, because of the experience which has created an apprehension that they might not be voluntary, and consequently that they might be false. 6 A.509 (545), per *Straight, C.J.* U

(d) The reason why the law in Ss. 25 and 26 of the Evidence Act jealously excludes a confession made to a police officer, and a confession made by an accused while in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate is, that there is room for apprehension that a police officer, who is armed with large powers over accused persons, may unwillingly excite terror in the minds and extort false and involuntary confessions; and his duty to investigate criminal cases and to detect offenders and bring them to justice may make him feel tempted to obtain confessions from accused persons by threat, or promise, or other improper influence. 2 C.W.N.71 (74). V

(e) Even in England, confessions made to the Police are received with special caution, the police officer being invariably taken to be a person in authority, any tangible inducement, threat or promise from him of the nature described in S. 21 of the Evidence Act would render the confession inadmissible, unless it led to discovery. 6 A. 509 (537); per *Mahmood, J.* W

(f) The state of things in India has induced the Legislature to frame, in S. 25, an equally absolute rule in regard to confessions made to police officers, which are presumed to have been made under conditions prohibited by S. 24. 6 A. 509 (541); per *Mahmood, J.* X

(5) **Indian Law as to confessions improperly obtained same as rule in Harvey's case.**

The law of India as to confessions improperly obtained is the same as the rule laid down in *Harvey's case*, 2 East P. C. 658, by Lord Eldon, and confessions to a police officer are conclusively presumed to have been improperly obtained, so as to be subject to the same rule, unaffected by the question of discovery. 6 A. 509 (541) (F.B.) per *Mahmood, J.* Y

(6) **Criterion for excluding confession in section.**

In S. 25, the criterion for excluding the confession is the answer to the question—“To whom was the confession made?” If the answer is that it was made to a police officer, the law says that such confession shall be absolutely excluded from evidence, because the person to whom it was made is not to be relied on for proving such a confession, and he is, moreover, suspected of employing coercion to obtain confessions. 6 A. 509 (532) (F.B.); per *Mahmood, J., dissentient.* Z

(7) **Test of admissibility of statements made to police.**

“A useful test as to admissibility of statements made to the police is to ascertain the purpose to which they are put by the prosecution. If the

2.—“*Made to a Police Officer.*”—(Continued).

1.—GENERAL.—(Continued).

latter rely on the statements of the accused to the police as being true, then, they may, and, probably, in many cases, will, be found to amount to confessions. If, on the other hand, the statements of the accused are relied on, not because of their truth, but because of their falsity, they are admissible. They are in such cases brought forward to show what the defence of the accused is, and, that, as the defence is untrue, this is a circumstance to prove the guilt of the accused.” A.A. & W. Ev., 4th Ed., p. 163, *referring to R. v. Kangal Mali*, Cr. Ref., 30 of 1905, Cal. H.C., 18th Sept. 1905. **A**

(8) **Jury to consider value of confession to police officer by one accused on behalf of co-accused.**

The value of a confession made to a police officer by one of two accused persons, as a circumstance in favour of the co-accused, may be great or small, and is a matter to be weighed by the jury. 2 B. 61 (64). **B**

(9) **Investigation of case by police-officer to whom confession is made, whether necessary.**

It is immaterial whether such police officer be the officer investigating the case. The fact that such person is a police officer invalidates the confession. 1 C.L.R. 21. See, also, 5 M.L.J. Art., p. 33. **C**

(10) **Confession to police in presence and hearing of another person.**

A confession made to a police officer in the presence and hearing of a private person is not to be regarded as made to the latter, and is, therefore, still within the prohibitive scope and meaning of S. 25. Per *Stuart*, C.J. 4 A. 198 (201). **D**

(11) **Police methods, remarks on.**

In almost every case of serious gravity or difficulty the primary object towards which the police direct their attention and energies is, if possible, to secure a confession Instead of working *up to* the confession, they *work down* from it, with the result that the Courts frequently find themselves compelled to reverse convictions, simply because, beyond the confession, there is no tangible evidence of guilt. 6 A. 509 (512) (F.B.), per *Straught*, C.J. **E**

(12) **Police-officer may disprove ill-treatment alleged against him.**

If an allegation of ill-treatment has been made against a police-officer, it is only just that he should be given an opportunity of disproving it. 1 C.L.R. 238 (219) ; per *Fox*, C.J. **F**

(13) **Question to police-officer as to statement of accused, when not under arrest.**

A police officer may be questioned as to what the accused had stated to him at a time when the latter was not under arrest. 6 C. 530 (532). **G**

(14) **Police Officers, their duties and powers.**

(a) “Their business,” as the late Mr. Justice Byles remarked of English policemen, “is to catch thieves, ours to give them a fair trial.” 6 A. 509 (518) (F.B.) ; per *Straight*, C.J. **H**

(b) Lord Denman observed to some constables who were called as witnesses :—
“The distinction is very clear; you are not to suppress the truth,

2.—“*Made to a Police Officer.*”—(Continued).

1.—GENERAL.—(Concluded).

but you are not to take any measures of your own endeavour to extort it.” *R.v. Cart*, Maid. Sum. Ass. ; see *Tay. Ev.*, 10th Ed., S. 882, p. 623. I

(c) *Cave, J.*, defined the duty of a policeman arresting a prisoner to be “To keep his mouth shut and his ears open.” *Rogers v. Hawkins*, 67 L. J.Q.B. 526 ; see *Tay. Ev.*, 10th Ed., S. 881, p. 622. J

(d) Exposition of a Police officer's powers of arrest and detention of accused persons and witnesses with a view to the suppression of the practice of torture. 7 W.R. (Cr.), 3. K

2.—POLICE-OFFICERS, WHO ARE AND WHO ARE NOT.

(1) The following persons have been held to be police officers.

- | | | |
|----------------------------------|--|---|
| (a) A police constable, | 10 B. L. R. App. 2, 2 B. 61, 6 C. 530,
6 B. 31, 6 A. 509. | L |
| (b) A police head constable ; | 5 N. W. P. 86, 11 B. H. C. R. 242 ;
4 A. 198, 10 B. 595 ; | M |
| (c) A police patrol, | 10 B. 595 ; | N |
| (d) A daroga ; | 4 A. 198 ; | O |
| (e) A sub-Inspector of thannah ; | 1 C. L. R. 21 ; | P |
| (f) A police Inspector ; | 1 C. 207 & 15 C. 589 ; | Q |
| (g) A police sub-Inspector ; | 19 W. R. 5 (Cr.), 11 C. 635 ; | R |
| See 5 M. L. J. Art., p. 33. | | |

2) Chowkidar, a police officer.

- (a) The words “in S. 25 of the Evidence Act are not restricted to officers of the regular police force. A chowkidar is a police officer. 26 C. 569, *approving* 1 C. 207. S
- (b) A Chowkidar, although he is not a police officer in the sense of Act V of 1861, is a police officer under Reg. XX of 1877 and Act I of 1892, and a confession made to him is inadmissible in evidence. 2 C.W.N. 637 (638), *dissenting from* 2 C.W.N. 71 ; see, also, 9 C.W.N. 474 (476). T

3) Deputy Commissioner of police is a Police officer.

- (a) The provision that a confession made by a prisoner to a police officer is inadmissible as evidence against him, applies to confessions made to the higher officers of police, to wit, a Deputy Commissioner of Police in Calcutta. 25 W.R. 36 (Cr.)—1 C. 207. U
- (b) The Deputy Commissioner of Police in Calcutta, whose essential functions were those of a police officer and head of the Calcutta Police, though he was also a Magistrate, especially when sitting in his place of office, surrounded by police officers immediately under his control, could not divest himself of his character of a police officer, which, in common parlance, he was understood to be. 1 C. 207 ; *cited in* 1 L.B.R. 65 (66). Y

4) Native State police-officers are Police Officers within section.

There is no justification for declaring that the officials, ordinarily described police officers in Native States, and performing in such States

2.—“*Made to a Police Officer.*”—(Continued).

2.—POLICE-OFFICERS, WHO ARE AND WHO ARE NOT.—(Continued.)

functions of police, are not Police officers within the meaning of Ss. 25, 26 & 27 of the Evidence Act. 22 B. 235 (237); following 1 C. 207. **W**

(5) **Gaung is a police-officer.**

Although the *gaung* or headman in Lower Burma is not a police officer within the meaning of Act V of 1861, and the Code of Criminal Procedure, he has certainly been vested with all the powers of a police officer under those enactments. L.B.R. (1872—1892), 479 (481). **X**

(6) **Ten-house-gaung is a police-officer.**

A ten-house-gaung, appointed under S. 3 (4) of the Lower Burma Village Act, is a police officer, within the meaning of S. 25 of the Evidence Act, and a confession made to him is inadmissible in evidence. 3 L.B.R. 283 (284) = 5 Cr. L. J. 421 (422). **Y**

(7) **Ywathugyi is a police-officer.**

The *ywathugyi* is the head of the rural police, and has police duties to perform. He is to all intents and purposes a police officer, though he may not be so designated. The material point is, not whether he is called a police officer, but whether he discharges the duties of a police officer. The spirit, and not the letter of the law, is to be considered. A confession made to him was, hence, held inadmissible. *Maung Wun v. Queen Empress*, L.B.R. (1893-1900), p. 22 (23). citing 1 C. 207; dissenting from in 1. L.B.R. 65. **Z**

(8) **Chowkidar not a police-officer.**

(a) A village *chowkidar* was held not to be a police officer within the meaning of Ss. 25 & 26 and a confession made by an accused person, while in the custody of a chowkidar, was held to be admissible in evidence. 2 C.W.N. 71, per *Banerjee & Wilkins, JJ.* (This case distinguishes 1 C. 207 & 17 B. 485). But see 2 C.W.N. 637, *contra*. See 6 C.W.N. cccxlvii. **A**

(b) A chowkidar was held not to be a police officer, within the terms of S. 59, Cr. P.C., 1898, so as to make rescuing a person, who was in his custody, an offence. 4 C.W.N. 252 = 27 C. 366. per *Prinsep & Stanley, JJ.* **B**

(9) **Reason why a chowkidar is not a police-officer.**

The reason for the rule excluding confessions to a police-officer (see *supra*) can have no application to a chowkidar, who is vested with no such power, on whom no such duty of determining and bringing to justice an offender is imposed, and who is not, therefore, likely to exercise any such influence or to be under any similar temptation. 2 C.W.N. 71 (74), relying on 26 B. 795. **C**

(10) **Village Munsiff not a police officer.**

A village Munsiff is not a police-officer, and the village Cess Act, S. 7 does not make him one, and, hence, a confession made to a village Munsiff is not irrelevant by reason of S. 25. 7 M. 287 (288), explained in 1 L.B.R. 65 (66). **D**

2.—“*Made to a Police Officer.*”—(Continued).

2.—POLICE-OFFICERS, WHO ARE AND WHO ARE NOT.—(Concluded.)

(11) **Punchayet not a police officer.**

A *punchayet* is not a police officer, but he is a person in authority within the meaning of S. 24, Evidence Act. 11 C.W.N. 904 = 6 Cr. L. J. 154. **E**

(12) **Ywathugyi not a police-officer.**

(a) A *ywathugyi* cannot be regarded as police officer within the meaning of S. 25 of the Evidence Act. 1 L.B.R. 65 (67). **F**

(b) The case of the *ywathugyi* is clearly distinguished from that of the Deputy Commissioner of Police in that the former bears no title indicating that he is a police officer and is not popularly regarded as one, and it is also distinguishing in the same way from that of the police patel. 1 L.B.R. 65 (67); *distinguishing* 1 C. 207 & 17 B. 485. **G**

(c) But owing to the position of authority which a *ywathugyi* actually exercises in his village, a confession made to him should be received in evidence with caution, the circumstances in which the confession was made being important for consideration in each case in estimating the weight to be attached to the confession. 1 L.B.R. 65 (67). **H**

3.—STATEMENTS TO POLICE HELD INADMISSIBLE.

(1) **Inadmissible confessions to Police.**

(a) A confession made to a police officer was held not to be admissible against the accused. 3 A.W.N. 188. **I**

(b) Where a person was convicted on the grounds that some stolen property was discovered beneath the “chulha” of his house, that he had stated to the police that he had buried a part of it somewhere, which spot he pointed out and the property was discovered there, *held* that his statements and the pointing out were inadmissible in evidence as the statement was made to a police officer within the meaning of S. 25, as S. 25 is not governed by the provisions of S. 27, and as no fact was discovered *in consequence* of any information given by the accused, but by his own act. 2 A.W.N. 225. **J**

(c) Where a person, accused of murder, made a statement to a darogah and gave up a knife, as that with which the crime was committed, in the presence of a head constable, and conducted the police officer to the spot where he had thrown the anklets of the deceased and pointed them out, *held* that, as his statements were confessions made to a police officer, and as it was by his own act, and not by any information given by him, that the discovery took place, his statements could not be proved against him. 4 A. 198. **K**

(d) Under S. 25, confessions made to police officers are altogether excluded. 8 O.C. 395 (401). **L**

(e) Where the accused was practically in the charge of some chowkidars from the time she was taken out of her house till she was made over to the custody of the Magistrate, statements made by the accused to these people were held not to deserve much importance. 2 C.W.N. clxxx. **M**

2.—“*Made to a Police Officer.*”—(Continued).3.—STATEMENTS TO POLICE HELD
INADMISSIBLE.—(Continued).

- (f) As a general rule a confession made to a police officer is not admissible in evidence. 25 C. 413 (415) = 2 C.W.N. 257 (259). **N**
- (g) A *Chowkidar* is a police officer within the meaning of S. 25 and a confession to him is irrelevant. 3 C.W.N. 393 = 26 C. 569; see 6 C.W.N. cexlvii. **O**
- (h) A confession is inadmissible if made to a police officer. 6 C.W.N. ccxi. **P**
- (i) A confession made to a police officer cannot be proved against an accused person. 7 C.W.N. 220 (222). **Q**
- (j) As a confession made to a police officer cannot be proved against an accused person, a statement by a police officer to that effect should not be placed on the Magistrate's record. 7 C.W.N. 220 (222). **R**
- (k) That is, he should not be allowed to depose that the accused confessed to him, even though the terms of the confession were not allowed to be proved. 7 C.W.N. 220 (222). **S**
- (l) A confession made to a police officer is not relevant against an accused person. 3 P.R. 1868 (Cr.). **T**
- (m) An accused person, while in the custody of the police, promised to restore the stolen property. His statement, coming within the category of a confession, as being an incriminating statement suggesting the inference that the prisoner participated in the commission of that offence, was held to be inadmissible against him, under Ss. 25 and 26 of the Evidence Act. 20 P.R. 1905 = 51 P.L.R. 1905. **U**
- (n) An incriminating statement, made to the Police by an accused person, though not a confession, when nothing had been discovered in consequence of it, was held to be inadmissible in evidence against him. 4 Cr. L. J. 177 (178) = 111 P.L.R. 1906 = 16 P.R. 1906 (Cr.). **V**
- (o) So much of the evidence of a *kyegaung* as stated that the accused confessed to him that they had committed a certain crime was held to be inadmissible. L.B.R. (1872—1892), p. 479 (481). **W**
- (p) A Sessions Judge in admitting against the prisoner admissions said to have been made by her to police officers while in their custody was held to have directly contravened the law. 3 W.R. (Cr.), 21 (22). **X**
- (q) A Deputy Commissioner of Police in Calcutta is a police officer within the meaning of S. 25 and a confession made to him is irrelevant. 1 C. 207 (F.B.). **Y**
- (r) Though the confession made to the Deputy Commissioner of Police was made at a time when he was not acting as a police officer, but as a Magistrate, and there was no danger that a person in that position would extort a confession, yet the Court considered itself bound to give the accused the benefit of the literal construction of the words of S. 25. 1 C. 207. **Z**
- (s) A police officer, examined for the prosecution, stated, in the course of cross-examination, that, when he arrested the prisoner, he said to the former that some Chinamen, at the time of the occurrence, came

2.—“*Made to a Police Officer.*”—(Continued).3.—STATEMENTS TO POLICE HELD
INADMISSIBLE.—(Continued).

out with hatchets. In re-examination, the Policeman substituted the words “at the time” for the words “at the time of the occurrence.” On being asked if the prisoner had explained “what time,” the Policeman answered that the prisoner said “at the time I struck the deceased.” Held, that the statement of the prisoner that Chinamen came out with hatchets at the time when he struck the deceased would not be admissible in evidence, as it was an incriminating statement made to a police-officer by an accused person in custody. 10 C. 1022 (1023), per Field, J. **A**

(t) For a case where some statements made by an accused person to a police officer were held to be relevant and some to be irrelevant, see 15 C. 589 (593—4). **B**

(u) A man and a woman were charged with the murder of the latter's husband. Among various things, the woman, at the commencement of the police inquiry, made certain statements to the police incriminating her co-accused. It was held that her statements to the police were not admissible in evidence. 22 C. 50 (76 & 77). **C**

(v) Where a Sub-Inspector of a thanah of a certain place had come to another place to give evidence in another case and was in no way concerned with the investigation of the case against the accused, and the prisoner went to him as to a personal friend and asked his advice of his own accord and made a confession to him, held, the confession was nevertheless inadmissible. 1 C.L.R. 21. **D**

(w) A police *patel* is a police officer within Ss. 25 & 26 and confessions made to him are not admissible. 3 B. 12, referred to in 26 C. 569 (570); see 6 C.W.N. ccxlvii. **E**

(x) A confession of murder, made to a police constable, is not at all confirmed by the prisoner's saying “That is the place where I killed the deceased,” and when, starting from the pointing to a ditch or tree, a long narrative of transactions, some of them altogether remote from any connection with the spot indicated, is allowed to be deposed to as confessed by a prisoner, the intention of the Evidence Act is not fulfilled but defeated. 3 B. 12 (17). **F**

(y) A statement made to a police officer by an accused person, while in the custody of the police, though not made as a confession of guilt, but rather made by the prisoner in self-exculpation, was held nevertheless to be an admission of a criminating circumstance on which the prosecution mainly relied as the most important part of the evidence against the accused, coming properly within the prohibition laid down by Ss. 25 & 26 of the Evidence Act. 6 B. 34 (36 & 37). **G**

(z) The accused, charged with the theft of some *Jwari*, admitted before the police, during the police investigation, that they had taken the *Jwari* and concealed it in a jar and immediately produced it. The identity of the *Jwari* recovered with that stolen was not proved to the Magistrate's satisfaction, except by these admissions, upon which, however, they were convicted. Held, reversing the conviction, that, as the

2.—“*Made to a Police Officer.*”—(Continued).

3.—STATEMENTS TO POLICE HELD INADMISSIBLE.—(Continued.)

prisoners themselves produced the *Jwari*, it was by their own act and not from any information given by them that the discovery took place and that, though the production of the property may be proved the accompanying confession made to the police was not admissible in evidence. 10 B. 595 (596 & 597), following 1 A. 198. **I**

(aa) A confession of guilt or an admission of a criminalizing circumstance or statement suggesting an inference that the prisoner committed the crime, made to a police officer while in police custody, should be rejected. 11 B. 260. **I**

(bb) A police *patel* was held to be a police officer, and a confession made to him was not admitted in evidence, the Judges declining to follow the Madras ruling (7 M. 287) which, it was stated, followed the view that, in the Presidency of Madras, Village Munsiffs are “Magistrates and not Police officers, which cannot be said of police *patels* in this Presidency.” 17 B. 485 (486), following 1 C. 207, cited in 1 L. B. R. 65 (67). **J**

(cc) Where a statement made by a prisoner to the police, while in their custody, was an admission of a criminalizing circumstance relied on by the prosecution, and influenced the Magistrate, its admission in evidence was held to be contrary to Ss. 25 & 26 of the Evidence Act. 19 B. 363 (368). **K**

(dd) A Village Munsiff is not a police officer and the District Magistrate is not right in inferring from S. 7 of the Village Cess Act, Madras, IV of 1864 that he is a police officer. The confession made to him was not, therefore, inadmissible under S. 25 of the Evidence Act, and, since the woman was not in custody at the time (the police had not even come to the village), it cannot be excluded under S. 26. 7 M. 287 (288). **L**

(ee) It is contrary to English principles of justice to admit in evidence against an accused person an admission of a criminalizing circumstance elicited from him by a police-officer in cross-examination during a departmental enquiry. L.B.R. (1893–1900), p. 42 (46), referring to 6 C. 530. **M**

(ff) Where a person was charged with giving false information in that he originally laid a complaint of criminal misappropriation against another, but the next day told the police that his report was incorrect, and there was no offence committed against him, held that the second statement, that the information originally given by him was false, was a confession, and, being made to a police officer, was inadmissible under S. 25 of the Evidence Act. U.B.R. (1897–1901), 156 (157) (Cr). **N**

(gg) Where the case against an accused person rested on the confession of a co-accused, on his own confession before a *lambardar*, and on his production of stolen property, and it was proved that there was enmity between the accused and the *lambardar* who took an active part in the investigation, and the confession before him was made in

2.—“*Made to a Police Officer.*”—(Continued).3.—STATEMENTS TO POLICE HELD
INADMISSIBLE.—(Continued).

the presence of the Deputy Inspector of Police and the property found was such that it could not be identified, *held* that the confession made by the accused was inadmissible in evidence and the other evidence against him was insufficient and that he must be acquitted. 1 Cr. L.J. 42 (43). **O**

(iii) A confession made in the presence of the investigating police officer, who joins the prosecutor in questioning the accused person, is in fact made to a police officer, though actually taken down by the prosecutor, and is inadmissible under S. 25 of the Evidence Act. 10 C.P.L.R. 16 (Cr.). **P**

(2) **Confession recorded by Police officer and Magistrate.**

A confession recorded by a police officer, who is also a Magistrate, is inadmissible in evidence. 1 C. 207--25 W.R. 86 (Cr.). **Q**

(3) **Presence of Magistrate insufficient to admit confession made to police.**

(a) The mere standing by of a Magisterial Officer when confessions are being made to and recorded by the police, for their own use, will not make them evidence. 12 W.R. 82 (Cr.). **R**

(b) A confession made to a police officer is not admissible in evidence, even if it is made in the presence of a Magistrate. 24 W.R. 82 (Cr.), see, also, 6 C.W.N. cxi. **S**

(4) **Confession made to a Native State police officer inadmissible.**

In regard to the police, it would be unreasonable to hold that a confession made to a Native State policeman should be more admissible than one made to a British policeman. 22 B. 235 (237). **T**

(5) **Accused's statements to police inadmissible against co-accused.**

Statements made by an accused person, convicted of poisoning her husband, to a *thanadar*, were, in so far as she confessed that she had poisoned her husband, held to be inadmissible, under S. 25 of the Act, against a person who was convicted for abetting her, as the confession was made to a police officer. 5 O.C. 321 (325). **U**

(6) **Complaint to police in another case inadmissible.**

Where a person in the custody of the police, as an accused, gave information to the police as the complainant in another case, his statements made in the complaint should not be used as evidence against him in his trial. 21 C. 392. **V**

(7) **Improper conduct of police in obtaining statement from person and then arresting him—Sufficient materials to arrest already existing.**

Where a statement, obtained by the police from the mother of an accused person, incriminated another accused person, who was not arrested, but was examined as a witness and was then arrested, *held* that a police officer, having sufficient material before him to arrest an accused person, should not adopt such a course and that it was, to all intents and purposes, the obtaining by the police of a statement from an accused person and reducing it to writing, and that the statement so obtained was not admissible in evidence whether regarded

2.—“*Made to a Police Officer.*”—(Continued).

3.—STATEMENTS TO POLICE HELD INADMISSIBLE.—(Concluded).

as a confession made by the other accused to a police officer under S. 25, or whether it was to be used as evidence against the other prisoners. 27 C. 295 (302). **W**

(8) **Answers to questions put by police held not relevant.**

(a) Where a prisoner in prison was questioned by a constable with the view of inducing her to make admissions, the answers of the prisoner were held to be irrelevant. *R. v. Gavin*, 15 Cox, 656; Tay. Ev., 10th Ed., S. 881, p. 622. **X**

(b) Where a constable after arresting and warning a prisoner, questioned him, and read a statement made by a person afterwards called as a witness for the prosecution, what the prisoner said in answer was held inadmissible. *R. v. Mule*, 17 Cox, 689; Tay. Ev., 10th Ed., S. 881, p. 622. **Y**

(9) **Ss. 161 & 162, Cr.P.C., 1882.**

(a) The true meaning of S.162, Cr.P.C., is that the statement made by an accused person, reduced to writing, under S.161, that is, the writing containing such a statement, cannot be used as evidence against him, but does not mean that the accused's statement shall not be proved. 15 P.R. 1886 (Cr.). **Z**

(b) S.162, Cr.P.C., provides that a statement made by an accused person as a witness to the Police in a police investigation and reduced to writing shall not be admitted in evidence against an accused person; but it does not say that the statement shall not be proved against him in any way. 5 P.R. 1891 (Cr.). **A**

4.—STATEMENTS TO POLICE HELD ADMISSIBLE.

(1) **Rule of relevancy under the Act.**

Under the Indian Evidence Act, admissibility is the rule and exclusion the exception. 3 N.L.R. 51 (53). **B**

(2) **Section excludes only confessions, not admissions, to police.**

(a) S. 25 of the Evidence Act excludes only confessions made by persons accused of any offence. an admission made by an accused person to a police officer may be proved, if it does not amount to a confession. 3 N.L.R. 51 (53) = 5 Cr.L.J. 434 (435), referring to 6 C. 530. **C**

(b) A person proceeded against under S. 109, Cr.P.C., for being without ostensible means of subsistence or being unable to give a satisfactory account of himself is not “accused of an offence” for the purpose of Ch. XIV of that Code or S. 25 of the Evidence Act. Such person's statements about himself are not inadmissible in evidence, merely because they were made to the police. 3 N.L.R. 51 = 5 Cr. L.J. 434. **D**

(3) **Statements to police held relevant.**

(a) Evidence proving a confession to a policeman is not wholly to be excluded, but may be referred to as proving other relevant facts detailed in it. 4 A. 198 (202); per *Stuart, C.J.*, approving 11 B.H.C.R. 242 & 3 B. 12; see, however, 14 B. 260 and 25 C. 413. **E**

2.—“*Made to a Police Officer.*”—(Continued).4.—STATEMENTS TO POLICE HELD
ADMISSIBLE.—(Continued).

- (b) A statement made by a prisoner, while in police custody, which proved to be no more than a statement by a person who admits having witnessed the perpetration of a crime, but denies having participated in it and alleges that he protested against it, was held not to amount to a confession. 7 A. 646 (649). **F**
- (c) S. 25 does not exclude statements or admissions of fact made to a police officer, provided that they do not amount to admissions or confessions of culpability. U.B.R. (1897-1901), 15G (157) (Cr.). **G**
- (d) Thus, in the case of a man accused of murder, if the accused said: “deceased broke into my house and attacked me with a sword and I killed him in self-defence,” this statement, though an admission of fact, could not be regarded as an admission or confession of guilt, but as an exculpatory statement; it would, therefore, be admissible though made to a police officer. But, subject to the proviso in S. 27, if the statement amounts to a confession of guilt, it is inadmissible. U.B.R. (1897-1901) (Cr.), 15G (158). **H**
- (e) A prisoner was charged with theft and dishonestly receiving stolen property. Evidence was adduced of a statement made by the prisoner to a constable, who arrested him, to the effect that some of the property had been given him by his sister, and that he had bought the rest and was admitted, the Court saying that there was a distinction in the Evidence Act between ‘admission’ and ‘confession’. 10 B.L.R. Ap. 2. **I**
- (f) A confession made by an accused before the *punchayet*, who told the accused to speak the truth, is admissible in evidence. 11 C.W.N. 904 = 6 Cr.L.J. 154. **J**
- (g) A statement made by an accused person to the police which does not amount, directly or indirectly, to an admission of any criminalizing circumstance is admissible in evidence. 5 Bom. L.R. 312 (313). **K**
- (h) An accused person, who was found carrying a box at night, when asked by a policeman on duty to whom the box belonged, said that it belonged to him. His statement, not amounting directly or indirectly, to an admission of any criminalizing circumstance, was held to be relevant against him on his trial for theft of the box. 5 Bom. L.R. 312 (313). **L**
- (i) A confession made, not to a police officer, and not improperly obtained as laid down in S. 24, is always admissible against an accused person. 8 O.C. 395 (401). **M**
- (j) Thus where an accused person was not in police custody when he said that he had committed a murder, and his confession, when first made, was not made to a police officer, proof of it was held not to be prohibited by S. 25 or S. 26 of the Evidence Act, and it was held to be relevant under S. 24, if the inducement held out to him, that “it would be a good thing if he confessed,” did not proceed from a person in authority, which the men of influence in the village, to whom the accused confessed, were held not to be. 8 O.C. 395 (404). **N**

2.—“*Made to a Police Officer.*”—(Continued).

4.—STATEMENTS TO POLICE HELD ADMISSIBLE.—(Continued).

- (k) Where an accused person, while in police custody, made a statement to a Magistrate, and not to the police, and no kind of inducement was held out to him to make it, it was held to be admissible in evidence. 24 W.R. 33 (36) (Cr). **O**
- (l) Statements made to the police by the accused regarding the ownership of property which formed the subject-matter of certain proceedings against them, though not admissible against them to establish the offence with which they were charged, were yet held to be admissible as admissions under S. 18 against them (S. 21) in their character of persons setting up an interest in property, the object of an enquiry held by a Magistrate under S. 523, Cr. P.C., 1882. 9 B. 191 (134). **P**
- (m) S. 25 of the Evidence Act does not forbid the proving in evidence of a confession made to a *gyathuayi* or a village headman under the Lower Burma Village Act, 1889. 1 L.B.R. 65 (67); dissenting from L.B.R. (1893—1900), p. 22 (23). **Q**
- (n) A village chowkidar is not a police officer in any sense, technical or popular, and a confession made to him is admissible in evidence. 2 C.W. N. 71 (75), *distinguishing* 1 C. 207. **R**
- (o) Nothing in the Crim. Pro. Code, 1872, or the Evidence Act was held to exist necessarily rendering inadmissible an admission made by an accused person on the faith of a promise, made by a police officer making an enquiry, that such person could escape if he should make a disclosure, when it does not amount to a confession, however illegal or improper the conduct of the police might have been in inducing the admission. 8 P. R. 1882 (Cr.). Per *Elsmie, J.* **S**
- (p) While in police custody, the accused was improperly induced to make an incriminating statement to the police. A witness, in consequence of such incriminating statement, visited a certain place and made enquiries of some persons. *Held*, that the facts that the accused made a statement, in consequence whereof a witness visited a certain place and made enquiries, were relevant, for the discovery of a relevant fact in consequence of information given by the accused, if the discovery on such information be itself relevant, he is open to proof without evidence being given of any portion of an irrelevant confession. 34 P. R. 1894 (Cr.). **T**
- (q) Where a policeman overheard the accused's confession, though made in another room in ignorance of the policeman's vicinity and uninfluenced by it, the statement was held not to be legally inadmissible. 7 W. R. (Cr.), 56. **U**
- (r) Where the accused had been overheard muttering something to himself, or saying to his wife or to any other person something in confidence, his statement so made was held to be admissible in evidence. *R. v. Simons*, 6 C & P. 541; Tay. Ev., 10th Ed., S. 881, p. 621. **Y**

() **Answers to questions put by police held relevant.**

- (a) The cases upon this subject in England are conflicting; but the later cases seem to show that statements made by a prisoner in answer to a

2.—“*Made to a Police Officer.*”—(Concluded).4.—STATEMENTS TO POLICE HELD
ADMISSIBLE.—(Concluded).

question put by a police officer are admissible in evidence. 15 W.R. 71 (Cr.), Foot-note. W

(b) A confession made by a prisoner in answer to a question put to him by a police officer was held to be admissible. *Reg. v. Mick*, 3 F. & F. 342; *Mellor, J*; cited in 1 B.L.R. O (Cr.), 15=15 W.R. 71 (Cr.). X

(c) A statement, which a prisoner made in answer to a question put to her by a police officer, was admitted in evidence against her, though the prisoner had not been cautioned. *Queen v. Cheverton*, 2 F. & F. 833; per *Erle, C.J.*; cited in 15 W.R. 71 (Cr.). Y

(d) A confession obtained, without threat or promise from a boy 14 years old, by questions put to him by a police officer, in whose custody the boy was on a charge of felony, and when the boy had no food for nearly a whole day, was properly received as evidence against him. 1 Moo. C.C. 27; cited in 15 W.R. 71 (Cr.). Z

(e) An answer given to a police constable when he arrested the prisoner was held not to amount to a confession of guilt, but was a statement of facts, which, if true, showed that the prisoner was innocent, and that it was not a confession obtained under an inducement of hope or fear, and that it was, therefore, admissible. 15 W.R. (Cr.), 71=1 B. L.R.O.Cr. 15. A

3.—“*Shall be proved.*”

(1) Wording of Ss. 25 & 26 different from that of S. 24.

Ss. 25 & 26 are differently worded and aim at a different object, from that which S. 24 aims at. 2 L.B.R. 168 (171). B

(2) Term “irrelevant” used in S. 24—“Shall not be proved” used in Ss. 25 and 26.

(a) In sections 25 and 26 the wording is the same, “no confession—shall be proved;” while in S. 24, the words used are “a confession—is irrelevant.” 2 L.B.R. 168 (171). C

(b) S. 25 excludes confessions of any kind made to a police officer. It declares that no such confession shall be *proved*. 2 L.B.R. 168 (170). D

(c) Ss. 25 and 26 say that a confession shall not be *proved* in certain circumstances. S. 27 provides an exception that, even though proof would be excluded by S. 26, the accused being in the custody of a police officer, under a certain condition proof may be admitted. 2 L.B.R. 168 (171); per *Thirkell White, C.J.* E

(d) None of the three sections 25, 26 and 27 refers to the relevancy or irrelevancy of confessions to the police, and the re-adoption of the expressions “relevant” and “irrelevant” in Ss. 28 and 29 is significant. 6 A. 500 (588); per *Mahmood, J.* F

(3) Reason for not retaining ‘irrelevant’ in section.

The word “irrelevant” that occurs in S. 24 seems advisedly retained. There was not the same necessity for excluding statements obtained by improper inducements, if relevant under other sections, as there was in excluding statements made to the police which might encourage

3.—“*Shall be proved.*”—(Concluded).

them to torture and ill-treat the persons in their custody. 2 L.B.R. 168 (174), per *Bucks, J.* **G**

(4) Rules contained in Ss. 25, 26 & 27, whether rules of relevancy.

The rules contained in Ss. 25, 26 and 27 are not, strictly speaking, rules of relevancy called forth by the abstract principles of evidence. They are positive prohibitions necessitated by the exigencies of the situation in British India. 6 A. 509 (538); per *Mahmood, J.* **H**

(5) Principle of relevancy.

The principle of relevancy is a doctrine relating to evidence which may be said to be based upon a consideration of the question—What facts afford sufficiently safe *data* for arriving at the truth? The principle, which is an essential law of the human mind, is universal to all mankind, though, in adopting it as a rule of judicial investigation, various nations, according to the exigencies of their position and the stage of civilisation at which they have arrived, have made differences in matters of detail. 6 A. 509 (538) (F.B.); per *Mahmood, J.*, *dissentient.* **I**

4.—“*As against.*”

(1) Confession to police not to be proved against maker.

S. 25 only provides that no confession made to a police officer shall be proved *as against* a person accused of any offence. 2 B. 61 (64). **J**

(2) But it may be used on behalf of another co-accused.

S. 25 of the Indian Evidence Act does not preclude the counsel for one accused person, on *behalf* of his client, asking questions to prove a confession made to the police by another accused person, tried jointly with him; such a confession is not to be received or treated as evidence against the person making it, but simply as evidence on *behalf* of the other. 2 B. 61 (64). **K**

(3) Duty of judge under such circumstances.

But under such circumstances it would be the duty of the Judge to instruct the jury that such a confession is not to be received or treated as evidence, against the person making it, but simply as evidence to be considered on behalf of the other. 2 B. 61 (64). **L**

(4) Reason.

(a) Unless the law were so, the accused person, who was on his trial with the confessing party, might be considerably prejudiced by the exclusion of that evidence. 2 B. 61 (64). **M**

(b) Where a confession made to the police by an accused person was sought to be proved not *as against* either the confessing person, or his co-accused, but on behalf of the latter, *held*, there was not anything in the Evidence Act that would justify the Courts in excluding such evidence when sought to be given on *behalf* of the co-accused, provided it be relevant, though it may be difficult for a jury to give to the latter accused the benefit of such evidence, and not to permit it to prejudice in their minds the confessing party. 2 B. 61 (64). **N**

4.—“*As against.*”—(Concluded).(5) **Court not to presume jury will disobey direction.**

(a) But the Court is not to presume that the Jury will disobey the direction of the Judge (whose duty it is to instruct the Jury as to the law), when he tells them, as he should do, that the confession made to a police officer is not to be regarded as evidence against the accused who made it. 2 B. 61 (64). O

(b) That accused would have the protection of the direction, whereas, if the confession were wholly excluded, the co-accused might suffer serious injury and would be absolutely helpless. The value of the confession as a circumstance in his favour, may be great or small. That is a matter to be weighed by the Jury. 2 B. 61 (64). P

(6) **Two accused jointly tried—Confession by one adduced as evidence for another—If separate trial necessary.**

Where a Judge, on perusing the depositions before trial, perceives that a confession, made to a police officer by one of two accused persons jointly tried, is likely to be offered in evidence on behalf of another accused, it would be an important matter for his consideration whether it would not be desirable to direct the jury that the accused persons should be separately tried. 2 B. 61 (64). Q

5.—“*A person accused of any offence.*”(1) **Section makes unlimited exclusion.**

(a) S. 25 says, without limitation or qualification, that “no confession made to a police officer shall be proved as against a person accused of any offence.” 1 C. L. R. 21; cited in 5 M. L. J. Art., p. 33. R

(b) The law is imperative in excluding the words stated to a police officer by an accused person in the custody of the police, if they should incriminate him. 10 C. 1022 (1023). S

(c) The provisions of S. 25 are *unqualified*. 6 C.W.N. cxxi. T

(d) Ss. 25 & 26 provide that a confession shall not be proved, if made to a police officer, whether the person making it is in custody or not; and that, if an accused person is in police custody, his confession shall not be proved, whether made to a police officer or to any other person, unless it is made in the presence of a Magistrate. 2 L.B.R. 168 (171). U

(e) It is immaterial whether the confessing party was, at the time of making the confession, accused or not, or whether he was in police custody or not, and whether the confession was made to a police officer in the presence of a Magistrate or not. 5 M.L.J. Art., p. 35. Y

(f) The person making a confession may, or may not be, an accused person; may or may not be in police custody at the time of making the confession; and it is also immaterial whether the confession is made in the presence of a Magistrate or not. 6 C.W.N. cxxi. W

(g) Confessions made to police officers are irrelevant whether made whilst a person is in police custody or not, and whether in the immediate presence of a Magistrate or not. 5 M.L.J. Art. p. 37. X

(h) The imperative provision of the law in excluding what comes from an accused person in custody of the police, if it incriminates him,

5.—“A person accused of any offence.”— (Concluded).

applies equally to a statement made to a police officer by an accused who is not in custody. L.B.R. (1893—1900), 42 (45). **Y**

(2) Test whether section applies to confessions before person is accused of offence.

(a) As regards the question whether S. 25 of the Evidence Act applies to confessions made by a person before he is accused of an offence, the test is the position of the person alleged to have made the confession at the time when it is proposed to prove it, not his position at the time when he is alleged to have made it. There is no warrant in S. 25 nor is there authority for any other construction of the section. U.R. R. (1897—1901) (Cr.), 156 (158). **Z**

(b) The criterion in S. 25 excluding a confession is not, to whom was the confession made and was it made by a person accused of an offence, but to whom was the confession made? If it was made to a police officer it is excluded. 5 O.C. 321 (325). **A**

(3) Circumstances where S. 25 is applicable.

I (a) Confessions to police officers, not made in the immediate presence of a Magistrate, when the confessing party is (i) neither accused nor in custody, (ii) accused but not in custody, (iii) in custody but not accused, (iv) both accused and in custody. 5 M.L.J. Art., p. 35. **B**

(b) Example of (i) above: A confession to a police inspector by a person, when he was neither accused nor arrested, is irrelevant. 15 C. 589. **C**

(c) Example of (ii) above: (1) An admission, not being a confession of guilt, made to a police officer by an accused person, before his arrest, is admissible in evidence. 7 C.L.R. 541=6 C. 530. **D**

(2) Where an accused person's statement was taken by a police officer before his arrest, the statement was held to be a confession and irrelevant under S. 25 of the Evidence Act. 4 C. W. N. 129. **E**

(d) Example of (iv) above: A confession to a police officer when a person was accused and in custody is inadmissible. 2 B. 61; 9 B. 131; 10 C. 1022; 1 C.L.R. 21; vide also 11 B.H.C.R. 242; 4 A. 198; 10 B. 595; see 5 M.L.J. Art. p. 35. **F**

II (a) Confessions to police officers made in the immediate presence of a Magistrate, when the confessing party is (i) neither accused nor in custody, (ii) accused but not in custody, (iii) in custody but not accused, (iv) both accused and in custody. 5 M.L.J. Art., p. 35. **G**

(b) Example of (iv) above: A confession to a police-officer by an accused person in custody, though made in the immediate presence of a Magistrate, is irrelevant. 12 W.R. 82 (Cr.); 24 W.R. 33 (Cr.); 1 C. 207; 6 A. 509; but vide 4 A. 198; per *Stuart, C.J.*; and 1 C.L.R. 21; see 5 M.L.J. Art., p. 36. **H**

26. No confession made by any person (1) whilst he is in the custody of a police-officer, (2) unless it be made in the immediate presence of a Magistrate, (3) shall be proved (4) as against such person.

Confession by accused while in custody of police not to be proved against him,

Explanation.—In this section ‘Magistrate’ does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George or in Burma or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882.†

(Notes).

1.—“No confession made by any person.”

(1) Section taken from S. 149, Cr. P.C., 1861.

S. 149, Cr. P.C., 1861, from which S. 26 was taken enacted as follows :—No confession or admission of guilt made by a person, whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be used as evidence as against such person. See 6 A. 509 (512), (F.B.), per *Oldfield, J.* I

(2) Ss. 148 & 149, Cr. P.C., 1861, not identical.

S. 148, for which see under S. 25 *supra*, and S. 149, Crim. Pro. Code, 1861, must not be understood to contain identical propositions of law. The former section laid down a general proposition against the admissibility of confessions made to police officers. The next section carried the principle further by rendering similar confessions inadmissible, even though not made to a police officer, but made by a person “whilst in the custody of a police officer.” 6 A. 509 (525) (F.B.) ; per *Mahmood, J.*, *dissentient.* J

(3) Decision on Ss. 148 and 149, Cr. P.C., 1861, is still law.

The relation between Ss. 148 and 149, Cr. P.C., 1861, is the same as the relation between Ss. 25 and 26 of the Evidence Act, and, therefore, a decision upon those sections of the old Code is still law, so far, at least, as the question, whether S. 25 of the Evidence Act admits only confessions made while in custody to *persons other than* police officers in the immediate presence of a Magistrate, or whether it admits confessions to police officers while the prisoner was in their custody and made in the immediate presence of a Magistrate, is concerned. 5 M.L.J. Art., p. 38 ; but, see 2 L.B.R. 168 (169). K

(4) Section not an exception or proviso to S. 25.

(a) S. 26 cannot be treated as an exception or proviso to S. 25, there being no words to justify such an interpretation. 6 A. 509 (532) (F.B.) ; per *Mahmood, J.* L

(b) The 26th section is not intended to qualify the plain meaning of the 25th, but means that no confession made by a prisoner in custody to any person other than a police-officer, shall be admissible, unless made in the immediate presence of a Magistrate. 1 C. 207 (215). M

(c) S. 26 does not qualify S. 25, but it gives a further safeguard to an accused person. This section enacts that no confession made by a prisoner in custody to any person other than a police officer, shall be relevant, unless made in the immediate presence of a Magistrate. 6 C.W.N. cxi. N

1.—“No confession made by any person.”—(Continued).

(5) Scope of section.

- (a) S. 26 deals only with confessions to persons other than police officers. 5 M.L.J. Art., p. 37. **O**
- (b) But the section does not deal with all confessions made to persons who are not police officers, but only when they are made under two particular circumstances, (i) whilst the accused is in the custody of a police officer, (ii) when made in the immediate presence of a Magistrate. 5 M.L.J. Art., p. 37. **P**

(6) Object of section.

- (a) The object of S. 26 of the Evidence Act appears to us to be to prevent the abuse of their powers by the police, and, hence, confessions made by accused persons, while in custody, cannot be proved against them, unless made in the immediate presence of a Magistrate. 24 W.R. (Cr.). 33 (36). **Q**
- (b) But, if a man, in the custody of the police, volunteers a statement, to a person in the position of a Magistrate, there can be no ground for saying that such statement cannot be used as evidence against the man who makes it. 24 W.R. (Cr.) 33 (36). **R**

(7) Criterion for excluding confession under section.

The criterion adopted in S. 26 for excluding a confession is the answer to the question—“Under what circumstances was the confession made?” If the answer is that it was made whilst the accused was in the custody of a police officer, the law lays down that such confession shall be excluded from evidence, unless it was “made in the immediate presence of a Magistrate”; the reason being that the custody of a police officer provides easy opportunities of coercion for extorting confessions. 6 A. 509 (532) (F.B.); per *Mahmood, J.* **S**

(8) Reason.

To dispute this proposition is to say that the words in S. 26 preceding the saving clause should have properly found place in S. 25, but the Legislature cannot be credited with such verbiage. 6 A. 509 (532) (F.B.); per *Mahmood, J., dissentient.* **T**

(9) Analysis of section.

- (a) S. 26 virtually lays down two propositions, firstly, that a confession made, whilst the prisoner is in the custody of a police officer, and in the immediate presence of a Magistrate, is relevant. 5 M.L.J. Art., p. 37. **U**
- (b) But, secondly, a confession made whilst the prisoner is in the custody of a police-officer, but *not* in the immediate presence of a Magistrate, is not relevant. 5 M.L.J. Art., p. 37. **Y**

(10) Prohibition of section must be strictly applied.

The prohibition contained in this section must be strictly applied, and any relaxation of it in accordance with the proviso to S. 27 should be sparingly admitted. 4 A. 198 (204); per *Straight, J.* **W**

(11) Construction of section—Legislature's intention in passing it—Disregard of its provisions.

For the proper construction of this section, *vide* S. 25 under ‘General,’ (22), 1 C.L.R. 21 (22). For the intention of the Legislature in passing the

1.—“No confession made by any person.”—(Concluded).

provisions contained in Ss. 25 and 26, see under S. 25, *supra*. And for a case where the Court commented upon a prevailing tendency to disregard the provisions of S. 26 of the Evidence Act, perceptible in several cases, recourse being had, although not justified by facts, to the proviso contained in S. 27, see 24 W. R. (Cr.), 36 (37). **X**

(12) **Confessions to which section applies.**

S. 25 applies to all confessions to police officers, and S. 26 applies only to confessions to persons other than police officers, when made by persons in police custody, in the immediate presence of a Magistrate. 24 W. R. 33*; 1 C. 207; 6 A. 509, see 5 M. L. J. Art. p. 43. **Y**

(13) **Unreliable and suspicious confessions—Illegality.**

When there is no judicial proof of the guilt of an accused person, it is illegal to rely upon an unreliable or suspicious confession, or a confession which is open to the grave suspicion of having been produced by the ill-treatment of the police. 21 P. W. R. 1907 (Cr.)—6 Cr. L. J. 266. **Z**

(14) **No indication to whom confession must be made—Effect.**

The omission of the Legislature to indicate to whom the confession must be made has created some difficulty as to the difference between Ss. 25 & 26. 5 M. L. J. Art., p. 36. **A**

(15) **Language covers confessions to police officers and to others.**

(a) S. 25 refers to confessions to police officers, but the present section says nothing on the point, but, so far as the language goes, it is wide enough to include confessions to police officers and to others. 5 M. L. J. Art., p. 36. **B**

(b) S. 26 provides that, if an accused person is in police custody, his confession shall not be proved, whether made to a police officer or to any other person, unless it is made in the presence of a Magistrate. 2 L. B. R. 168 (171). **C**

(c) S. 26 deals with confessions made in the presence of a police officer, who has the custody of an accused person, that is, of a police officer who is concerned more or less in the investigation of the case; and those confessions are absolutely excluded, whether made to a police officer or to any other person, unless made in the immediate presence of a Magistrate. 1 C. L. R. 21 (22). **D**

(d) Whether a statement is made to a police officer or a private person, if it be made while in police custody and not in the immediate presence of a Magistrate, it ought to be excluded. 1 C. 215. **E**

(16) **Meaning of S. 26—Result of decisions.**

The result of the cases on the meaning of Ss. 25 & 26 may be summed up by saying that, with the exception of the view of Stuart, C. J., in 4 A. 198 and of 1 C. L. R. 21, the rest (24 W. R. (Cr.), 33, 1 C. 207 & 6 A. 509) lay down that S. 25 applies to all confessions made to police-officers and that S. 26 only to those confessions made to persons other than police-officers, when made, by persons in police custody, in the immediate presence of a Magistrate. 5 M. L. J. Art., p. 43. **F**

Note.—(This construction is the one that has been established by the High Courts both before and since the passing of the Evidence Act. See 5 M. L. J. Art., p. 38). **G**

2.—“*Whilst he is in the custody of a police-officer.*”

(1) **Rule regarding confessions by prisoners whilst in custody.**

- (a) The general rule applicable to confessions made by prisoners whilst in the custody of a police officer is contained in S. 26 of the Evidence Act and the proviso contained in S. 27 refers to an exception to that rule. 12 M. 153 (154). **H**
- (b) S. 26 provides that no confession made by any person whilst he is in the custody of the police, unless made in the presence of a Magistrate, shall be proved against him. 2 L.B.R. 168 (170). **I**
- (c) If a person, while he was in the custody, and consequently under the influence of the police, made a confession to a third person, such confession is incapable of proof, unless made in the immediate presence of a Magistrate. 6 A. 509 (545) (F.B.); per *Straight, J.* **J**
- (d) As a general rule, the law renders statements made by people while in the custody of the police inadmissible. 11 B.H.C.R. 242 (244). **K**
- (e) But to that rule there is appended a qualifying exception. 11 B.H.C.R. 242 (244), referring to S. 27, for which see *infra*. **L**

(2) **Custody, what constitutes.**

- (a) To constitute custody of the police, it seems that some sort of custody is sufficient. 5 M.L.J. Art., p. 43. **M**
- (b) Under S. 26 there is no necessity to prove a formal arrest. It will be held to be a sufficient custody if the accused is present before the police and cannot depart at his own free will. 3 M.H.C. 318. **N**

(3) **Instances.**

- (a) The mere temporary absence of a policeman from the room does not terminate his custody of the accused, if he has taken effective steps to prevent his escape whether by locking the door of the room or by waiting outside, ready to capture him if he should attempt to run away. Rat. Unrep. Crim. Cases 855 (856). **O**
- (b) Where a prisoner in police custody was brought before a Magistrate, for the purpose of having his confession recorded, the police remaining outside the room while the confessions were being recorded, it was held that he did not cease to be in the custody of the police, notwithstanding that no police officer was in the room during the recording of the confession. Rat. Unrep. Cr. Cases 855 (856) referring to 20 B. 165. **P**
- (c) A person, under arrest on a charge of murder, was taken in a conveyance from the place, where the alleged offence was committed, to another place, and a friend drove with her, a mounted policeman riding in front; during a short absence of the policemen, necessitated by the exigencies of the journey, the accused made a statement to her friend with reference to the alleged offence. Held that, notwithstanding the temporary absence of the policeman, the accused was still in custody and that the witness should not be asked as to what the prisoner said to him. 20 B. 165 (166). **Q**
- (d) Where the prisoners were some, among a number of persons gathered by a police *patel* on suspicion, and where the police *patel* had himself accused them of complicity in the offence, the prisoners were held to be in the custody of the police, some sort of custody being sufficient under S. 26. 10 B. 595. **R**

2.—“Whilst he is in the custody of a police officer.”—(Continued).

(c) The custody of the keeper of a jail in a Native State was held not to be the custody of a police officer, merely because his subordinates, the warders of the jail, were members of the police force of the State. In the absence of any suggestion of a close custody of the prisoner inside the jail, such as may possibly occur when a prisoner is watched and guarded there by the police officer investigating the offence, it is wrong to hold that S. 26 of the Evidence Act precluded such a jailor from giving evidence of what the prisoner told him. 20 B. 795 (797). **S**

4) *Accused whether in custody or not when confessing, Judge, not Jury, to decide.

It is the duty of the Judge, not of the Jury, to decide whether an accused person was or was not in the custody of the police, at the time he made a confession, as being a matter of fact which it was necessary to prove in order to enable the confession to be admitted in evidence, (see Cr.P.C., S. 298, cl. (d), and his omission to state to the Jury his finding on the point is not a misdirection and could not prejudice the accused. 18 M.L.J. 66 (68) - 3 M.L.T. 270. **T**

5) Saving clause of section affords guarantee against extortion of confession.

The Legislature has prohibited the admission of even such confessions as are made to third persons by the accused, whilst in the custody of a police officer, and this rule is made subject to the saving clause contained in S. 26 rendering confessions admissible, if they are not made to the police officer, but a third person, “in the immediate presence of a Magistrate”, which affords a guarantee that the confession was not extorted. 6 A. 509 (541) (F.B.), per *Mahmood, J., dissentient*. **U**

6) Difference between incidents of confessions to police and to third persons while in police custody.

There is a marked difference between the incidents of a confession made to a police officer and a confession made, *not to a police officer*, but to a third person, by the accused “whilst he is in the custody of a police officer”, for, confessions to a police officer, even though made in the presence of a Magistrate, would be wholly inadmissible, for the simple reason that the saving clause contained in S. 26 does not exist in S. 25. 6 A. 509 (532) (F.B.), per *Mahmood, J., dissentient*; referring to 12 W. R. 82 (Cr.). **Y**

7) Confessions held irrelevant under section.

(a) When an accused person promised, while in police custody, to restore the stolen property, *held* that the promise was an incriminating statement suggesting the inference that the accused participated in the commission of the offence, and, therefore, was a confession, irrelevant under Ss. 25 & 26 of the Evidence Act. 20 P. R. 1905 (Cr.) - 51 P. L. R. 1905 - 2 Cr. L. J. 230; following 14 B. 260 & 10 C. 1022. **W**

(b) Where the Sessions Judge allowed a prosecution witness to give hearsay evidence as to the guilt of some of the accused, recorded alleged confessions made by them while in police custody, misdirected the jury by telling them that confessions to the police, if followed by the production of stolen property, were admissible and did not warn them to take the case of each accused separately, and that a confession by one accused involving himself alone could not be used against

2.—“*Whilst he is in the custody of a police-officer.*”—(Continued).

other accused, their conviction was set aside and their re-trial ordered. 3 M. L. T. 263. **X**

(c) Where the police put a spy—a man who had been beaten through the streets for telling lies—beside the accused to listen to revelations while they were in custody, the Court observed that the provisions of S. 26 of the Evidence Act were apparently overlooked. U. B. R. (1892—1896), 83 (84). **Y**

(d) Statements containing incriminating matter and made to a Magistrate by the accused when in the custody of the police, cannot be admissible as an admission under S. 21 of the Evidence Act, unless they be shown to be voluntary. 2 C.W.N. 702 (708). Per Maclean, C. J. **Z**

(e) The law is imperative in excluding what comes from an accused person in custody of the police, if it incriminates him. 10 C. 1022 (1023). **A**

(f) A statement made by a prisoner, while in the custody of the police, was held to be an admission of a criminating circumstance on which the prosecution relied and which weighed with the Magistrate in his judgment on the facts, and inadmissible in evidence as contrary to Ss. 25 and 26 of the Evidence Act. 19 B. 363 (367-8). **B**

(g) Where a prisoner's statement made to the police, while in custody, was probably not intended as a confession of guilt, but was rather made by the prisoner in self-exculpation, it was nevertheless held to be an admission of a criminating circumstance on which the prosecution mainly relied as the most important part of the evidence, against the accused, coming properly within the rule of exclusion which the Legislature has laid down in regard to confessions made by a person while in the custody of the police. 6 B. 34 (36). **C**

(h) A confession made to a Police Inspector was held to be inadmissible in evidence. 18 M.L.J. 66 (67)—3 M.L.T. 270. **D**

(i) The statements made by accused persons to the police cannot be treated as evidence on which they can be convicted, when the facts stated in them are not proved by evidence given at the trial. 18 M.L.J. 66 (70)—3 M.L.T. 270. **E**

(j) It cannot be that a statement which would not have been admissible against an accused person, if made by himself when in custody, is admissible against him when made by a co-accused when in custody. 18 M.L.J. 66 (69)—3 M.L.T. 270. **F**

(k) The provisions of Ss. 25 and 26 lay down that confessions made by the accused in the presence of a Police Inspector shall not be proved. 3 M.L.T. 333. **G**

(l) A confession is inadmissible if made while in police custody and not in the presence of a Magistrate. 6 C.W.N. cxi. **H**

(m) A witness sent by the police in presumably under restraint and a statement made by such a witness is liable to the suspicion that it was not voluntarily made. 4 C.W.N. 129. **I**

(8) **Confession held relevant under section.**

(a) S. 26 relates to confessions made to persons *other than police officers, while the prisoner is in the custody of the police*; and a confession made,

2.—“Whilst he is in the custody of a police-officer.”—(Concluded).

therefore, to such third person by a prisoner while he is *not* in such custody is not protected by the section. 5 M.J. J. Art., pp. 43 & 44. **J**

- (b) A confession is admissible if made while an accused person is not in police custody and if made to any person other than a police officer. 6 C.W.N. cexi. **K**

- (c) Where an accused was not in police custody at the time he made a confession and his confession, when first made, was not made to a police-officer, proof of it was held not to be prohibited by S. 25 or S. 26 of the Evidence Act. 8 O.C. 395 (404). **L**

- (d) For a case where the evidence of a policeman, who overheard a prisoner's statement made in another room, in ignorance of that police-man's vicinity and uninfluenced by it, was held to be legally not inadmissible, see 7 W.R. (Cr.), 56, under S. 25, *supra*. **M**

(9) Keeper of foreign jail not police officer.

The keeper of a foreign jail was held, on the evidence before the Court not to be a police officer. 20 B. 795 (797). **N**

3.—“Unless it be made in the immediate presence of a Magistrate.”**(1) “Police-officer and Magistrate”—Meaning of words.**

- (a) The words “police officer and Magistrate” in S. 26 of the Evidence Act include the police officers and Magistrates of Native States as well as those of British India. 22 B. 235 (237), *approving* 1 C. 207 *following* 12 A. 595 and *referring* to 2 M. 5. **O**

- (b) A limitation which would exclude the use, in British Indian Courts, of a confession made by a person, while in police custody, to a Magistrate in England or in a foreign country, does not appear to have been intended. 22 B. 235 (237-8), *following* 12 A. 595. **P**

- (c) Though the decision in 12 A. 595 deals with the question of the admissibility of the record of the proceedings of the Magistrate of a Native State, under S. 80 of the Evidence Act, yet, as it is based on the construction of the word “Magistrate” in that section as including a Magistrate in a Native State, it is an authority for a similar construction of the word in S. 26; as it would be unreasonable to hold that the Legislature used the same word in different senses in the same Act 22 B. 235 (238). **Q**

- (d) The words “police officer and Magistrate” in S. 26 include also police officers and Magistrates in Native States. Rat. Un. Cr. C. 855. **R**

- (e) The words “a Magistrate” in S. 149 of the Crim. Pro. Code, 1861, were held to mean “any Magistrate”, and not merely “the Magistrate having jurisdiction”. 7 B.H.C.R. 56 (57) (Cr.). **S**

- (f) At the same time, the *ywallugyi* is not a Magistrate under the Crim. Pro. Code, nor is he a Magistrate, within the meaning of S. 26 of the Evidence Act, and, owing to the position of authority he actually exercises in his village, a confession made to him should no doubt be received in evidence with caution, the circumstances in which the confession was made being important for consideration in each case in estimating the weight to be attached to the confession. 1 L.B.R. 65 (67). **T**

3.—“Unless it be made in the immediate presence of a Magistrate.”—(Continued).

(2) Incriminating statements of accused in custody, relevancy of.

Where an accused person is in the custody of a police officer and makes a certain statement incriminating himself, that statement, unless made in the immediate presence of a Magistrate, ought to be excluded. 6 C.W.N. cxi. U

(3) Confession to Magistrate and to third person.

A confession made to a Magistrate falls within these words; but if the confession be made to a third person, the presence of the Magistrate is necessary. 5 M.L.J. Art. p. 14. Y

(4) Instances of statements, of persons in custody, held relevant and not relevant.

(a) Where a prisoner, who was at the time in the custody of the police, made a confession to the Deputy Magistrate, *Buch, J.*, held it to be admissible under S. 26, on the ground that “it was made to P, who is a Magistrate. It was voluntarily made to him, and not to the police, and no kind of inducement was held out to the prisoner to make it.” 24 W.R. 33 (36) (Cr.). W

(b) The emphasis put on the fact that the confession was made to the Magistrate, and not to the police, would tend to prove that the case was within S. 26, and seems to be an admission that if it had been made to the police, instead of to the Magistrate, it would have been inadmissible. 5 M.L.J. Art., p. 39. X

(c) It is only when properly made to the Magistrate that a confession can be used against a prisoner. 12 W.R. 82 (Cr.). Y

(d) The mere standing by of a Magisterial Officer, when confessions are being made to, and recorded by, the police, for their own use, will not make those confessions evidence against the prisoner. 12 W.R. (Cr.) 82; See, also, 6 C.W.N. cxx. Z

(e) Though an accused person was in police custody at the time he made a confession, S. 26 was held not to prohibit its being proved as it was made in the immediate presence of the Magistrate. 8 O.C. 395 (405). A

(f) Where an accused person, who was in police custody at the time, made, to a Presidency Magistrate during a police investigation, a confessional statement which was reduced to writing, held that the document was relevant under S. 26. 15 C. 595 (607), (F.B.). B

(g) Where a confession was made by a prisoner, while in police custody, to a first class Magistrate, in the Native State of Muli in Kathiawar, and was duly recorded by him in the manner provided by the Crim. Pro. Code, 1882, it was held to be admissible in evidence under S. 26 of the Evidence Act. 22 B. 235, following 12 A. 595; see 6 C.W.N. cclv. C

(h) A confession made by a prisoner voluntarily before a Magistrate in a Native territory and recorded by him under S. 164, Cr. P.C., is admissible in evidence in a trial in British India, although such confession was subsequently retracted in the Court of the committing Magistrate and the Court of Session. 8 P.R. (Cr.) 1907=33 P.W.R. 1907 (Cr.) following 12 A. 595 and 22 B. 235. D

3.—“Unless it be made in the immediate presence of a Magistrate.”—(Continued).

(i) The accused, when examined before the committing Magistrate, made a clear and full confession—a confession which was in every way borne out by the evidence of the witnesses called for the prosecution. This was held to be admissible, though, before the Court of Sessions, the accused stated that it was the result of threats and hopes. 11 B.H. C.R. 137 (138). **E**

(j) The provisions of S. 26 of the Evidence Act do not restrict the meaning of the word “Magistrate” to a Magistrate within the meaning of the Crim. Pro. Code, 1872, and the village Munsif in the Madras Presidency is a “Magistrate” within the meaning of S. 26 of the Evidence Act. 2 M. 5 (7). **F**

Note—(But the Explanation to the section, added by S. 3, Act III of 1891, effects a change in the law as laid down in the above decision).

(k) Where an accused woman, charged with attempt to commit suicide, made, before the police had even come to the village, a confession before a Village Magistrate, it was held that, the Village Munsif not being a police-officer and the woman not having been in custody at the time, her confession could not be excluded under S. 26. 7 M. 287 (288). **G**

(l) A confession made to a Village Munsiff is not inadmissible. 10 M. 295 : see 6 C.W.N. cclxiv. **H**

(m) Evidence of a confession made by a prisoner to a police-officer, not in the immediate presence of a Magistrate, is inadmissible. It is irregular to record, as evidence, the opinion of a police officer as to the points, in the case under enquiry, which he considers to establish the guilt of an accused person. S. C. 98 (Oudh). **I**

(n) Statements containing incriminating matter and made to a Magistrate by the accused when in the custody of the police cannot be admissible as an admission under S. 21 of the Evidence Act, unless they be shown to be voluntary. 2 C.W.N. 702 (708). **J**

(5) Confessions to Magistrates—General rules to be observed in recording them.

(a) Confessions are so often, in this country, obtained by undue influence that, in order to give weight to confessions of prisoners recorded under S. 149, Cr. P. C., 1861, there should always be made a judicial record of the special circumstances under which such confessions were received by the Magistrate, showing in whose custody the prisoners were and how far they were quite free agents. 5 W. R. (Cr.), 6. **K**

(b) Where a confession was recorded under S. 122, Cr. P. C., 1872, it was held that, in order to be admissible in evidence, it must not only bear a memorandum that the Magistrate believed it to have been voluntarily made, but also a certificate, under S. 346 of the Code, that it was taken in the Magistrate's presence and hearing, and contained an accurate account of the whole statement of the accused person. 1 B. 219. **L**

(c) It does not follow that confessions made before Magistrates cannot be taken into consideration merely because the memoranda required by law to be attached thereto have not been written in the exact form prescribed. 3 A. 338 (339). **M**

3.—“Unless it be made in the immediate presence of a Magistrate.”—(Continued).

- (d) A judge, in fact, is hardly justified in treating a confession, made by a prisoner before a Magistrate, as a mere piece of evidence, which a Jury may deal with, in the same way as they would with the evidence of a witness of doubtful veracity. 13 W.R. (Cr.), 42 (43). **N**
- (e) If a prisoner has confessed before a Magistrate, the attention of the Jury should be drawn to the question whether there was any reason to suppose that that confession was made under any undue influence; and if there is no reason to suppose anything of the kind, the jury should be told so, and advised that they may act upon it. 13 W.R. (Cr.), 42 (43). **O**
- (f) Where an accused person makes two criminating statements, one before a Magistrate and another before a police-officer, it is very essential to compare them and to try and ascertain why there occurred a change and which of them was the true one, with the view of testing the value of the confession before the Magistrate; the other being, of course, inadmissible for any other purpose whatever as being made to the police. 21 P.W.R. 1907 (Cr.). **P**
- (g) The practice of taking prisoners before Magistrates, not having jurisdiction in the case, for the purpose of getting a confession recorded is not generally desirable. It is still more objectionable to send prisoners before different Magistrates, each of whom would have an imperfect knowledge of the matter from only taking one or two examinations. Rat. Un. Cr. C. 254 (261). **Q**
- (h) The record of a confession, upon which a prisoner is convicted, need not be attested by the Magistrate, trying the accused, as required by S. 346 of the Cr.P.C., of 1872. It is not even necessary for the Magistrate to record any “confession”, since he is competent, on the admission of the prisoner, to sentence him without any further record. (S. 324). 3 C. 756=2 C.L.R. 317. **R**
- (i) A confession made to a Magistrate in the course of an investigation cannot be admissible, unless recorded in the manner prescribed by S. 164, Cr.P.C., which, when closely examined, seems to require a confession, made to a Magistrate in the course of an investigation, to be recorded in a particular manner and is a matter required by law to be reduced to the form of a document, and S. 91 of the Evidence Act applies. 2 L.B.R. 19 (21). **S**
- (j) The duty imposed upon a Magistrate, before whom a person is brought to make a confession, is plain. He must question the prisoner with a view to discovering whether the prisoner confesses voluntarily, and this questioning must be in pursuance of a real endeavour to find out the object of it, the requirement not being satisfied by a few formal questions. 3 L.B.R. 173 (174)=4 Cr.L.J. 198. **T**
- (k) The questioning of the accused before recording a confession is a matter of substance and not of mere form, and if it has been omitted, the omission cannot be cured by any evidence under S. 533, Crim. Pro. Code. In view of the propensity of the police to induce prisoners to confess, the Legislature has imposed on Magistrates the duty of making a substantial enquiry for themselves as to the voluntary nature of a

3.—“Unless it be made in the immediate presence of a Magistrate.”—(Continued).

confession, and, unless such enquiry is made, a confession even before a Magistrate is not admissible in evidence. 3 L.B.R. 173 (175)=4 Cr. L.J. 198. **U**

- (i) Where a Magistrate, taking a confession under S. 164, Cr.P.C., has omitted to question the person making the confession, as required by that section, in order to ascertain whether it was voluntarily made and the confession is subsequently retracted, the confession is inadmissible in evidence, and S. 533 of the Code does not cure such a defect. U.B.R. (1903), 1st Quarter, Crim. Pro. Code, p. 13 (16). **Y**

(6) Confession to Magistrates held admissible.

- (a) A confession full of detail, circumstantial, bearing upon it the impress of truth, and made before a Magistrate, in the absence of evidence to suggest that it was false in any particular, should not be rejected, simply because it was subsequently retracted. 20 A. 133 (135). **W**

- (b) Where, before a person was formally charged, he admitted the offence to a Magistrate after due warning, the admission was held to be relevant against the party making it. 4 W.R. (Cr.) 10. **X**

- (c) A confession recorded by a Magistrate having jurisdiction is to be treated as an examination under S. 193 of the Crim. Pro. Code of 1872, notwithstanding that the prisoner may have been brought before the Magistrate before the completion of the investigation by the police. The provisions of the last paragraph of S. 346 of the Cr.P.C., apply to such a confession. 5 C. 954 (F.B). **Y**

- (d) A confession is not inadmissible, because it is made to a Magistrate who recorded it and also held a subsequent judicial enquiry and committed the accused to the Sessions. 3 C.W.N. 387; *explaining and distinguishing*, 5 C. 954, *contra*. **Z**

- (e) The statement made by an accused person, while he was in police custody, was made to, and in the immediate presence of a Presidency Magistrate, who took it down. It was proved that the whole statements contained in the document were either the actual words spoken by the prisoner or were accepted by him as representing the true meaning of what he had said, the whole document was signed by him with his own hand. *Held* that the whole of the admissions contained in the document was strictly proved to have been made by him and that the document was admissible against him under S.26 of the Evidence Act. 15 C. 595 (607); *referred to* in 21 B. 495 (499). **A**

- (f) Where the statements contained in a document, purporting to contain the record of a prisoner's confession, made by a Magistrate, though not the actual words spoken by the prisoner, were testified to by the Magistrate to have been accepted by the prisoner as representing the true meaning of what he had said, and the whole document was signed by him with his own hand, *held* that the document was admissible in evidence. 21 B. 495 (499) *following* 15 C. 595, 606 (F.B.). **B**

(7) Confessions to Magistrates held inadmissible.

- (a) A confession made by an accused person recorded by a Magistrate having no jurisdiction to try or commit him, was held to be defective when

3. — “ Unless it be made in the immediate presence of a Magistrate.” — (Concluded).

it was not signed by, or attested by the mark of, the accused, and to be inadmissible in evidence. 10 B.H.C.R. 166. **C**

(b) The confession of a prisoner under S. 122, Cr.P.C., 1872, was not taken in the manner prescribed by S. 346 and was therefore defective. The Recording Officer's evidence that such a confession was actually made was held to be inadmissible to remedy the defect. 4 C. 696 (698) following 10 B.H.C.R. 166. **D**

(c) Where a Deputy Magistrate was deputed by the District Magistrate, under S. 169, Cr.P.C., to hold an investigation into a case of murder and he recorded the statements of the accused, the statements were held to have been rightly rejected. 2 C.W.N. 702. **E**

4. — “ Shall be proved as evidence”,

Season for using ‘proved’ in section.

The word “irrelevant” occurring in S. 24 seems advisedly retained. There was not the same necessity for excluding statements obtained by improper inducement, it relevant under other sections, as there was in excluding statements made to the police which might encourage them to torture and ill-treat the persons in their custody. 2 L.B.R. 168 (171) ; per Birkis, J. **F**

5. — “ Against such person.”

Accused's confession to police relevant on behalf of co-accused.

Where a confession made by an accused person to a police-officer was sought to be proved, not *as against* either the confessing person, or his co-accused, but *on behalf* of the latter, it was held there was nothing in the Indian Evidence Act that would justify a Court in excluding such evidence when sought to be given *on behalf* of the co-accused, provided it be relevant. 2 B. 61 (64). **G**

27. Provided that, when any fact ⁽¹⁾ is deposed to ⁽²⁾ as discovered ⁽³⁾ in consequence of information received ⁽⁴⁾ from a person accused of any offence, in the custody of a police-officer, ⁽⁵⁾ so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered ⁽⁶⁾ may be proved ⁽⁷⁾.

(Notes.)

1. — “ Provided that, when any fact”.

1. — GENERAL.

(1) “ Provided that”, effect of term.

The words “provided that” have raised the question whether S. 27 is a proviso only to S. 26 or also to Ss. 24 and 25. 5 M.L.J. Art., p. 74. **H**

(2) Section only a proviso.

S. 27 is merely a proviso. It provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of the police, so much of such

1.—“*Provided that, when any fact.*”—(Continued).

1.—GENERAL.—(Continued).

information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved. 2 L.B.R. 168 (170). I

(3) S. 150, Cr. P. C., 1861.

S. 150, Act XXV of 1861, from which S. 27 of the Evidence Act is taken ran as follows :—“When any fact is deposed to by a police-officer as discovered by him in consequence of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or admission of guilt or not, as relates distinctly to the fact discovered by it, may be received in evidence.” 6 A. 509 (512) (F.B.) J

(4) S. 150, Cr. P.C., 1861, as amended by Act VIII of 1869.

S. 150, Cr. P.C., 1861, was thus altered by Act VIII of 1869 :—“Provided that when any fact is deposed to in evidence as discovered in consequence of information received from a person accused of any offence, or in the custody of a police-officer, so much of such information, whether it amounts to a confession or admission of guilt or not, as relates distinctly to the fact thereby discovered, may be received in evidence.” 6 A. 509 (512) (F.B.) K

(5) Effect of proviso.

But for the proviso in S. 27, a confession made by a person in police custody cannot be proved in virtue of that section. The section provides that although the person is in police custody, still, in given circumstances, the confession can be proved. 2 L.B.R. 168 (171) ; per *Thirkell White, C.J.* L

(6) Ground on which proviso is based.

(a) “The fundamental theory upon which confessions become inadmissible is that, when made under certain conditions, they are untrustworthy as testimonial utterances. A very slight probability of untruth is sufficient to exclude. . . . If now a circumstance appears which indicates that the law’s fear of untrustworthiness is unfounded and counteracts the significance of the improper inducement by demonstrating that, after all, it exercised no sinister influence, the confession should be adopted. This is the theory of Confirmation by Subsequent facts which has been in vogue ever since there has been any doctrine about excluding confessions.” Wigm. Ev., ‘05 Ed., S. 856, p. 987. M

(b) “Where, in consequence of a confession otherwise inadmissible, search is made and facts are discovered which confirm it in material points, the possible influence which, through caution, had been attributed to the improper inducement, is seen to have been nil, and the confession may be accepted without hesitation.” Wigm. Ev., ‘05 Ed., S. 856, p. 987. N

(c) “The proviso is based upon the supposition that, if the confession is supported by the discovery of some fact, it may be presumed not to have been extorted, or, at any rate, to be true.” Mark. Ev., p. 27. O

1.--"Provided that, when any fact."—(Continued.)

1.—GENERAL.—(Continued).

(d) "The ground of exclusion in these sections is not irrelevancy. It is that it is necessary to protect persons, charged with crimes, from being exposed to ill-treatment by the police. who, in their zeal to procure a conviction, would be tempted to endeavour to extort a confession. The idea is that, by rendering the confession inadmissible in evidence, the temptation is taken away." Mark. Ev., p. 27. **P**

(7) No such provision in England.

"There is no such provision as this in England in regard to police-officers. But their evidence, like the evidence of all zealous partisans, has to be carefully watched: and if they are suspected; they are likely to be subjected to a very vigorous cross-examination." Mark. Ev., p. 27. **Q**

(8) S. 27 is a proviso to both the preceding sections 25 & 26. Reasons for this view.

(a) S. 27 is in the way of a proviso and is intended to govern both the preceding sections and to have a general application to information received from an accused person in custody of the police, and to allow proof of information amounting to a confession received from an accused person in custody of the police, whether given to a police officer or not. 6 A. 509 (511) (**F.B.**), per *Oldfield, J*; see, also, at p. 519, for a similar opinion by *Brodhurst, J.* **R**

(b) Where two persons, charged with offences under S. 414 I.P.C., gave information to the police, (which led to the discovery of the stolen property), that they had stolen it in a certain place and sold it to a particular person at a particular place, held, by the Full Bench (*Mahmood J, dissenting*), that S. 27 of the Evidence Act is a proviso to S. 26 and also to S. 25, and that so much of such information, whether it amounted to a confession or not, as distinctly related to the fact thereby discovered, might be proved. G.A. 509 (546) (**F.B.**) *dissenting from* (1882) Weekly Notes, p. 225. *Mahmood, J, dissenting*, held, that the section was a proviso only to S. 25 and that the statements were not admissible in evidence). **S**

(c) S. 27 applies to both the preceding sections which absolutely prohibit the proof of statements made by way of confession to police-officers. 2 L.B.R. 168 (173), per *Birks, J.* **T**

(d) It seems that it is probable to some small extent that, as in the Code of 1861 the section, which is reproduced as S. 27 of the Evidence Act qualified at most the two preceding sections, the intention of the Legislature was that S. 27 also should be read as a proviso at most to the two sections immediately preceding, and the wording of the section points to the same conclusion. 2 L.B.R. 168 (170). **U**

(e) A Full Bench of the Bombay High Court assumed that S. 27 applied to S. 25 as well as to S. 26 of the Evidence Act. 14 B. 260 (**F.B.**), referred to in 2 L.B.R. 168 (170). **Y**

(f) The rule in S. 25 was held to be restricted by S. 27 though, in the particular case, there being no discovery, S. 27 did not actually render the confession admissible. 11 B.H.C.R. 242. See 5 M.L.J. Art., p. 78. **W**

(g) The applicability of S. 27 to S. 25 was admitted though, in the actual result, the confession in the case was not admitted in evidence. 3 B.12. **X**

I.—“*Provided that, when any fact.*”—(Continued).

1.—GENERAL.—(Continued).

- (h) S. 27 of the Evidence Act is only a proviso to S. 25. 8 O.C. 395 (401). **Y**
 - (i) A majority of 3 Judges of the Allahabad High Court held that S. 27 of the Evidence Act applied to S. 25. 4 A. 198; cited in 2 L.B.R. 168 (170). **Z**
 - (j) It seems to be established in the four High Courts that S. 25 must be understood as limited by S. 27. See 19 W.R. 51. (Cr.). See 5 M.L.J. Art., p. 78. **A**
 - (k) From their contents as well as from the fact of their arrangement in the first Crim. Pro. Code of 1861, these three sections are strongly connected one with the other. 6 A. 509 (514) (F.B.), per *Brodhurst, J.* **B**
 - (l) The proviso in S. 27 seems to have been inserted to show that the prohibitions contained in Ss. 25 & 26 do not apply, when facts are discovered in consequence of information received from a person even though he is both himself accused of an offence and also in the custody of a police officer. 2 L.B.R. 168 (173) per *Birks, J.* **C**
 - (m) The only alterations in S. 27 are the omission of the words “in evidence,” the omission of the word “or” before “in custody,” and the substitution, in the last line, of the words “may be proved” for “may be received in evidence.” 6 A. 509 (513) (F.B.), per *Oldfield, J.* **D**
 - (n) The only alteration on which any stress can be laid is the omission of the word “or,” but this only shows that the operation of the proviso is restricted to information from an accused person in the custody of the police, and does not apply to information from accused persons not in the custody of the police. It in no way touches the point, to what person the information is given. 6 A. 509 (513) (F.B.); per *Oldfield, J.* **E**
 - (o) Ss. 25, 26 & 27 were embodied in the Indian Evidence Act with some alteration from the Crim. Pro. Code of 1861, and, on an examination of the changes in the sections, there is nothing to show that the Legislature intended S. 27 of the Act not to apply to information received by a police officer from an accused person in the custody of the police. 6 A. 509 (512), per *Oldfield, J.* **F**
 - (p) Had the proviso contained in S. 27 been intended to be a proviso to S. 26 only, it would not have been put in the form of a separate section, but as part of S. 26. 6 A. 509 (511) (F.B.) **G**
 - (q) Unless S. 27 is applicable, not only to S. 26, but also to S. 25, the meaning of the last paragraph of S. 162, Act X of 1892, is not apparent. 6 A. 509 (516) (F.B.): per *Brodhurst, J.* **H**
- (9) **S. 27 is a proviso only to S. 26—Reasons for this view.**
- (a) Neither the history of the origin and the changes which Ss. 25, 26 & 27 have from time to time undergone, nor their transfer from one Act to the other, nor their position in the Evidence Act shows that S. 27 is a proviso to any section but S. 26. 6 A. 509 (530); per *Mahmood, J., dissentient.* **I**
 - (b) The new section—introduced by Act VIII of 1869—by its change of language allowed the imperative rule laid down in S. 148 to stand supreme, by rendering the language of S. 150 a mere proviso to the rule

I.—“*Provided that, when any fact.*”—(Continued).

1.—GENERAL.—(Continued).

contained in the immediately preceding section 149, which was expressly limited to confessions made by a person “whilst he is in the custody of a police-officer”—confessions which, if made to the police-officer himself, would not be admissible under the provisions of S. 148, Cr. P. C., 1861. 6 A. 509 (527); per *Mahmood, J., dissentient.* **J**

- (c) The change effected by the Evidence Act in the sections of the Crim. Pro. Code under consideration consisted in the omission of the word “or” from the clause “a person accused of any offence, or in the custody of a police officer;” and in the place of the omitted word “or”, a comma has been substituted, rendering the words “in the custody of a police-officer” a parenthetical clause forming the qualification of the person whose confession would fall under the section. The removal of the disjunctive is remarkable, and, if it has any effect, it is that of limiting the scope of the proviso. 6 A. 509 (529); per *Mahmood, J., dissentient.* **K**

- (d) The difficulty with regard to the question, whether S. 27 contemplates confessions made to a *police officer*, that is, whether S. 27 is a proviso to S. 26 only, or both to Ss. 25 and 26, is due to the circumstance that the proviso contained in S. 27 appears as a separate section; that is to say, if the numerals “27” were obliterated, the section would apply only to S. 26. 6 A. 509 (530); per *Mahmood, J., dissentient.* **L**

- (e) So far as the argument that S. 27 is a proviso, not only to S. 26, but also to S. 25 and also to S. 24, is based on the fact that the proviso contained in S. 27 stands as a separate section, and not as a part of S. 26, the division of statutes into sections is a matter of comparatively recent growth, and such division does not affect the principle of construction that each clause of the statute should be read with reference to the other, and with due regard to its own language. 6 A. 509 (530); per *Mahmood, J., dissentient.* **M**

- (f) S. 27 is obviously not a separate rule independent of the other sections; it is not a main proposition of law, as it originally was in Act XXV of 1861, before the repeal by Act VIII of 1869. The section is a proviso to some main proposition or propositions which precede it, and the accident that it has been numbered as a separate section has in itself no significance as a matter of interpretation. 6 A. 509 (530-1); per *Mahmood, J., dissentient.* **N**

- (g) A proviso is of great importance when the Court has to consider what cases come within the enacting part of a section, and it is always to be construed with reference to the preceding parts of the clause to which it is appended. The mere fact, indeed, that a proviso was printed as part of any one section did not at the time when statutes were not divided into sections upon the roll, limit the effect or construction of the proviso. 6 A. 509 (531) (**F.B.**) per *Mahmood, J.* **O**

- (h) To use the words of Holroyd, J., “The question whether a proviso in the whole or in part relates to, and qualifies, restrains or operates upon the *immediately* preceding provisions only of the statute, or whether it must be taken to extend in the whole or in part to all the preceding matters contained in the statute, must depend upon its words and

1.—“*Provided that, when any fact.*”—(Continued).

1.—GENERAL.—(Continued).

import, and not upon the division in sections that may be made for convenience of reference in the printed copies of the statutes.” (Wilberforce on Statute Law, pp. 302—3). G A. 509. (531); per *Mahmood, J., dissentient.* **P**

- (i) Where an enacting clause, which is general in its language and objects, is followed by a proviso, that proviso must be construed strictly; it cannot enlarge the words of the enacting clause. (Wilberforce on Statute Law, p. 303). G A. 509 (531), per *Mahmood, J., dissentient.* **Q**
- (j) No argument, one way or the other, can be based on the mere fact of the proviso in question being framed as a separate section. The real question is, whether the *words* of the proviso itself can be taken to extend to any proposition in the Evidence Act other than that contained in S. 26. G A. 509 (531); per *Mahmood, J., dissentient.* **R**
- (k) But it has been suggested that the provisions of S. 162 of the Crim. Pro. Code, Act X of 1882, which refer expressly to S. 27 of the Evidence Act, favour the contention—that S. 27 is a proviso to both the preceding sections—regarding the scope of the latter section. The answer is that no such reference to S. 27 of the Evidence Act existed in the corresponding S. 119 of the Code of 1872, which was enacted contemporaneously with the Evidence Act, and that the wording of a statute, passed in 1882, cannot be a safe guide to the interpretation of another statute passed 10 years before. G A. 509 (537), per *Mahmood, J., dissentient.* **S**
- (l) But, apart from this consideration, there is no force in the view thus attempted to be deduced from a comparison of S. 27 of the Evidence Act, with the saving clause of S. 162 of the Crim. Pro. Code, 1882. It is obvious that S. 27, when it speaks of “*information*,” includes statements which fall short of confessions as well as statements which amount to confessions. G A. 509 (537), per *Mahmood, J., dissentient.* **T**
- (m) “My interpretation would be that the saving clause of S. 162 Cr. P. C., 1882, relates only to the former clause of statements. G A. 509, 537, (538). per *Mahmood, J., dissentient.* **U**
- (n) There is not one word in S. 27 which will warrant the inference that it contemplates confessions made to the police within the meaning of S. 25. G A. 509 (538), per *Mahmood, J., dissentient.* **V**
- (o) As a general rule and almost always a proviso must be taken to govern the main proposition of law which immediately precedes such proviso, unless indeed the language of the statute shows a different intention. G A. 509 (540), per *Mahmood, J., dissentient.* **W**
- (p) An illustration of this is to be found in Ss. 107 and 108 of the Evidence Act itself, the former section being the main proposition, and the latter constituting the proviso. And the illustration is especially applicable to the matter now under consideration, as S. 108 of the Evidence Act, like the original S. 150 of the Crim. Pro. Code, 1861,—corresponding to S. 27 of the Evidence Act—originally stood as a main and independent proposition of law. G A. 509 (540), per *Mahmood, J., dissentient.* **X**

I.—“*Provided that, when any fact.*”—(Continued).

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- (g) S. 9 of Act XVIII of 1872 did to S. 108 of the Evidence Act what Act VIII of 1869 had done to S. 150 of the Code of 1861. It reduced the section into a mere proviso by introducing the words “provided that” at the beginning of the section—a change which Sir James Stephen, in a postscript to his edition of the Evidence Act, has described as having made a “substantial alteration” in the Act. It was that, from being an independent proposition of law, the section sank into a mere proviso to the main proposition contained in the immediately preceding S. 107; as the statute now stands, it seems obvious that S. 108 must be taken to be a proviso to S. 107 and to no other; and there is no more reason for holding that S. 27 governs not only S. 26, but also Ss. 25 and 24, than there would be for the untenable proposition that S. 108 is a proviso, not only to S. 107, but also to the six preceding sections which relate to burden of proof. 6 A. 509 (541), per *Mahmood, J., dissentient.* **Y**
- (r) S. 27 did not qualify S. 25. A.W.N. (1882), p. 225. **Z**
- (s) The proviso contained in S. 27 refers to an exception to the general rule in S. 26 applicable to confessions made by prisoners whilst in the custody of a police officer. 12 M. 153 (154). **A**
- (t) The proviso in S. 27 refers back to the preceding sections, or at least to the preceding section, of which the wording is similar. 2 L.B.R. 168 (171); per *Thakell White, C.J.* **B**
- (u) S. 27 provides an exception that, even though proof would be excluded by S. 26, the accused being in the custody of a police-officer, under certain condition proof may be admitted. The proviso is strictly limited in its scope; it only enables a confession or part of it to be proved, under the condition stated, if the accused person is in the custody of the police. This particular and precise wording of the section seems, though it is not necessary to express a decided opinion upon the point, to restrict the proviso to S. 26. 2 L.B.R. 168 (171), per *Thakell White, C.J.* **C**
- (10) **Logical result of making S. 27 a proviso to S. 25 is to restrict S. 24 also.**
- (a) S. 27 was held to be a proviso not only to S. 26 but also to S. 25; Mahmood J., while contesting this opinion in a weighty judgment, referred to the logical result of the argument in its favour that, if S. 27 was a proviso to S. 25, it was also a proviso to S. 24. 2 L.B.R. 168, (170), referring to 6 A. 509 (F.B.); per *Mahmood, J., dissentient.* **D**
- (b) The logical result following from making S. 27 an exception to S. 25 will be to draw S. 24 also within the control of S. 27. See 5 M.L.J. Art. p. 77. **E**
- (11) **No authority on application of S. 27 to S. 24.**
- There does not seem to be any direct authority on the application of S. 27 to S. 24. 2 L.B.R. 168 (170). **F**
- (12) **Predominant opinion on relation of Ss. 27 & 24—State of authorities—S. 27 restricts S. 24.**
- (a) The predominant opinion with regard to the relation between Ss. 27 and 24 appears to be that S. 27 is also an exception to S. 24. This is at

I.—“*Provided that, when any fact.*”—(Continued).

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least so with the rulings of the High Courts of Allahabad and Bombay, for the point has not arisen in the Calcutta and Madras High Courts. 5 M.L.J. Art., p. 74. **G**

(b) In the Allahabad High Court, notwithstanding the express decisions at 5 N.W.P. 86 and 2 W.N. 225 and the view of *Mahmood, J.*, in 6 A. 509, the Majority of the Court in 6 A. 509 have virtually established the rule that S. 27 governs also S. 24. 5 M.L.J. Art., p. 77. **H**

(c) “The law, as it at present stands, permits the police to give evidence of the fact discovered, and that they discovered it in consequence of what the prisoner told them, no matter how improperly they may have obtained the information from him; if all this is evidence, despite torture, threat, inducement or promise, it seems inconsistent to stop short there and forbid them giving the words used by the accused, which they assert led to the discovery, simply because they contained an admission of guilt.” This passage in the judgment of *Straight, C. J.*, in 6 A. 509, seems to indicate that he thought that S. 27 applied also to S. 24. 2 L.B.R. 168 (174), per *Birks, J.* **I**

(d) Whatever the torture, or inducement, or promises, or threats that may have been applied, or made use of towards him, there is nothing in the law which forbids policemen from, at any rate, going so far as to say: “In consequence of what the prisoner told me, I went to such and such a place, and found such and such a thing.” They may have committed offences against the Penal Code for which they are punishable, but they are not prohibited from stating a fact or facts discovered, and that they did discover them owing to information given by the prisoner. Nay more, they may repeat the words in which the information was couched. 6 A. 509 (545), per *Straight, C. J.* **J**

(e) S. 27 seems to have been thought by *Stuart, C. J.*, to be a proviso to S. 24, though he does not express himself very clearly. 4 A. 198. See 5 M. L. J. Art., p. 75. **K**

(f) In the Bombay High Court, the case in 3 B. 12 together with the result of the application of S. 27 to S. 25 has made it very probable that S. 27 will be held to be a proviso to S. 24. See 5 M. L. J. Art., p. 77. **L**

(g) It seems to be assumed in the judgment of a very learned jurist, *West, J.*, that S. 27 of the Evidence Act is a proviso to S. 24 of that Act as well as to the two intermediate sections. 2 L. B. R. 168 (169), referring to 3 B. 12. **M**

(h) The question of the relation of Ss. 27 and 24 has not yet been discussed in any reported case by the Calcutta and Madras Courts, though in the former of these there are decisions on the subject under the older law, and though the fact of S. 27 being an exception to S. 25 is acknowledged in these High Courts. See 5 M. L. J. Art., p. 77. **N**

(13) **S. 27 does not apply to S. 24—Reasons.**

(a) S. 27 cannot be taken to govern S. 24, which is only a reproduction of the old law, prohibiting confessions illegally obtained, even though such confessions led to the discovery of facts, and there is nothing in the

1.—“*Provided that, when any fact.*”—(Continued).

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Act to show that it intended to alter the old rules. 6 A. 509 (537), per *Mahmood, J., dissentient, referring to* 8 W.R. (Cr.), 13 and 9 W. R. (Cr.), 16; see also 8 O.C. 395 (401), per *Ryres, O.A.J.C., cited infra.* O

- (b) A police-officer acts illegally and improperly in offering any inducement to an accused person to make any disclosure or confession. S. 146, Cr. P.C., 1861, expressly forbids a police-officer from doing so. No part of his evidence as to the discovery of facts in consequence of such a confession is legally admissible. 8 W.R. (Cr.), 13 (14); *referred to* in 6 A. 509 (537) per *Mahmood, J.* P
- (c) An admission obtained by a police-officer from a prisoner by persuasion and promises of immunity in contravention of S. 146, Cr. P.C., 1861, was held not to be admissible in evidence, even though it led to the discovery of facts. 9 W.R. 16 (Cr.): *cited in* 6 A. 509 (526), by *Mahmood, J., dissentient.* See also *ibid*, p. 537. Q
- (d) In the case of 5 N.W.P. 86, *Spankie, J.*, gave a very strong effect to the section, by applying it even to a confession made to a police-officer, repeated before a Magistrate, and repeated again before the Sessions Judge—a confession which the report shows had led to discovery. 6 A. 509 (537), per *Mahmood, J., dissentient.* R
- (e) An accused person confessed to a police constable, on the assurance that nothing would happen to her, that she had killed her new born child and had buried it in an enclosure in her house. This statement led to the discovery of some bones belonging to the infant and some other articles used as a weapon by her in killing the child. Before the committing Magistrate, she repeated her statement. Before the Sessions Judge, she denied having killed the child with stone and other things, but stated that she buried it, not knowing whether it was dead or alive. *Held*, that the confessions were inadmissible in evidence. This case is an express authority for the proposition that S. 27 does not qualify S. 24. 5 N.W.P. 86. S
- (f) These rules owe their origin to the safeguards which the Legislature intended to provide against torture being employed by police officers for the purpose of extorting confessions and enforcing disclosures. This appears from Reg. XX of 1817, and the history of the various changes which these sections have undergone shows a steady tendency in the direction of excluding confessions which are liable to the suspicion of having been extorted. 6 A. 509 (533), per *Mahmood, J., dissentient.* T
- (g) In no case could confessions obtained under the circumstances described in S. 24 be admitted in evidence, whether they led to discovery or not, unless indeed they fell under S. 28 of the Evidence Act, but then the question of discovery would be immaterial. 6 A. 509 (525). —per *Mahmood, J., dissentient.* U
- (h) The rule on this point adopted in the Indian Act seems to be more stringent than, and at variance with, that of the English Law of evidence as explained in Taylor's celebrated work. But the difference

1.-“*Provided that, when any fact.*”—(Continued).

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between the state of things in England and in this country amply accounts for the difference which the Legislature has thought fit to make. 6 A. 509 (535, 536), per *Mahmood, J., dissentient.* **Y**

- (i) Even in England, Lord Eldon, in *Harvey's case*, 2 East, P. C. 658, cited by Taylor, laid down the rule by saying that, when the knowledge of a fact was obtained from a prisoner under such a promise as excluded the confession from being given in evidence, he should direct an acquittal, unless the fact proved would itself have been sufficient to warrant a conviction without any confession leading up to it. 6 A. 509 (536), per *Mahmood, J., dissentient.* **W**
- (j) The rule excluding confessions illegally induced has, in India, an additional policy as its basis, viz., the check which the Legislature has thought fit to impose upon the extortion of confessions. Therefore, in interpreting statutory rules peculiar to India, it cannot be altogether safe to deduce any conclusions by following the rule *in pari materia* in England. Even in England confessions to the police are received with especial caution. The police officer being invariably taken to be a person in authority. 6 A. 509 (536), per *Mahmood, J., dissentient.* **X**
- (k) To hold that S. 27 is a proviso to S. 24 also is to mix up two different principles altogether. 6 A. 509 (539); per *Mahmood, J.* **Y**
- (l) The proviso contained in S. 27 is not intended to qualify the absolute rules contained in Ss. 24 and 25, but only the rule contained in the immediately preceding S. 26, which relates to confessions made *not* to the police-officer, but to third persons whilst the person making the confession is in the custody of the police. 6 A. 509 (541), per *Mahmood, J., dissentient.* **Z**
- (m) S. 27 provides that, although the person is in police custody, still in given circumstances, the confession can be proved. Even though it is held that this proviso refers back to S. 25, it does not follow that it must logically be held to refer back to S. 24 of which the meaning and intention are quite different. 2 L.B.R. 168 (171). **A**
- (n) Whether S. 27 of the Evidence Act refers to S. 25 and to S. 26, or to S. 26 alone, it does not refer to S. 24. 2 L.B.R. 168 (172). **B**
- (o) S. 24 of the Evidence Act contains an absolute rule which is not affected by the proviso, enacted for a different purpose, in S. 27. 2 L.B.R. 168 (171). **C**
- (p) It is extremely improbable that, if the Legislature had intended to make the proviso in S. 27 apply to S. 24 of the Evidence Act, it would have restricted its application to the case of a person in police custody. The absurd result would happen that, if a person, under an inducement, confessed and pointed out stolen property before he was arrested, or when he was on bail, his confession would be irrelevant under S. 24; while, if he did so after he had been arrested and while in police custody, his confession, though declared to be irrelevant by S. 24, could be proved by reason of S. 27 of the Evidence Act. This is an unreasonable and improper interpretation of the law and is inconsistent with the precautions taken by the Legislature to safeguard the making of

1.—"Provided that, when any fact."—(Continued).

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confessions by accused persons to the police or while in their custody.
2 L.B.R. 168 (171); see also 6 A. 507 (533-4), per *Mahmood, J.* **D**

- (g) S. 27 does not qualify the prohibition contained in S. 24 of Evidence Act, where the confession is illegally induced by a police-officer; a confession, irrelevant under S. 24, does not become proveable by reason of a fact being deposed to as discovered in consequence of information received from an accused person while in the custody of the police.
15 P.R. 1885 (Cr.). **E**

(14) Analysis of section.

The confessions which fall under the purview of the section must possess every one of the following qualifications:— **F**

- (1) The person making the confession must be "a person accused of any offence." **G**
- (2) He must be "in the custody of a police officer" whilst making the confession. **H**
- (3) The confession must "relate distinctly to the fact thereby discovered." **I**
- (4) The confession must not be "a confession made to a police officer" within the meaning of S. 25, nor must it have been caused by any inducement, threat, or promise" within the meaning of S. 24. 6 A. 509 (532); per *Mahmood, J.* **I**

(15) Proviso of S. 27 should be sparingly admitted.

The prohibition laid down in Ss. 25 and 26, must be strictly applied, and any relaxation of it in accordance with the proviso of S. 27 should be sparingly admitted, and only to the extent of so much of the accused's statement as directly and distinctly relates to the fact alleged to have been discovered in consequence of it. 4 A. 198 (204), per *Straight, J.*; explained in 6 A. 509 (544), per *Straight, C.J.*; see also 11 C. 635. **J**

(16) S. 27 need not be applied to S. 24—Reasons.

- (a) It is not necessary to make the proviso in S. 27 applicable to S. 24, for Ss. 7, 8 and 39 are sufficient to meet the case. S. 39 provides for the proof of so much of a statement or conversation as the Court considers necessary in each particular case to the full understanding of the nature and effect of the statement and of the circumstances under which it was made. This seems to get over the difficulty felt by *Mahmood, J.*, in 6 A. 509 (530, 536), that, if S. 27 applied to S. 24 as well as to Ss. 25, & 26, it would lead to an anomaly. 2 L.B.R. 168 (173), per *Birks, J.* **K**
- (b) The general provisions of the Code are sufficient to show that statements otherwise irrelevant under S. 24 may be admitted in evidence without relying on S. 27 alone. 2 L.B.R. 168 (174), *Birks, J.* **L**

(17) Responsibility of person for statements made by him.

If a man makes statements, he is responsible for them even though they should not in fact be true. If he chooses under pressure, if there be any pressure, not to appeal to the protection of the Magistrate, but

1.—“*Provided that, when any fact.*”—(Concluded).

1.—GENERAL.—(Concluded).

to make to the Magistrate confessions which in fact are untrue, he voluntarily incurs the risk of their being taken to be true against him. Where the accused have full opportunity to speak as they wished before a Magistrate and the Magistrate has certified that their statements were voluntarily made, if the statements are not true, the prisoners themselves are to blame. 11 B.H.C.R. 242 (246, 247). **M**

2.—ANY FACT.

(1) **Construction of expression “any fact.”**

The words “any fact” are qualified by the word “discovered” as used in the section. 5 M.L.J. Art., p. 79. **N**

(2) **Facts discovered through admissible confessions.**

Any fact discovered in consequence of an admissible confession can be admitted against an accused person. 8 O. C. 395 (401) ; per Ryves, O. A. J. C. **O**

(3) **Proof of facts involving no confession of guilt on accused's part.**

(a) S. 27 does not provide that a statement of facts involving no confession of guilt on the part of an accused person may be proved. It assumes that facts of this kind may be proved and provides that when evidence of them is given something further which would ordinarily be excluded may be proved also. 2 L. B. R. 168 (172). **P**

(b) Where before the committing Magistrate an accused person admitted that he had shown where certain stolen property was concealed and explained that he had been told by the robbers where they had hidden it, it was held that, although he might have been improperly induced to deliver up part of the stolen property, there was no rule of law which excluded proof of the fact that he did so. 2 L. B. R. 168 (172). **Q**

(c) But even though the proviso in S. 27 may not apply to the case under consideration, it does not affect the admissibility of evidence of facts which are relevant without any reference to it. 2 L. B. R. 168 (172). **R**

2.—“*Is deposed to.*”(1) **Discovery through information must be deposed to. - Effect.**

(a) It should be *deposed* that a particular fact has been discovered from the information of A. B., and this will let in, under S. 27, only so much of the information as *relates distinctly to the fact thereby discovered*. 24 W. R. (Cr.), 36. **S**

(b) It is essential to bring a case of discovery within S. 27, that the fact discovered must be *deposed to* by the person to whom the statement was made. 5 M.L.J. Art., p., 80. **T**

(2) **Strictest precision necessary when information given by accused is deposed to.**

(a) Where a statement is being detailed by a constable as having been made by an accused, in consequence of which he discovered a certain fact or facts, the strictest precision should be enjoined on the witness, so

2. — “Is deposed to.” — (Concluded).

that there may be no room for mistake or misunderstanding. 6 A. 509 (549) (F.B.), per *Straight, C.J.* U

- (b) It is necessary that the utmost precision should be required of a police-officer deposing to the statement of an accused person who gives a piece of information, which is alleged to have led to the discovery of a certain fact and which becomes, therefore, relevant under S. 27 of the Act. 4. L.B.R. 116. Y

(3) Witness should depose to exact words or conduct of accused.

Where a witness testifies to admissions or incriminating actions made or done by more than one accused person, it is essential that he should be required to depose, as nearly as possible, to the exact words or conduct of each of the accused. 4 L.B.R. 116. W

(4) Witness deposing to fact discovered cannot describe accused's confession.

Where a fact is deposed to as discovered in consequence of information received from an accused person in the custody of the police, a witness ought not to be allowed to describe a confession made by the accused person. S.C. 81 (Oudh). X

3. — “As discovered.”

(1) Necessity to exclude confessions to police, when disappears.

- (a) The necessity for excluding confessions made to a police-officer, viz., to avoid the danger of admitting false confessions, disappears in a case provided for by S. 27, when the truth of the confessions is guaranteed by the discovery of facts in consequence of the information given. 6 509 (513) (F.B.), per *Oldfield, J.* Y

- (b) Certain statements, made under certain circumstances, are rendered inadmissible, because the Legislature has, in such cases, considered them unworthy of credit; but the taint is removed by the finding, upon search, of articles connected with the crime or other facts. 5 M.L.J. Art. p. 80. Z

- (c) Although a confession may be irrelevant by reason of undue influence (S. 24), or because it was made to a police officer (S. 25), or because it was made while in police custody and not in the immediate presence of a Magistrate, (S. 26); if any fact is deposed to, which is discovered in consequence of such confession, so much of it as relates distinctly to the fact thereby discovered may be proved under S. 27. 6 C.W.N. cccxii. A

- (d) Facts discovered in consequence of confessions improperly obtained, and so much of such confessions as distinctly relate to such facts, may be proved. Steph. Dig., 7th Ed., Art. 22, p. 31. B

- (e) Where in consequence of information obtained from the prisoner in an improper manner, the property stolen, or the instrument of the crime, or the body of the person murdered or any other material fact has been discovered, proof can be given that such discovery was made conformably to the information so obtained. Tay. Ev., 10th Ed., S. 902, p. 636. C

3.—“As discovered.”—(Continued).

(2) Instances.

- (a) Where it was not pretended that any discovery of facts, through information derived from an accused person, occurred after his statement was made to a Magistrate, it was held that its defect, as made under undue influence, was not and could not be counteracted in the only possible way and that the confession ought to have been wholly rejected. 3 B. 12 (16). **D**
- (b) The words “in the only possible way” read with the sentence immediately preceding seem to refer to S. 27 and not to S. 28. Later on the remarks made by West, J, at p. 17 also seem to imply that if such discovery had been shown, the statement leading to it would have been admissible. See 5 M. L. J. Art., p. 75. **E**
- (c) On an indictment for concealing a birth, the fact of searching for and finding the child after information by the accused was admitted in evidence. *R. v. Cain*, 1 Cr. & D. 37; Wigm. Ev., '05 Ed., S. 858, p. 959; see, also, Phip. Ev., 4th Ed., p. 247. **F**
- (d) Even in those cases of improper confessions, a confession of theft is admissible in evidence, if the property is discovered in consequence of it, because it leads to the inference that the party was not accusing himself falsely. *R. v. Gabbett*, 2 C. & K. 490; Wigm. Ev., '05 Ed., S. 856, p. 987. **G**
- (e) Where a prisoner was persuaded by improper inducement to confess and to himself deliver up the property stolen, his declarations, contemporaneous with, and explanatory of, the act of delivery, though amounting to a confession of guilt, will be admissible in evidence. *R. v. Griffin*, R. & R. 151; Tay. Ev., 10th Ed., S. 903, p. 637; Phip. Ev., 4th Ed., p. 247. **H**
- (f) Facts and documents disclosed in consequence of inadmissible confessions are admissible in evidence if relevant. *R. v. Leatham*, 8 Cox. 498; Phip. Ev., 4th Ed., p. 247. See, also, Roscoe Cr. Ev., 13th Ed., p. 36. **I**
- (g) Where it was contended that, as the fact of finding stolen property in the custody of an accused person had been obtained through the means of an inadmissible confession, the proof of that fact ought also to be rejected, as obtained by a breach of faith, the Court observed, “This principle respecting confessions has no application whatever as to the admission or rejection of facts, whether the knowledge of them be obtained in consequence of an extorted confession or whether it arises from any other source: for, a fact, if it exist at all, must exist invariably in the same manner, whether the confession from which it is derived be, in other respects, true or false. Facts thus obtained, however, must be fully and satisfactorily proved without calling in the aid of any part of the confession from which they may have been derived; and the impossibility of admitting any part of the confession as a proof of the fact clearly shows that the fact may be admitted on other evidence; for, as no part of an improper confession can be heard, it can never be legally known whether the fact was derived through the means of such confession or not.” *Warickshall's Case*, 1 Leach Cr. L. 298; Wigm. Ev., '05 Ed., S. 859, p. 990. **J**

3.—“*As discovered.*”—(Continued).

- (h) No statements were allowed to be given in evidence but only the fact discovered. *Warwickshall's Case*, 1 Leach, 263. See 14 B. 260 (265). **K**
- (i) Where an inadmissible confession is not confirmed by the discovery of the property, no proof either of the statements or acts can be admitted in evidence, for, the influence that produces a groundless confession may also produce a groundless conduct. *R. V. Jenkins*, R. & B. 492; Phip. Ev., 4th Ed., p. 247. Tay. Ev., 10th Ed., S. 903, p. 637. **L**
- (j) An incriminating statement, made by an accused person to the police, when nothing is discovered in consequence of it, cannot be admitted, in evidence against him. 4 Cr. L. J. 177 = 16 P.R. 1906 (Cr.). **M**
- (k) S. 27 of the Act does not permit statements made by an accused person, while in police custody, to be proved, when he gave no clue which led to the discovery of stolen property. P.L.R. (1900), 56 (58) **N**

(3) Reason.

Such 'discovery' affords a guarantee for the truth of statements, which would, otherwise, by being devoid of its sanction, retain the suspicion cast upon them. 5 M.L.J. Art., p. 80. **O**

(4) Discovery, meaning of.

- (a) The "discovery" is, in ordinary parlance, capable of two meanings, firstly, the purely mental act of learning something which was not known before to a person, and secondly, the physical act of finding upon search something, the existence or the locality of which was unknown till then. It is in the latter, and not in the former, sense that the word is employed in S. 27 of the Evidence Act, and this will be made evident upon considering the principle underlying this section. 5 M. L.J. Art., p. 80. **P**
- (b) The mere mental act of becoming aware of a statement after hearing it made or a mere mental discovery would have no such probative force as to place the truth of the statements beyond doubt. 5 M.L.J. Art., p. 80. **Q**
- (c) That the Legislature intended only probative discovery to have the effect of removing the taint otherwise attaching to certain statements is clear from the portion made relevant by the section. It is not the whole statement which is made admissible, but only so much of it as is directly proved to be true by the facts thereby discovered; the rest, not being purged of suspicion, being still considered as incredible 5 M.L.J. Art., p. 81. **R**
- (d) It follows from this meaning of 'discovery' that simple statements, or statements made while pointing out the scene where the crime was committed, or while producing articles, and showing the connection of the place or thing with the offence, are not rendered admissible under S. 27, but only statements preceding, the finding, upon search or enquiry of articles or other facts connected with, or referable to, the crime. 5 M. L.J. Art., p. 81. **S**
- (e) The term "discovery" as used in S. 27 does not include mental discovery. 5 M.L.J. Art., p. 81. **T**

3.—“*As discovered.*”—(Continued).

(f) Taking the expression to apply only to physical discovery, there is no conflict between Ss. 25 and 26. 5 M.L.J. Art., p. 81. **U**

(g) The true meaning of the word “discovery” in S. 27 is a finding, upon search or enquiry, of articles connected with the crime or other material fact: the reason being that this kind of “discovery” proves that the information, in consequence of which the discovery was made, is true and not fabricated. 5 M.L.J. Art., p. 85, referring to 11 B.H.C.R. 242, 3 B. 12, and 14 B. 260. **Y**

(h) In all the cases under S. 27 where the statements were held relevant, the “discovery” was of articles or other material facts. S. 27, thus understood, is identical with the principles enunciated by Taylor, in his Evidence. 5 M.L.J. Art., p. 85. **W**

(i) From the statement “this is the place where I killed the deceased” there is no “discovery”, according to the meaning of the section, and, therefore, no sanction of its truth, and it is not within S. 27. The reference to Taylor shows further that the “discovery” means a physical discovery. 5 M.L.J. Art., p. 83, commenting upon 3 R. 12. **X**

(5) **Applicability of section to fact already discovered.**

(a) Under S. 159 of Act XXV of 1861, it was apparently necessary that the discovery should be by the deponent, as the words were “*discovered by him*”; but these words have been omitted in the Evidence Act, and it would seem that if the fact has been already discovered by a person other than the deponent, S. 27 will not apply. 5 M. L. J. Art., p. 85. **Y**

(b) It would be most dangerous to extend the provisions of S. 27 and allow a police officer, who is investigating a case, to prove information received from a person, accused of an offence, in the custody of a police officer, on the ground that a material fact was thereby discovered by him, when that fact was already known to another police officer. 11 C. 635. **Z**

(6) **Effect of accused's pointing out to police scene of offence.**

Where a Session Judge held that a confession, made by a prisoner charged with dacoity and murder, corroborated by his having pointed out to the police, the places where certain acts were committed, the Court observed that the effect of an accused's pointing out to the police the places where certain acts were committed is merely to accentuate or particularize the accused's verbal statements made to the same effect. The conduct of an accused in doing so is nothing more than making a statement by signs instead of words, and should be treated as part of his statement; and if the prosecution relies on such statements as being true; e.g., to show that the accused had an accurate knowledge of the circumstances, such statements are incriminating statements in the nature of confessions and are inadmissible in evidence. 4 L. B. R. 244 (245). **A**

(7) **Stolen property discovered whether can be replaced to ask other accused to produce it.**

Even assuming that the fact of the existence of the stolen property being concealed in a particular place was *discovered* in consequence of informa-

3.—“As discovered.”—(Continued).

tion received from an accused person, that fact would not justify the police in replacing the stolen property in the place whence it was discovered and in asking the other accused to produce the property. There could be no further discovery under S. 27 as against the other accused persons. 2 Bom. L.R. 1089 (1901). **B**

(8) **Indifferent discovery, effect of.**

The discovery of a fact which, save for the confession, would be altogether indifferent, cannot take a confession out of the excluding rule. 3 M.H. C.R. 318 (319). **C**

(9) **Facts discovered must be independently admissible.**

(a) Where a confession was not receivable in evidence as not having been made in the presence of a Magistrate, it was held that the condition essential to let in the information which leads to a discovery is that the fact discovered in consequence of it must be one which, of its own force, independently of the confession, would be admissible in evidence. 3 M.H.C.R. 318 (319). **D**

(b) The giving up by a cultivator of a bill-hook, or the pointing out of a place where *bajri* appears to have been trampled, is, however, in itself an unambiguous act. It is in general also insignificant. It needs no explanation, and a confession accompanying it does not explain it, but is a collateral matter, whose exclusion, where it is excluded, is not prevented by its being connected with matters that are not excluded. 11 B.H.C.R. 212 (246). **E**

(10) **Facts discovered must be of a kind which information helps to discover.**

Where it is alleged that facts have been discovered in consequence of information received from a person accused of an offence, the facts discovered must be of a kind which such information really helps to bring to light and which it could be difficult to recover otherwise, before those facts can be regarded as of any substantial probative force. U.B.R. (1897—1901), 152. **F**

(11) **But discovery held not essential where confession was circumstantial.**

Where prisoners confessed in the most circumstantial manner to having committed a murder, it was held that the finding of the dead body was not absolutely essential to a conviction. 4 W.R. (Cr.), 19 (20). **G**

(12) **Evidence as to discovery by police illegally offering inducement to confess, admissibility of.**

(a) No part of the evidence of a police-officer, who acted improperly and illegally in offering inducement to an accused person to make a disclosure or confession, as to the discovery of facts in consequence of the confession, is legally admissible in evidence. 8 W.R. (Cr.), 13 (14). **H**

(b) Where a sub-Inspector acted contrary to the provisions of S. 146, Cr.C.P., 1861, in persuading the prisoner to make a disclosure it was held that the statement made by the prisoner before that officer, admitting the commission of the offence, could not be received as evidence against the accused person and that the depositions of the police-

3.—“*As discovered.*”—(Continued).

officer were not sufficient to warrant his conviction. 9 W.R. (Cr.), 16 (17). I

- (13) **Facts discovered through information received from one accused not to be treated as discovered from that of other co-accused.**

When a fact is discovered in consequence of information received from one of several persons charged with an offence, and when others give like information, the fact should not be treated as discovered from the information of them all. 24 W. R. (Cr.), 36 (37). J

Note.—(In this case the Court observed upon a prevailing tendency to disregard the provisions of s. 26 by having recourse to the proviso contained in s. 27, although not justified by facts). K

- (14) **Accused making detailed statement to Magistrate—No subsequent discovery—Description of manner in which offence committed not relevant.**

Where an accused person made a statement to a Magistrate, detailing *in extenso* the occurrence of the crime, but there was no discovery of the articles *subsequent* to the making of the statement, the description of the manner in which the murder was committed was held to be irrelevant. 3 B. 12, see 5 M. L. J., Art., p. 82. L

- (b) An accused person, besides his formal recorded confession, made confessions to the police-officers, before and during his pointing out particular places and particular articles said to have been connected with the murder with which he was charged. The Court observed that a confession of murder made to a police constable was not at all confirmed by the prisoner's saying, “that is the place where I killed the deceased” and when starting from the pointing to a ditch or a tree, a long narrative of transactions, some of them altogether remote from any connection with the spot indicated, is allowed to be deposed to as confessed by a prisoner, the intention of the Evidence Act is not fulfilled, but defeated. 3 B. 12 (17). M

- (c) The Evidence Act makes those statements admissible, and those only which are the essential complement of acts done or refused to be done, so that the act itself or the omission to act acquires a special significance as a ground for inference with respect to the issues in the case under trial. It is important that this should be borne in mind, as otherwise prisoners will, by the exercise of the commonest ingenuity, be entirely deprived of the safeguard which the Legislature intended to throw round them in ss. 24 to 26 of the Evidence Act. 3 B. 12 (17). N

- (15) **Accused's statement a necessary preliminary to fact discovered—Admissibility.**

Where the statement of the accused is a necessary preliminary to the fact discovered, it is admissible under S. 27 of the Act, irrespective of the question, whether the statement is sufficient to enable the police to make the discovery by themselves or is only of such a nature as to require further assistance of the accused to enable them to discover the fact. 25 C. 413 (416), referring to 11 C. 635. O

- (16) **Instances of statements held admissible as leading to discovery.**

- (a) Where a statement, by the accused that he had buried the property in question in the fields, distinctly set the police in motion and led to

3.—“As discovered.”—(Continued).

the discovery of property, it was held to be admissible under S. 27 of the Evidence Act. 14 B. 260 (265). **P**

- (b) Where a statement was made by an accused person to a witness, who was a village headman, in consequence of which certain property, which had been stolen, was discovered in a forest, the Court below rejected the statement made to the headman as having been induced improperly, and owing to the absence of other satisfactory evidence acquitted the accused. *Held*, that the statement might be admissible under S. 7 of the Evidence Act as the immediate cause of a relevant fact, the finding of the stolen box, and also relevant as a statement explaining the conduct of the accused under S. 8, and that it was not relevant as a confession under S. 24, as it was made under an inducement that had not been removed within the meaning of S. 28. 2 L.B.R. 168 (173), per *Burks, J.* **Q**

- (c) In a case of murder, the fact that the accused or one of them pointed out where the bones of the murdered person lay is relevant under S. 8 of the Act, but it is not in itself sufficient proof that the accused took part in the murder. 4 L.B.R. 116 (119). **R**

- (d) Where some empty biscuit tins and condensed milk tins were found in a well which was pointed out to the police by the accused, charged with murder and dacoity, whose confessions were, therefore, contended to be corroborated, it was held that the fact that the discovery was made in consequence of information received by the police from the accused is admissible, and so much of the information given by the accused as led directly to such discovery would be admissible; but that a statement made by the accused to the police that the tins had been stolen by the dacoits is inadmissible, because such statement is not connected directly with the discovery; and there was nothing else to connect the tins with the dacoity. 4 L.B.R. 244 (245). **S**

(17) Instances of statements held inadmissible as leading to no discovery.

- (a) Where one of the prisoners produced a bill-hook and knife from the field and the other prisoner a stick, and each made certain incriminatory statements, the Court held that these statements were inadmissible, as there was no “discovery” and that they were not let in by Expl. 1 to S. 8, though it was of opinion that the acts of the prisoners could be proved. 11 B.H.C.R. 242. **T**
- (b) Where no discovery was pointed out as made through the information, given by an accused person, who had made confessions to the police before and during his pointing out particular places and particular articles said to have been connected with the murder, with which he was charged, which would make his statement leading to it admissible, nor was it shown that any act done by the prisoner was so explained by his statements as to receive from those statements a character which otherwise it might not have, and a character of importance for the case in hand so as to make those statements admissible as what is commonly called part of the *res gestae* under S. 8, the Court rejected the statement. 3 B. 12 (17). **U**
- (c) Where a police officer deposed that the accused told him that he had robbed K of Rs. 48, whereof he had spent Rs. 8 and had got Rs. 40,

3.—“*As discovered.*”—(Concluded).

and that he (the accused) made over Rs. 40 to him, this statement was held to be inadmissible in evidence, as no facts were discovered by the prisoner's statement. 11 C. 635. **Y**

(18) **Evidence of discovery held inadmissible.**

(a) Where a discovery was made under the most suspicious circumstances, the accused being removed from one police station to another, and the search being conducted, not by local headman, but by others from elsewhere, and the property discovered being apparently found in a condition inconsistent with their having been buried for some days underground, while no good reason was shown why they should have been put in that situation at all, it was held that evidence as to the alleged discovery was entirely inadmissible. U.B.R. (1892—96), 83 (84). **W**

(b) The accused pointed out the place in the pond where the bundle of stolen ornaments was recovered. The prosecution alleged that the accused had said to the police that he had buried the things in the pond. Held, that the statement of the accused was inadmissible in evidence. 155 P.L.R. 1908. **X**

4.—“*In consequence of information received.*”(1) **Test of admissibility of information received from accused.**

The test of the admissibility, under S. 27, of information received from an accused person in the custody of a police-officer, is, “was the fact discovered by reason of the information, and how much of the information was the immediate cause of the fact discovered, *and as such a relevant fact?*”. 12 M. 153 (154), approving 11 C. 635, 4 A. 198 & 11 B.H.C.R. 242. **Y**

(2) **Admission by accused must be antecedent, not subsequent, to discovery.**

(a) To make an admission, by an accused person, of the guilty knowledge of the means by which money, alleged to have been acquired by dacoity, had been obtained evidence, under S. 150, Cr. P.C., it must be shown that it was antecedent to the discovery of the money. Where the admission was subsequent to the discovery, it was held to be excluded. 17 W.R. (Cr), 50 (51). **Z**

(b) Where an accused person makes a confession subsequently to the discovery of a fact in consequence of information given by him to the police, the confession is rendered irrelevant. 4 L.B.R. 116. **A**

(c) The statement to be admissible under S. 27, must be information in consequence of which a fact is discovered and does not include an explanatory statement made at the time of, or after the discovery of the fact. 10 C.P.L.R. 25 (26). **B**

(d) There is nothing at all in S. 27 of the Evidence Act which renders admissible a statement in the nature of a confession made by an accused person to a police-officer at the time of producing the property. 10 C.P.L.R. 25 (26). **C**

(e) For example, if an accused person says, “I put the stolen property in such and such a place” and the police in consequence of that information

4.--“*In consequence of information received.*”-- (Continued).

go and find the property in that place, the statement is admissible in evidence under S. 27. 10 C.P.L.R. 25 (26). **D**

- (f) But if the accused were merely, in giving up certain property to the police, to say, “this is the property that I stole,” it would not be admissible. The statement would not be information in consequence of which a fact was discovered, and, therefore, the provisions of S. 27 would not be applicable to it. 10 C.P.L.R. 25 (26). **E**

(3) **Fact discovered must be relevant to, and be caused by, statement made.**

- (a) It is not all statements connected with the production or finding of property which are admissible; those only which lead immediately to the discovery of property, and so far as they do lead to such discovery, are properly admissible. 11 B.H.C.R. 242 (241). **F**

- (b) Whatever be the nature of the fact discovered, that fact must, in all cases, be itself relevant to the case, and the connection between it and the statement made must have been such that that statement constituted the information through which the discovery was made, in order to render the statement admissible. 11 B.H.C.R. 242 (244). **G**

- (c) Other statements connected with the one thus made evidence, and so mediately, but not necessarily or directly, connected with the fact discovered, are not to be admitted, as this would rather be an evasion than a fulfilment of the law, which is designed to guard prisoners accused of offences against unfair practices on the part of the police. 11 B.H.C.R. 242 (244). **H**

- (d) For instance, a man says, “You will find a stick at such and such a place. I killed Rama with it.” A policeman, in such a case, may be allowed to say he went to the place indicated, and found the stick; but any statement as to the confession of murder would be inadmissible. If, instead of “you will find?” the prisoner has said, “I placed a sword or knife in such a spot,” when it was found, that too, though it involves an admission of a particular act on the prisoner’s part, is admissible, because it is the information which has directly led to the discovery, and is thus, distinctly and independently of any other statement, connected with it. But if, besides this, the prisoner has said what induced him to put the knife or sword where it has been found, that part of his statement, as it had not furthered, much less caused, the discovery, is not admissible. 11 B.H.C.R. 242 (244-5). **I**

(4) **Facts must be directly discovered in consequence of information.**

The fact discovered in consequence of information given by an accused person to the police must be directly discovered in consequence of the information given by him to make evidence as to the information admissible under S. 27. L.B.R. (1893—1900), p. 963. **J**

(5) **Instances of statements held to be and not to be discovered in consequence of information.**

- (a) Where it was clear that it was upon the information, which the statement of an accused person gave the police, that they accompanied the accused to the spot where the stolen property was disinterred by the accused, and where it was equally clear that, but for that information, the property would not have been discovered, it was held to be in accordance with the ordinary use of such terms to say that the

4.—“*In consequence of information received.*”—(Continued).

discovery of the property was the *consequence* of the information ; it set the police in motion, the immediate consequence being that the police asked the accused to show them the spot, and accompanied him there ; but such a proceeding on the part of the police was with the view to the discovery of the property, and was the natural consequence of the information they had received from him, and so connected it with the final result, *viz.* the discovery of the property as a *causa causans*. 14 B. 260 (264). **K**

- (b) Where the actual confessions made by the accused, that they had killed the deceased and had buried his body and afterwards removed his bones to the places where they were found, were made after the discovery, and it was not in consequence that the bones were discovered, the confessions were held not to be such as may be admitted under S. 27 of the Evidence Act and must be excluded from consideration. 4 L. B. R. 116 (119). **L**

- (c) Where an accused person, charged with dacoity and murder, made a confession induced by the police and pointed out to the police the places where certain acts were committed, held that evidence as to the accused pointing out the place, etc., was not admissible under S. 27 of the Evidence Act, because no fact was discovered in consequence of the information given by the accused. 4 L. B. R. 244 (245). **M**

- (d) Some gold, said to be part of the stolen property, was found near the house of an accused person. He took the police to a place near his house and looked for something he had hidden there and found nothing. He said his brother was present when he buried the things. The accused's brother was questioned and said that he had moved the gold and money to another place and pointed them out. The information which the accused gave to the police, which led to their questioning the accused's brother, and, with his aid, to their finding the gold and silver, was held to be inadmissible in evidence under S. 27. L. B. R. (1893—1900), 363. **N**

- (e) Where the statements by accused persons, amounting to confessions, were made to the police and no fact was discovered in consequence of any information derived from such statements within the meaning of the proviso contained in S. 27 of the Evidence Act, it was held that the property being discovered, not in consequence of what the prisoner had said, but by his own act, the statements were not admissible in evidence. 4 A. 198 (204). **O**

- (f) Where an accused person first reported to the police that P had criminally misappropriated his property, but the next day told the police that his report was incorrect and that he had given permission to P to use it and was consequently charged with having given false information, held, that the view, that, in consequence of information given by the accused, it was discovered that he had committed an offence under S. 182, I. P. C., was untenable and that the proviso to S. 27 could not be so far reaching as contended. U. B. R. (1897—1901) (156) (158) Cr.). **P**

- (g) Where X and Y were committed to the Court of Sessions for trial, X charged with murder and Y with abetment, X pleaded guilty and the

4.—“*In consequence of information received.*”—(Continued).

prosecution attempted to establish Y's guilt by means of the confession made by X and by a statement, made by Y to the police, of facts which were already within their knowledge. It was held that, as it did not exactly appear that anything was discovered in consequence of Y's statement, it could not be used against him under S. 27 of the Evidence Act. 11 P. R. 1900 (Crim.). Q

(6) **Distinction between discovery by act of party and one from information given by him.**

- (a) A distinction between a discovery by the *act* of the party and one from his information was made by *Straight, J.*, in 4 A. 198. R
- (b) Where an accused person gave a knife to a police-officer stating it was the weapon with which he had committed the murder, that he had thrown down certain jewels worn by the deceased at the scene of the murder, and that he would point them out next morning, and, on the following day, conducted the police officer to the spot and pointed out the jewels, it was held that his statements being confessions made to a police-officer were inadmissible in evidence, as it was by his own act and not from any information given by him that the discovery took place. 4 A. 198 (204). S
- (c) Where a conviction was made on the ground that part of the stolen property was discovered beneath the *chulha* of the prisoner's house and that the prisoner had told the police that he had buried it near some ice-pits, and, accompanied by the police, and shown the spot where he had done so and the property was there discovered buried in an earthen vessel; *held*, neither the statement nor the pointing out by the prisoner of the place where the stolen property was found was relevant against him, as it was made to a police-officer, as S. 25 was not governed by S. 27 and as the stolen property was not discovered owing to any information given by the accused, but by his own act. S. 27 contemplates information only. 2 A. W. N. 225. T
- (d) Where the accused, charged with the theft of some *jwari* admitted before the police during the police investigation that they had taken the *jwari* and concealed it in a jar, which they immediately produced, the identity of the *jwari* recovered with that stolen not having been proved to the Magistrate's satisfaction except by the admissions, held that, as the prisoners themselves produced the *jwari*, it was by their own act and not from any information given by them that the discovery took place and that S. 27 of the Evidence Act did not apply to the case. In the circumstances, the production of the property may be proved, but not the accompanying confession made to the police. 10 B. 595 (599) = Rat. Unrep. Cr. C. P., p. 285, *following*, 4 A. 198; *overruled* by 14 B. 260. U
- (e) In the Calcutta High Court, the doctrine of the distinction between a discovery by the *act of the party* and a discovery made *in consequence of the information* has not been established. 5 M.L.J. Art., p. 24; *referring* to 19 W.R. 51 (Cr.). Y
- (f) Where the accused, after describing the assault on the deceased, said that he took from the body a necklace and bracelets which he had concealed in the jungle, and, on his being taken there, produced them from a concealed place, saying they were the ornaments removed by

4.—“*In consequence of information received.*”—(Continued).

him from the body of the deceased, *held*, the discovery of the ornaments was made in consequence of the information. 19 W.R. 51 (Cr.). **W**

Note. (In this case, the accused himself produced the property).

(g) Whether the statement made by an accused person is of such a detailed description as to enable the police themselves to discover the property, or only of such a nature as to require his assistance in discovering the exact spot where the property is, it cannot prevent the statement from being admissible under S. 27. In both cases, there is the guarantee afforded by the discovery of the property for the correctness of the accused's statement, and which is presumably the ground of the admission of the exception to the general rule. The distinction, therefore, appears to be without substance. 14 B. 260 (264); *overruling* 10 B. 595. **X**

(7) **Information, meaning of.**

S. 27 of the Evidence Act, when it speaks of “*information*” includes statements which fall short of confession as well as statements that amount to confession. 6 A. 509 (537); *per Mahmood, J.* **Y**

(8) **Section refers to information received by police officer and by other persons.**

(a) The section refers to information whether received by a police officer or by other persons, there being nothing in the language of the section to justify any distinction in respect of the person to whom the information is to be given. 6 A. 509 (511) (**F. B**) **Z**

(b) The section itself makes no distinction, in respect of the person to whom the information is to be given, which could only be given effect to by adding words to it. 6 A. 509 (511) (**F. B**). **A**

(c) What the section provides is that “when any fact is discovered as discovered in consequence of information received from a person accused of any offence in the custody of a police-officer so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.” 10 C. P. L. R. 25 (26). **B**

(d) It cannot be said that this section—S. 150, Cr. P. C., 1861—will not apply to information received by a police-officer. 6 A. 509 (512) (**F. B**) *per Oldfield, J.* **C**

(e) It will be seen that S. 150, Act XXV of 1861, referred to depositions by a police-officer as to a fact discovered by him in consequence of information received from a person accused of an offence, whereas the amended section—see citation from Act VIII of 1869, *supra*—so far enlarged the proviso as not to restrict its operation to depositions by police-officers only, or to information received from a person accused of an offence, but to extend it to information received from a person in the custody of a police-officer; but there is nothing in the amended section to render the proviso inapplicable to information received by a police-officer. In fact, S. 150 was intended to govern both the proceeding Ss. 148 and 149. 6 A. 509 (512 & 513) (**F. B**). **D**

(f) S. 162, Cr. P. C., 1882, affords a ground for assuming that no such distinction was contemplated by the Legislature. 6 A. 509 (513) (**F. B**); *per Oldfield, J.* **E**

4.—“*In consequence of information received.*”—(Continued).

- (g) S. 162, Cr. P. C., 1882, after declaring the rule that no statement, other than a dying declaration, made by any person to a police-officer in course of an investigation under the chapter, shall be used in evidence against the accused, goes on to provide that “nothing in the section shall be deemed to affect the provisions of S. 27 Indian Evidence Act”, evidently on the assumption that S. 27 contemplates information received by a police-officer; otherwise the proviso would have been out of place in a section like S. 162, which deals with statements made to a police-officer. 6 A. 509 (513) (F.B.); per *Oldfield, J.* **F**
- (h) There seems no advantage to be gained by drawing a distinction between information amounting to a confession received by a police-officer, and by some person other than a police-officer, and excluding proof of the former, while admitting it of the latter; for, while an accused person is in the custody of a police-officer, the confession in both cases would be liable to distrust. 6 A. 509 (514) (F.B.); per *Oldfield, J.* **G**
- (i) In practice, information received by a police-officer has been allowed to be proved, under the provisions of S. 27, without any question being raised hitherto that the section did not contemplate such information. 6 A. 509 (511) (F.B.); per *Oldfield, J.* **H**
- (j) Were a police-officer incompetent to depose, under S. 27, to the extent specified above, no sufficient legal proof for a conviction would be obtainable, although there would be no room for doubt as to the guilt of the accused. 6 A. 509 (519) (F.B.); per *Brodhurst, J.* **I**
- (k) Both the provisions in Ss. 25 and 26 (which proceeded upon the assumption that confessions made to the police by accused persons while in their custody or not, or to third persons while in their custody, unless, in the latter cases, they were guaranteed by the presence of a Magistrate, were valueless as evidence) were never intended to debar police officers from deposing to facts discovered by them, no matter by what means they have obtained the information, that led to discovery, from the accused. 6 A. 509 (515), per *Straight, C. J.* **J**
- (l) If a police officer, no matter whether torture has been used or not, may prove that he discovered a fact, and that he did so in consequence of information received from the accused, and may give the words of the accused, embodying such information, so long as they do not amount to a confession, no additional harm could be contemplated as likely to result from his being permitted to give so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact discovered. 6 A. 509 (545-6), per *Straight, C. J.* **K**
- (m) The provisions of S. 27 are sufficiently stringent to obviate any serious interference with the broad rule laid down in S. 25. 6 A. 509 (546), per *Straight, C. J.* **L**
- (n) It is the principles of practice thus enunciated which, in my opinion, have been incorporated in s. 27 of the Evidence Act, and, as I have already remarked, if the provisions of that section are properly used by the Courts and not abused, but are administered strictly, the damages of which by brother Mahmood is apprehensive should be minimised. 6 A. 509 (547) (F.B.); per *Straight, C. J.* **M**

4.—“*In consequence of information received.*”—(Continued).

(o) But it is said, police-officers will fabricate facts for the purpose of dragging in a damaging statement or confession by an accused, and that they will put admissions upon him which he never made, as leading to the discovery of facts. 6 A. 509 (547) (F.B.); per *Straight, C.J.* **N**

(p) The only answer I can make to this is that no legal provision short of one rendering a police-officer altogether incompetent as a witness can prevent him, if he is so minded, from committing perjury. 6 A. 509 (548) (F.B.) per *Straight, C.J.* **O**

(q) It rests with the tribunals, whose business it is to administer criminal justice, to be alert and watchful to see that they are not deceived by false testimony, and they will do well to remember, when they are called upon to apply the provisions of S. 27, even where third persons are deposing to information amounting to a confession received from an accused, that the detail of it is to be sternly limited in the manner I have already indicated. 6 A. 509 (548) (F.B.), per *Straight, C.J.* **P**

(9) **Section does not refer to information received by police but by persons other than policemen.**

(a) The confession contemplated by S. 27 must have been made to some person *other* than a police-officer. This view seems to be the only one which does not clash with the policy of the law—the presence of a third person to whom the confession is made being a check upon maltreatment of the prisoner, the discovery which takes place in consequence of the confession being a guarantee of its truth. 6 A. 509 (534), per *Mahmood, J., dissentient.* **Q**

(b) Under this view a confession must not, and cannot, depend for its proof solely upon the testimony of the police officer in charge of the prisoner; if the rule were otherwise, the prohibition contained in S. 25 would be ineffective; it would certainly not have the effect of preventing tortures for extorting confessions. For such malpractices would still continue on the part of the police, in the hope of discovery; which hope, if realized, would render the confession admissible under S. 27: the policeman to whom the confession was made being the only witness to say whether it was extorted or not. 6 A. 509 (534), per *Mahmood, J., dissentient.* **R**

(c) An essential feature of the section—S. 150, Cr. P.C., 1861—was that the confession must be proved by the deposition of the police-officer himself to render it admissible in evidence. 6 A. 509 (526) (F.B.); per *Mahmood, J., dissentient.* **S**

(d) The two cases at 8 W.R. (Cr.), 13, and 9 W.R. (Cr.), 16, are distinctly authorities for the proposition that, notwithstanding the general terms of S. 150, Cr.P.C., 1861, it was never taken to qualify the prohibition in S. 146—which enacted that “no police-officer or other person shall offer any inducement to an accused person, by threat or promise or otherwise, to make any disclosure or confession”. 6 A. 509 (526); per *Mahmood, J., dissentient.* **T**

(e) In the change effected in S. 150, Cr.P.C., 1861, by Act VIII of 1869, the introduction of the opening words in the new section, and the removal of all such words as refer to the evidence of a police-officer signify that

4.—“*In consequence of information received.*”---(Continued).

the Legislature was conscious of the fact that the general rule laid down in S. 148, (for which see S. 25, *supra*) prohibiting the admission of confessions made to police-officers, was defeated by the rule contained in S. 150 of the same Act. 6 A. 509 (527), per *Mahmood, J., dissentient.* **U**

- (f) The law, as it stood in the Criminal Procedure Code of 1861, as amended by Act VIII of 1869, prohibited the admission in evidence of all confessions made by the accused to police-officers, whether such confessions led to discovery or not. And it follows from this that the confessions contemplated by S. 149 were those made to persons, other than police-officers, by the accused while in the custody of the police. 6 A. 509 (528); per *Mahmood, J., dissentient.* **Y**
- (g) If S. 26 does not contemplate and include within its scope confessions made to a police officer within the meaning of S. 25, it seems to follow, *a fortiori*, that such confessions do not fall within the purview of S. 27. For both the sections, so far as this point is concerned, depend exactly upon the same principle. 6 A. 509 (533), per *Mahmood, J., dissentient.* **W**
- (h) The opposite view implies propositions which are wholly opposed to a fundamental rule of interpreting statutes. The first of these propositions would be that the words occurring in S. 26, “unless it be made in the immediate presence of a Magistrate,” should be inserted in S. 25. The second proposition would be that the words “in the custody of a police-officer,” occurring as they do as an *essential condition* of the rule contained in S. 27, should be treated as meaningless or superfluous. The third proposition would be that the words “whether such confession was made to a police officer or not” must be read as forming a part of S. 27. The Legislature could never have intended these sections to be read in this manner, and there is ample reason to show that this was not its intention. 6 A. 509 (533); per *Mahmood, J., dissentient.* **X**
- (i) If S. 27 be taken to include confessions made to the police officer, it may be that the only evidence to connect the discovery with the alleged confession of the accused would be the evidence of the policeman and of no one else. But that the policy of the law intended to obviate such a contingency is apparent from other cognate provisions. 6 A. 509 (534), per *Mahmood, J., dissentient.* **Y**
- (j) S. 103, Crim. Pro. Code, 1882, which reproduces much older law, lays down that every search to be made by the police shall be made in the presence of witnesses, who must obviously be persons other than police officers. The reason is that the uncorroborated testimony of the police officer alone is not accepted, for it is not an uncommon plea raised by the accused that the stolen property or other thing affording evidence of crime, and said to have been found in his house, was brought there by the police itself. 6 A. 509 (535), per *Mahmood, J., dissentient.* **Z**
- (k) The analogy of the rules which imperatively require the presence of witnesses at a search by the police is very strong with the rule now under consideration; and if the fact that stolen property was found in the house of the accused person needs proof by the testimony of persons

4.--“In consequence of information received.”--(Concluded).

other than the police-officer, *a fortiori* an alleged confession by the accused must need independent testimony also. 6 A. 509 (535), per *Mahmood, J., dissentient.* **A**

(l) In England the rules excluding confessions caused by any inducement, threat, or promise proceeding from a person in authority are based upon a consideration that such confessions are valueless as evidence, and do not afford safe data for arriving at the truth; and, therefore, it is intelligible that, when facts are discovered in consequence of confessions improperly obtained, so much of such confessions as distinctly relate to such facts may be proved,—the reason of the rule being that the discovery of the facts affords a guarantee that the confessions were true. 6 A. 509 (536), per *Mahmood, J., dissentient.* **B**

(m) But the rule excluding confessions has, in India, an additional policy as its basis, viz., the check which the Legislature has thought fit to impose upon the extortion of confessions. There is a statutory prohibition in the most positive language against the employment of inducement, threat, or promise for the purpose of obtaining confession from the accused. Such statutory prohibitions do not exist in England. They were probably not called for by the conditions of life in that country. Therefore, in interpreting statutory rules peculiar to India, it cannot be altogether safe to deduce any conclusions by following the rule *in pari materia* in England. 6 A. 509 (536-7), per *Mahmood, J., dissentient.* **C**

(n) The rule contained in Ss. 24, 28 & also S. 29 belongs to a species different from that under which Ss. 25, 26 & 27 fall, and they might perhaps have been better arranged if the former set of sections were grouped together. But the circumstance that they are not so grouped would not alter the principle which should guide their interpretation. A. 509 (539) (**F.B.**), per *Mahmood, J., dissentient.* **D**

(o) The proviso contained in S. 27 is not intended to qualify the absolute rules contained in Ss. 24 and 25, but only the rule contained in the immediately preceding S. 26, which relates to confession made, not to the police-officer, but to third persons, whilst the person making the confession is in the custody of the police. 6 A. 509 (541). **E**

(p) The law of India as to confessions improperly obtained is the same as the rule laid down by Lord Eldon in *Harvey's case* 2 East, P.C. 658 and confessions to a police-officer are conclusively presumed to have been improperly obtained, so as to be subject to the same rule, unaffected by the question of discovery. 6 A. 509 (541). **F**

5.--“From a person accused of any offence in the custody of a police-officer.”

(1) S. 27 will not always qualify S. 24.

(a) Even though S. 27 be regarded as qualifying S. 24, it will not be applicable in every case that falls under the latter section. See 5 M.L.J. Art., p. 77. **G**

(b) According to S. 24, the confessions, which it provides for, are not relevant whether the confessing party was accused or not, and whether he was in custody or not at the time. *Ibid.* **H**

5.—“From a person accused of any offence in the custody of a police-officer.”—Continued).

(c) But S. 27 refers to confessions made by, a person accused of any offence in the custody of a police-officer'. *Ibid.* I

(d) Therefore, confessions made by persons when accused but not in custody, or in custody but not accused, or neither accused nor in custody, will not be rendered admissible under S. 27 even if there is any discovery. *Ibid.* J

(2) S. 27 qualifies S. 25 only when accused is in police custody.

(a) S. 27 only qualifies S. 25 when the accused is in the custody of the police; therefore, confessions to police officers made by persons who are accused but not in custody, or are in custody but not accused, or are neither accused nor in custody do not fall within S. 27. See 5 M.L.J. Art., p. 79, referring to 6 A. 509 (513, 533, 534), per *Oldfield, and Mahmood, JJ.* K

(b) A confession made to a police officer by a person who is not in the custody of the police, even though such confession led to discovery, would not be admissible in evidence, because it could not fall under the view of S. 27, which is restricted to persons “in the custody of a police officer.” 6 A. 509 (533-4), per *Mahmood, J., dissentient.* L

(3) S. 27 not applicable to information by accused not in custody.

(a) S. 27 of the Act is not applicable to information given to the police by an accused person who was not in their custody when he gave the information. 4 L.B.R. 116 (119). M

(b) Where it appeared that, on the statement of a police-officer that, when the accused showed where the bones of a murdered person were, the accused were not in the custody of the police, it was held that, if the accused had made a statement which led to the discovery of the bones, S. 27 of the Evidence Act would not have availed to render even so much of the information which they gave as related distinctly to the fact thereby discovered admissible in evidence. 4 L.B.R. 116 (119). N

(4) Custody, example of.

Where, at the time a prisoner made a confession, the police had arrived, it was held that after their arrival, it could scarcely be supposed that their custody of the prisoner had not commenced, 3 M.H.C.R. 318 (319). O

5) Native state police officers are police officers within Section.

For the purposes of S. 27, officials ordinarily described as police-officers in Native States, and performing in such states the functions of police, are police-officers 22 B. 235 (237). P

6) Case to which S. 27 is not applicable.

An accused person made a statement during the course of a police investigation to certain men of influence in the neighbouring villages when no police official was present. In consequence of his statement some money and other things belonging to the deceased were found at the places mentioned by him. The Sessions Court held that the accused not having been in the custody of the police at the time when the statement was made, it was inadmissible in evidence under S. 27 of the Evidence Act. But it was held on appeal by the Judicial Com-

5.—“From a person accused of any offence in the custody of a police-officer.”—(Concluded).

missioner's Court that the confession made by the accused to the residents of the neighbouring villages was admissible in evidence against him and that S. 27 had no application to the case. 8 O.C. 395 (401). Q

6.—“So much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered.”

(1) S. 27 not intended to let in confession generally, but only particular part of it.

S. 27 was not intended to let in a confession generally, but only such particular part of it as set the person, to whom it was made, in motion, and let to his ascertaining the fact or facts of which he gives evidence. 6 A. 509 (546) (F.B.); per *Straight, C.J.*; and 11 C. 635 (641), dissenting from the observations of *Stuart, C.J.*, in 4 A. 198 (201), and following 6 A. 509. R

(2) Accused's statements without clue leading to discovery, admissibility of.

S. 27 of the Evidence Act does not permit statements made by an accused person, while in police custody, to be proved when he gave no clue which led to the discovery of the stolen property. The object of S. 26 of the Evidence Act is to prevent the fabrication of confessions and this object would be defeated, if, on the discovery of property through the indication of A, evidence were admitted that B had also stated that the property was concealed where it was discovered. P.L.R. (1900), p. 56—12 P.R. 1900 (Cr.). 3

(3) Construction of material words of proviso, “so much proved”.

The material words of the proviso in S. 27 are, “so much of such information, whether it amounts to a confession or not as relates distinctly to the fact thereby discovered may be proved”: the reasonable construction is that, in addition to the fact discovered, so much of the information as was the immediate cause of its discovery is legal evidence. 12 M. 153 (154). T

4) Extent of words “thereby”—Test.

In regard to the extent of the words ‘thereby discovered’ some assistance may be derived from the tests applied by the Courts in dealing with proximate and remote causes of damage, that is, whether what followed was the natural and reasonable result of the defendant's action. 14 B. 260 (267). U

5) Caution.

But to avoid the judgment of the Court being applied to circumstances beyond its meaning and beyond the policy of the law and to statements that cannot be regarded as proximate causes, Lord Blackburn's decisions, where he discussed Bacon's maxim, ‘it were infinite for the law to judge the cause of causes’, and difficulty of drawing the line must be remembered. 14 B. 260 (267); per *Jardine, J.*, referring to *Sneesby v. Lanca Ry. Co.*, L.R. 9 Q.B. 267 & *Dudgeon v. Pembroke*, L.C. 595 & *Hobbs v. Lord. & S.W.R. Co.*, L.R. 10 Q.B. 121. Y

6.—“ So much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered.”—(Continued).

(6) Object of section.

The object of the Code (Evidence Act) was apparently to set the question at rest by adopting the view of the law laid down in *Taylor on Evidence*, as being now in force, that “so much of the confession as relates distinctly to the fact discovered by it may be given in evidence,” and it has done so in language which admits of no reasonable doubt as to its meaning, and it is the duty of the Court to give effect to it. 14 B. 260 (265, 266). W

(7) Confession introduced under cover of explanation.

If, under cover of an explanation said to have been given by a prisoner of an act in itself ambiguous, or not so obviously connected with a fact in issue as to be relevant, it is thought to introduce a confession of a prisoner to the police, or made while in the custody of the police, the Evidence Act does not warrant its admission. The rules of exclusion and the exception to them being definitely laid down, the exception is not to be extended to cases not properly falling within it. 11 B.H. C.R. 242 (246). X

(8) Confessions of accused in police custody, recording evidence of.

Confessions of accused persons, made by them when in police custody, are only relevant in so far as they relate distinctly to the fact thereby discovered, and evidence of such confessions should not be allowed to be given or recorded to any great extent, nor, when such evidence as is properly admissible has been recorded should the jury be afterwards told generally that the prisoners had confessed. 3 M.L.T. 263. Y

(9) So much information as relates distinctly to fact discovered provable.

(a) A police officer who deposes to a fact as discovered in consequence of information received from a person accused in his custody is not prohibited from stating so much of the information received as relates distinctly to the fact thereby discovered even though it amounts to a confession. 4 A. 198, explained in 6 A. 509 (544), by *Straight, C. J.* Z

(b) When any fact is deposed to by a police officer as discovered in consequence of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or admission of guilt or not as relates distinctly to the fact discovered by it, may be received in evidence. 6 A. 549 (512) (F.B.) per *Oldfield, J.* A

(10) But not more.

(a) It is only so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered that may be proved. 6 A. 509, (546), per *Straight, C. J.*; see also per *Oldfield, J.* at p. 514 and per *Brodhurst, J.* at p. 518. B

(b) So much of the confessions as relates strictly to the fact discovered by it may be given in evidence; for the reason of rejecting extorted confession is the apprehension that the prisoner may have been induced so say what is false. But the fact discovered shows that so much of the confession as immediately relates to it is true. *R. v. Butcher*, 1 Leach 265 note (a) to *Warickshall's Case*, 2 East P.C.C. 16, S. 94, p. 658; see 6 A. 509 (547), per *Straight, C.J.*, *Tay. Ev.*, 10th Ed., S. 902, p. 687. C

6.— “So much of such information whether it amounts to a confession or not as relates distinctly to the fact thereby discovered.” —(Continued).

- (c) It is now the common practice and it is proper to leave to the consideration of the jury, where a confession has been improperly obtained, the fact of the witness having been directed by the prisoner where to find the goods, and his having found them accordingly, but not the acknowledgment of the prisoner having stolen or put them there, which is to be collected or not from all the circumstances of the case. 2 East P.C.P. 658 cited in 6 A. 509 (547), per *Straight, C. J.* **D**
- (d) So where on an indictment for burglary it appeared that the prisoner had made a statement to a policeman, under some particular circumstances which induced the counsel for the prosecution, with the approbation of the Court, to decline offering it in evidence, but in consequence of the statement containing some allusion to a lantern, which was afterwards found in a particular place, the policeman was asked whether, in consequence of something which the prisoner had said he made a search for the lantern, the Court held that the words used by the prisoner with reference to the thing found ought to be given in evidence, and the policeman accordingly stated that the prisoner told him that he had thrown the lantern into a pond in Pooceck's fields. The other parts of the statement were not given in evidence. *R. v. Gould*, 9 C. & P. 364; cited in 6 A. 509 (547) & 14 B. 260 (265). Steph. Dig. 7th Ed., Art. 22, p. 32; Phip. Ev. 4th Ed., p. 247. **E**
- (e) Mr. Phillips after stating this case (*R. v. Gould*) adds:—“But the Judge in such a case would direct the jury, and so it is understood did direct the jury in that case, that his statement must not be taken as proof that he concealed, but merely as evidence that he knew of, or was privy to, the concealment, from which, together with the rest of the evidence, they would consider whether it was probable that he concealed it himself.” 6 A. 509 (547), per *Straight, C. J.* **F**
- (f) Where an accused person makes a statement amounting to confession, the most that could be taken into consideration, in such a statement, against a co-accused, would be, under Ss. 27 and 30 of the Evidence Act, so much of the information as was the immediate cause of the discovery of some relevant fact against him. 18 M.J.J. 66 (67). **G**
- (g) So much of the statement as related distinctly to the facts thereby discovered was held to be admissible in evidence, not as a confession, but as evidence of the facts thereby discovered. 11 C. 625 (640). **H**
- (h) Where a fact is deposited to as discovered in consequence of information received from an accused person in the custody of the police, the proof of that fact must be strictly confined to so much of the information as related distinctly to the fact thereby discovered. U.B.R. (1892-96), 83 (84). **I**
- (i) Where property has been discovered or delivered up through the aid of inadmissible confessions, so much of the confession as precisely relates thereto will be admissible, for those parts, at least, of the confession cannot be untrue. But independent statements, not qualifying or explaining the fact, though made contemporaneously, will be excluded. *R. v. Griffin*, R. & R. 151; *R. v. Harris*, cited Joy. 83. See Phip. Ev., 4th Ed., p. 217. **J**

6.—“ So much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered.”—(Continued).

- (j) So much of such confession as relates strictly to the fact may be received in evidence, and this is on the principle that so much of the confession is established to be true; and the foundation of the whole doctrine is that the Jury ought to hear whatever is true and are entitled to look for truth through any and every medium that may be calculated to reveal it. *State v. Vaigneur*, 5 Rich. L. 404; Wigm. Ev., '05 Ed., S. 856, p. 987. **K**

(11) **Duty of judicial officer.**

No judicial officer dealing with such provisions should allow one word more to be deposed to by the police-officer detailing a statement made to him by an accused, in consequence of which he discovered a fact, than is absolutely necessary to show how the fact that was discovered is connected with the accused, so as in itself to be a relevant fact against him. 6 A. 509 (546) (F.B.); per *Straight, C. J.*; and 11 C. 635 (641), approving the above observations of *Straight, C. J.* **L**

(12) **Information held admissible.**

- (a) Where the accused confessed, in the most circumstantial manner, to a Police Inspector, to having committed a murder, it was held that the deposition of that officer, with regard to so much of their confessions as led to the discovery of the grave in which they had buried their victim, might be received in evidence, under S. 150, Cr. P.C., 1861. 4 W.R. (Cr.), 19. **M**

- (b) Where the accused confessed to a Police Sub-Inspector, part of which confession related to the concealment of certain jewels, and, in consequence of the information so obtained, the jewels were discovered, held, that, under S. 27 of the Evidence Act, part of the accused's confession which described his assault on the deceased, and her consequent death, and the manner in which he became possessed of the jewels, distinctly related to the fact of the discovery of the ornaments and might be proved against the accused person. 19 W.R. (Cr.), 51 (52). **N**

- (c) Certain accused persons, arrested on a charge, gave information to the police which led to the discovery of the stolen property. The information was deposed to by a constable to the effect that the accused stated that they had stolen the property and sold it. Held that the confessions to the police were admissible in evidence, proof being confined to the statement of the constable that the accused told him that they had sold the stolen property. 6 A. 509 (514) (F.B.); *Mahmood, J., dissenting.* **O**

- (ā) Only so much of the information as distinctly leads to the discovery is admissible under S. 27 of the Evidence Act. A statement by the accused that he buried certain property in the field, where it was in consequence found, is admissible; but a statement that he had kept the property is inadmissible. 14 B. 260 (265) (F.B.), following 11 C. 635. **P**

- (e) The statement of an accused person that the property in question had been kept concealed by him in the place pointed out, though that statement was made while the accused was in police custody, and not in the immediate presence of a Magistrate, would be admissible

6. **“So much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered.”—(Continued.)**

evidence against him, as the part of the information used as evidence against the accused under S. 27 relates distinctly to the fact thereby discovered and does not go beyond it. 25 C. 413 (416)=2 C.W.N. 257. **Q**

(f) A Magistrate was held not to be in error in having recorded so much of the statement of an accused person to the police as led to the discovery of the stolen property in the case. 25 C. 413 (415). **R**

(g) Where an accused person charged with dacoity and murder made a confession and pointed out to the police a well in which some empty biscuit tins and condensed milk tins were found, held that the fact that the discovery was made in consequence of information received by the police from the accused was admissible and so much of the information given by the accused as led directly to such discovery would be admissible; but that a statement made by the accused to the police that the tins had been stolen by the dacoits was inadmissible, because such statement was not connected directly with the discovery and there was nothing else to connect the tins with the dacoity. 4 L.B.R. 244 (245). **S**

(h) The accused gave certain information to the police and this led to their being taken to the place indicated. On a search being made there, some property was discovered. Held, that the property was discovered in consequence of the information given by the accused, within the meaning of S. 27 of the Evidence Act and that so much of the information as distinctly related to the fact discovered could be proved, although it was given while the accused were in police custody and though they were present when the search caused by their information was made. 30 P.R. 1885 (Cr.). **T**

(i) In consequence of certain incriminating statements which an accused person was improperly induced to make by a promise of pardon and while in police custody, a witness proceeded to a certain place and made enquiries of certain persons. The accused objected to the evidence of this witness on the ground that, if evidence to the effect that anything was done in consequence of any part of the statements of the accused was admitted, it amounted to admitting part of such statements in evidence against the accused. Held, the circumstance that a relevant fact was discovered in consequence of information received from an accused person, if the discovery be itself a relevant fact, being capable of proof without adducing evidence of any portion of an inadmissible confession, the facts that the accused made a statement and that in consequence of it the witness went to a certain place and made enquiries from certain persons were relevant facts, provable against the accused. 34 P. R. 1894 (Cr.). **U**

(13) Information held inadmissible.

(a) Where, in consequence of information given to the police by the accused to the effect that he had stolen a cow and a calf and sold them to a particular person at a particular place, the animals were discovered, it was held that so much of the information as amounted to a confession of stealing was inadmissible in evidence. C A. 509; referred to in 10 B. 595. **Y**

6.—“*So much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered.*”—(Continued).

- (b) Where an accused person, charged with dishonestly receiving stolen property in the course of the police investigation, stated, in answer to a question by the police as to where the property was, that he had kept it and would show it, it was held that the statement that he had kept the property was not necessarily connected with the fact discovered—an earthen pot in which the property was kept and was disinterred by the accused on the spot—and was, therefore, inadmissible. 14 B. 260 (265). **W**
- (c) An accused person, while in the custody of the police, made a full confession, that he had murdered a boy, to the police and lambardars and offered to point out the spot where he had concealed the body. He subsequently took the police and lambardars to the place and exhumed the body himself, which was identified as that of the missing boy. *Held* that, the fact discovered being the boy's body lying buried in the place shown, and the information received from the accused (which related distinctly to that fact) being that the accused offered to show where the body lay buried, the information that the accused had killed the boy did not “distinctly relate” to the discovery of the body and was not admissible under S. 27 of the Evidence Act. 28 P. R. 1894, *following* 14 B. 260, and *referring* to 15 P. R. 1885 & 30 P. R. 1885 (Criminal). **X**
- (d) Evidence, taken on the record, of an accused person confessing to the robbery with which he was charged, when he made a statement alleged to have led to the discovery of something connected with the robbery, was held to be inadmissible beyond the matter relating to the discovery, as he was then in police custody. U.B.R. (Cr.) (1892—1896), 83 (84). **Y**
- (e) Where the Magistrate believed the witnesses, who deposed that the accused admitted the theft, and that the property was recovered in consequence of the admissions, but the judgment showed clearly that the identity of the *jowari* recovered with that stolen was not proved to the Magistrate's satisfaction, except by these admissions, *held*, that as the prisoners themselves produced the *jowari*, it was by their own act and not from any information given by them, that the discovery took place, and that so much of the information as amounted to a confession of stealing was inadmissible in evidence. Rat. Un. Cr.C. 285=10 B. 595, *referring* to 4 A. 198, 6 A. 509 (F.B.), 11 B.H.C.R. 242 & 3 B. 12; *overruled* by 14 B. 260; see, also, 25 C. 413 (416). **Z**
- (f) A statement by an accused person to the police that he had buried certain property is admissible, if the property had been discovered thereby. Further statements that the property was part of the produce of a robbery and that the accused was concerned in the murder committed in the robbery is not admissible. U.B.R. (1906), 3rd Quarter, Evidence, 3, *following* 11 C. 635. **A**
- (g) The only evidence against an accused was that, in consequence of information given by him, the second accused was questioned and produced the stolen property. The first accused was also said to have admitted the theft before the police. *Held*, that the evidence was too insufficient to justify the conviction of the first accused for theft; the confes-

6.—“So much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered.”—(Concluded).

sion was irrelevant as it did not lead directly to the recovery of the property. 3 M.L.T. 333. **B**

(h) Where an accused person made an admission on the faith of a promise made by the police-officer who was enquiring into the case that such person would get off provided he made a disclosure, held that, though S. 24 was applicable only to confessions which are distinguished in the Act from admissions, yet, reading it with S. 27, Evidence Act, and S. 120, Cr.P.C., 1872, it was inadmissible in evidence, except where the admission led to the discovery of some facts, and even then only so far as it related to the fact discovered by it. 8 P.R. 1892 (Cr.). **C**

(t) The production by an accused person, while in the hands of the police, of a thing unconnected with the commission of the crime is not admissible in evidence against him. 3 P. W. R. 1907 (Cr.). **D**

(14) Construction of the words “whether it amounts to a confession or not.”

The words in S. 27 of the Evidence Act “whether it amounts to a confession or not” are to be read as qualifying the word “information” in the immediately preceding context, not the words “so much;” and the effect is that, although ordinarily a confession of an accused person, while in custody, would be wholly excluded, yet if, in the course of such a confession, information leading to the discovery of a relevant fact has been given, so much of the information as distinctly led to this result may be deposed to, though, as a whole, the statement would constitute a confession which the preceding sections are intended to exclude. 11 B. H. C. R. 242 (245). **E**

7.—“May be proved.”

Reason for using term “proved” in section.

For the reason which induced the Legislature to use the term “irrelevant” in S. 24 of the Evidence Act,” and the expression “proved” in Ss. 25, 26 & 27, see 2 L. B. R. 168 at p. 174, per *Birks, J.*; cited under Ss. 24, 25 & 26, *supra* & 6 A. 509 (538), per *Mahmood, J.*, *dissentient*. **F**

28. If such a confession as is referred to in section 24 is made

Confession made after removal of impression caused by inducement, threat, or promise, relevant.

after the impression caused by any such inducement, threat, or promise, has, in the opinion of the Court, (1) been fully removed, (2) it is relevant⁽³⁾.

(Notes).

1.—“If such a confession as is referred to in S. 24—has, in the opinion of the Court.”

1.—GENERAL.

(1) S. 28 an exception to S. 24.

(a) S. 28 expressly forms an exception to the law provided by S. 24. 4 A. 198 (201), per *Stuart, C. J.* **G**

(b) When the Legislature wished to make an exception to the absolute rule in S. 24, it did so by a separate section, namely, S. 28, which declares

1.—“If such a confession as is referred to in S. 24—has, in the opinion of the Court.”—(Continued).

1.—GENERAL.—(Continued).

under what circumstances a confession rendered irrelevant by S. 24 may become relevant. 2 L.B.R. 168 (171). **H**

- (c) S. 28 is a qualification of S. 24, and its proper position in the Act should have been immediately after that section. 5 M.L.J. Art. p. 30 : see also 6 A. 509 (539), per *Mahmood, J.* **I**

(2) When illegally induced confession becomes relevant.

- (a) “A confession is deemed to be voluntary, if (in the opinion of the Judge) it is shown to have been made after the complete removal of the impression produced by any inducement, threat, or promise which would otherwise render it involuntary.” *Steph. Dig.*, 7th Ed., Art. 22, p. 31. **J**

- (b) Under S. 28 a confession, irrelevant under S. 24 loses its character of inadmissibility as evidence, when the inducement, threat or promise has been fully removed. 5 M.L.J. Art., p. 30. **K**

- (c) A confession made after the removal of the impression caused by the promise, threat, or inducement is admissible. 6 C.W.N. cxi. **L**

(3) Confession will become admissible, even where threat etc., have no influence.

Confessions are admissible in evidence, if they have been made under such circumstances as to create a reasonable presumption that the threat or promise had no influence, or had ceased to have any influence. *Ros. Cr. Ev.*, 13th Ed., p. 42. **M**

(4) Case where threat or promise was held as of no influence.

Where the question was whether the words used by a Subdivisional Magistrate, “it is of no use your trying to get out of it, you were seen with a pair of shoes,” to an accused person charged with criminal breach of trust were sufficient, under S. 21 of the Evidence Act, to invalidate his confession, held, though the language used, interpreting it most favourably to the accused, might be considered sufficient to overcome the mind of an uneducated and inexperienced boy, it was not sufficient to overcome the mind of a man of the age, experience, education, and position of the accused so as to induce him to make a confession which, he must have well-known, would, at the very least, have led to his expulsion from Government service, and, therefore, the confession was held not to be invalidated. *U.B.R. (Cr.) (1897—1901)*, 147 (149). **N**

(5) Rule in section a rule of relevancy.

S. 21 declares that confessions caused by inducement, threat, or promise are irrelevant, unless, as S. 28 provides, they are made after the impression caused by any such inducement, threat or promise, has been fully removed. The rule thus laid down is, speaking strictly, a rule of relevancy. 6 A. 509 (538), per *Mahmood, J.*, dissentient. **O**

(6) Discovery of material when confession falls under section.

In no case could confessions, obtained under the circumstances described in S. 24, be admitted in evidence, whether they led to discovery or not, unless indeed they fell under S. 28 of the Evidence Act, but then the

1.—“If such a confession as is referred to in S. 24—has, in the opinion of the Court.”—(Continued).

1.—GENERAL.—(Concluded).

question of discovery would be immaterial. A.W.N. (1882), p. 225, *per* Mahmood, J.; cited in 6 A. 509 (535). **P**

2.—TEST OF REMOVAL OF IMPRESSION CREATED BY INDUCEMENTS.

(1) Operation of inducement a question of fact to be decided upon the particular circumstances.

Whether a confession made to one person after an inducement by another had operated was held to be a question of fact to be decided upon the circumstances of the case. *Carty's Trial*, (1r.), 26 How. St. Tr. 889; Wigm. Ev., 705 Ed., S. 855, p. 986. **Q**

(2) Facts determining whether inducement ceased to operate.

(a) Whether or not an inducement has been fully removed will depend on the circumstances of each particular case taken as a whole, but principally upon such facts as, length of interval between the time of inducement and that of confession, the character of the person threatening, as well as of the confessing party, caution administered after the illegal pressure, and the like. 5 M.L.J. Art., p. 30. **R**

(b) In determining whether the inducement has ceased to operate, the nature of such inducement, the time and circumstances under which it was made, the situation of the person making it, the time intervening between inducement and confession, whether caution was given generally, specifically or expressly &c., &c., should be taken into consideration. 6 C.W.N. cccxxvi. **S**

(c) Where promises or threats have been once used of such a nature as to render a confession inadmissible, all subsequent admissions of the same or the like facts will be rejected, unless from the length of time intervening, from proper warning of the consequences, or from other circumstances, there be good reason to presume, that the delusive hope or fear which influenced the first confession has been effectually dispelled. Tay. Ev., 10th Ed., S. 878, p. 617. **T**

(d) Where the impression caused by the promise or threat is clearly proved to have been removed, viz., by lapse of time, by any intervening caution given by some person holding an authority superior, but not equal or inferior, to that of the person holding out the inducement, a confession subsequently made would be admissible in evidence. Phip Ev., 4th Ed., p. 246. **U**

(3) Individual capacities also to be taken into consideration.

The age, experience, intelligence, and character of the accused must be taken into consideration in appreciating the influence of inducements which will invalidate a confession. U. B. R. (1897—1901), Cr. 147 (149). **Y**

1.—“If such a confession as is referred to in S. 24—has, in the opinion of the Court.”—(Concluded).

3.—IN THE OPINION OF THE COURT.

(1) Whether inducement is fully removed is a question for Court.

(a) Where the Court is satisfied that the improper influence was totally done away before the confession was made, the confession will be admissible in evidence. *Tay. Ev.*, 10th Ed., S. 828, p. 618, referring to *R. v. Cheverton*, 2 F. & F. 833, (Where a confession made to one police-officer after improper inducement held out by another was held, upon the facts, to be admissible in evidence. *Wigm. Ev.*, '05 Ed., S. 855, p. 986.) **W**

(b) Whether or not the inducement, threat, or promise, which renders a confession inadmissible, has been fully removed, so as to make it relevant, is a question for the Court to consider. 5 M.L.J. Art. p. 30. **X**

(c) “It is for the Court to decide whether the improper influence was totally done away before the confession was made.” *Field. Ev.*, 6th Ed., p. 107. **Y**

(2) Case where Court was of opinion that impression was not fully removed.

A confession was made owing to an inducement held out by the police that nothing would happen, if the prisoner should confess. The prisoner repeated the confessions before the Magistrate and again before Sessions Judge who admitted both the confessions without recording any opinion on the point. *Spankie, J.* held that he was not prepared to say that the confession, made before the Sessions Judge, was made after the impression, created by the promise, had been fully removed. 5 N.W.P. 86; referred to in 6 A. 509 (537), per *Mahmood, J.* **Z**

2.—“Been fully removed.”

(1) Instances where impression held fully removed and confession held admissible.

(a) Where a police constable deposed that he questioned an accused person, charged with murder, and told him to tell the truth, that the accused produced the knife and said it was the weapon used in the murder, and that he said that he had thrown certain ornaments worn by the deceased into the jungle and would point them out in the morning which he did, it was observed by *Stuart, C.J.*, “Now all these statements, except as proving a confession of the murder, I hold to be admissible and relevant, not only under S. 27 of the Evidence Act, but also under S. 28, which expressly forms an exception to the law provided by S. 24.” 4 A. 198 (201). **A**

(b) Where a prisoner had been duly cautioned by a Magistrate in pursuance of 11 & 12, Vict. C. 42, S. 18, anything then said by the prisoner is evidence against him, although there might have been a previous promise or threat held out. *R. v. Bate*, 11 Cox. C. C. 686; *Tay. Ev.*, 10th Ed., S. 878, p. 618; *Ros. Cr. Ev.*, 13th Ed., p. 42. **B**

(c) A caution by a Magistrate was deemed to be sufficient in fact to dispel previous hopes. *Berigan's Case*, 1 (Ir.), Cir. R. 177; *Wigm. Ev.*, '05 Ed., S. 855, p. 986. **C**

(d) The caution given by a Magistrate, was held, on the facts, to be sufficient to render a confession subsequently made admissible in evidence, *R. v. Bryan*, *Jebb. C. C.* 157, (Ir.) *Wigm. Ev.*, '05 Ed., S. 855, p. 986. **D**

2.—“*Been fully removed.*”—(Continued).

- (e) Where a Magistrate told an accused person that, if he would confess, he would use his influence to obtain a pardon for him, but afterwards receiving a letter from the Secretary of State that no pardon could be granted, communicated the same to the accused, it was held that a confession, subsequently made, was admissible in evidence. *R. v. Clewes*, 4 C. & P. 221; Steph. Dig., 7th Ed., Art. 22, p. 32; Phip. Ev., 4th Ed., p. 250; Ros. Cr. Ev., 13th Ed., p. 42; Wigm. Ev., 1905 Ed., S. 855, p. 986; Tay. Ev., 10th Ed., S. 878, p. 618. **E**
- (f) Where an accused person had been induced by promises of favour to make a confession, which was for that reason rejected, but some months afterwards, and after he had been solemnly cautioned by more than one Magistrate that he must expect death and prepare to meet it, again fully admitted his guilt, the second confession was held to be admissible in evidence. *Guild's case*, 5 Halst. 168 (Am.); Tay. Ev., 10th Ed., S. 878, p. 618. **F**
- (g) An inducement by a constable was held to be removed by a Magistrate's caution. *R. v. Horner*, 1 Cox. C. C. 364; Wigm., Ev., '05 Ed., S. 855, p. 986. **G**
- (h) Where a constable promised an acquittal if the accused should make a confession, but the accused was afterwards cautioned by a Magistrate not to say anything against himself as his confession would do him no good, it was held that the confession afterwards made would be admissible in evidence as a voluntary confession. *R. v. Howes*, 6 C. & P. 404; Tay. Ev., 10th Ed., S. 878, p. 618; Ros. Cr. Ev., 13th Ed., p. 42; Wigm. Ev., '05 Ed., S. 855, p. 986; & Phip., Ev., 4th Ed., p. 250. **H**
- (i) Where a person, who assisted a constable in arresting an accused person, told him that it would be better for him to confess, but the Magistrate, on the day following, before the accused made any statement, cautioned him “to stay nothing against himself,” confession subsequently made was held to be admissible in evidence. *R. v. Lिंगate*, 1 Phil. & Arn. Ev., 10th Ed., p. 214; Phip. Ev., 4th Ed., p. 250. **I**
- (j) A girl, accused of poisoning, was told by her mistress that, if she did not tell all about it that night, a constable would be sent for next morning to take her before the Magistrate (and the statement made by the girl upon which was rejected); but, the next morning, a constable being sent for, who took the prisoner into custody, on the way to the Magistrate and without any inducement from the constable, she confessed to him, *held*, that the statement was admissible in evidence, as the inducement, that, if she confessed that night, the constable would not be sent for and she would not be taken before the Magistrate, was, by necessary implication, destroyed by the arrest. *R. v. Richards*, 5 C. & P. 318; Phip. Ev., 4th Ed., p. 251; Ros. Cr. Ev., 13th Ed., p. 43; Wigm. Ev., '05 Ed., S. 855, p. 986. **J**
- (k) A constable told a prisoner that it would be better for him to confess; but the prisoner afterwards asked the Magistrate whether it was so, to which the Magistrate replied that he would not say that it was. A confession subsequently made by the prisoner was held to be admissible in evidence. *R. v. Rosier*, 1 Phil. & Arn. Ev., 10th Ed., p. 414; Phip., Ev., 4th Ed., p. 250. **K**

2.—“*Been fully removed.*”—(Continued).

- (l) Where hopes were held out by an unauthorised bystander and a confession was subsequently made to a constable the confession was held to be admissible in evidence. *R. v. Tyler*, 1 C. & P. 129; Wigm. Ev., '05 Ed., S. 855, p. 986. **L**
- (2) **Instances of impression held not removed and confession held inadmissible.**
- (a) Where a promise of safety was made by a police officer, to whom the accused confessed, which confession was also repeated before the committing Magistrate, and the accused also made a confession, but slightly different, before the Sessions Judge, *held*, that the confession 'before the Magistrate was irrelevant, and that the Court was not prepared to hold that the confession before the Court of Sessions was made after the impressions caused by the promise of the police officer had been fully removed. 5 N.W.P. 86. **M**
- (b) A booking-clerk of a Railway Company was charged with criminal breach of trust. A travelling auditor of the Railway Company told the accused in his private lodgings that he had better pay the money than go to jail and that it would be better for him to tell the truth. Immediately after, he was taken to the Traffic Manager of the Railway, before whom he signed a receipt for the amount, with the misappropriation of which he was charged. *Held*, it would be impossible to hold that the impression had been effaced in the short interval which elapsed between the conversation at the prisoner's house and the signing of the receipt. 9 Bom. H.C.R. 358 (370). *Per Sargent*, C.J. **N**
- (c) A confession made to one Magistrate after menaces and promises by another Magistrate was held to be inadmissible in evidence. *R. v. Bell*, Mac Nally Ev., (Ir.), 43; Wigm. Ev., '05 Ed., S. 855, p. 986. **O**
- (d) Where, a Magistrate having told a prisoner that, if the latter would confess he would do all he could for him, the prisoner subsequently confessed to a turnkey, who did not caution him, the confession was held to be inadmissible. *R. v. Cooper*, 5 C. & P. 535; Phip. Ev., 4th Ed., p. 251; Ros. Cr. Ev., 13th Ed., p. 43; Wigm. Ev., 1905 Ed., S. 855, p. 986. **P**
- (e) Where a constable told a prisoner in the morning that it would be better to tell the truth and in the evening another constable cautioned him that anything he might say would be used against him, a confession subsequently made was held to be inadmissible. *R. v. Doherty*, 13 Cox, 23; Phip. Ev., 4th Ed., p. 251; Tay. Ev., 10th Ed., S. 878, p. 618. **Q**
- (f) The wife of a prosecutor told an accused person that she would forgive her, if she told the truth. The prisoner was then taken before a Magistrate, but was discharged without having confessed. She was afterwards re-arrested, when the Superintendent of Police told her, in the presence of her mistress, that she was not bound to say anything and that, if she had anything to say, her mistress would hear her, not knowing that her mistress had promised to forgive her. Her confession subsequently made was held to be inadmissible in evidence as the promise of the mistress must be regarded as still operating on the accused's mind, at the time of her confession, especially as the

2.—“*Been fully removed.*”—(Concluded).

interval was so short, but that, if the mistress had not been present, it might have been otherwise. *R. v. Hewett*, 1 Car. & M. 534; Phip., Ev., 4th Ed., p. 251; Ros. Cr. Ev., 13th Ed., p. 44; Wigm. Ev., '05 Ed., S. 855, p. 986. R

- (g) A, charged with the murder of B's child, having been asked by B whether he had anything to do with the disappearance of the child, cried and said, “If you won't send for the police, I will tell the truth.” On B. promising to that effect, A confessed. A afterwards repeated the confession to a neighbour of B's, who took A into a room and questioned her. It was held that the first confession was inadmissible in evidence, and that the second was so connected with the first as to be also inadmissible, although the neighbour was not a person in authority and held out no inducement. *R. V. Rue*, 34 L.T. 400 Phip. Ev., 4th Ed., p. 251. S

- (h) A second confession was rejected by *Patterson, J.*, observing, “There ought to be strong evidence to show that the impression, under which the first confession was made, was afterwards removed, before the second confession can be received; the interval of time being too short to allow of the supposition that it was the result of reflection and voluntary determination.” *R. v. Sherrington*, 2 Lewin, C. C. 123; Ros. Cr. Ev., 13th Ed., p. 43 & Wigm. Ev., '05 Ed., S. 855, p. 936. T

- (i) A constable told a prisoner that it would be better to confess. The prisoner made a statement which was afterwards taken down in the constable's deposition and read over to the prisoner in the presence of a Magistrate. Before the prisoner had made any answer, the Magistrate cautioned him not to say anything to injure himself, as it would be taken down and used against him. The prisoner then said, “what I have stated before is true”; held, that the confession was inadmissible, as the Magistrate, by not cautioning the prisoner that he should not rely on the constable's promise, had tacitly sanctioned it, and the prisoner might have believed that the second confession would not affect him. *R. v. Smith*, cited 3 Russ. Cr. 6th Ed., p. 498: Phip. Ev., 4th Ed., p. 250. U

3.—“*It is relevant.*”**Reason for using term “relevant” in section.**

For the reason which induced the Legislature to use the expression ‘relevant’ in S. 28, as contrasted with the use of the expression ‘proved’ in Ss. 25, 26 and 27. See 2 L.B.R. 169 (174) and 6 A. 509 (538), *per Mahmood, J.*, dissentient. Y

29. If such a confession is otherwise relevant,⁽¹⁾ it does not become irrelevant⁽²⁾ merely because it was made under a promise of secrecy,⁽³⁾ or in consequence of a deception practised on the accused person for the purpose of obtaining it,⁽⁴⁾ or when he was drunk,⁽⁵⁾ or because it was made in answer to

Confession otherwise relevant not to become irrelevant because of promise of secrecy, &c.

questions which he need not have answered, whatever may have

been the form of those questions,⁽⁶⁾ or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.⁽⁷⁾

(Notes).

1.—“If such a confession is otherwise relevant.”

1.—GENERAL.

(1) Scope of section.

A confession is relevant, if made under a deception or artifice; obtained when the accused was drunk; or made in answer to questions that the accused need not have answered; or when he was not warned that he was not bound to make such a confession. 6 C.W.N. cexi. **W**

(2) Test of admissibility where inducement is alleged.

The test in all the cases is, “Was the inducement sufficient, by possibility, to elicit an untrue acknowledgment of guilt? Wigm. Ev., 1805 Ev., S. 824, p. 935. **X**

(3) Inducement referring to collateral advantages.

If the inducement only refers to other collateral advantages, or be held out by a person, whose interference is altogether officious, the confession will be admissible in evidence. *R. v. Taylor*, 8 C. & P. 733. See, also, under S. 24, *supra*, pp. 348 to 351. **Y**

2.—CONFESSION.

(1) Statement to be taken as a whole.

(a) It was held that a statement made by the prisoner before a Sub-Inspector must be taken in its integrity; if any portion of his statement is to be used against him, the whole of that statement must be taken together. 9 W.R. (Cr.), 16 (17): See, also, under Ss. 17 and 24 for some more rulings on the point, pp. 204, 327 and 328. **Z**

(b) As the meaning of a writing must, in civil cases, be collected from the whole taken together, and as, when several instruments relating to the same matter have been executed at one time, they are all resorted to for the purpose of ascertaining the intention of the parties; so, if one part of a conversation is relied on as proof of a confession of the crime, the prisoner has a right to lay before the Court the whole of what was said, in that conversation, or, at least, so much as is explanatory of the part already proved. *The Queen's case*, 2 B. and B. 287, H.L. **A**

(c) Where a prisoner charged with murder stated that he was present when the murder was committed, but did not participate in it, the judge directed the jury that this statement must be taken all together, and was evidence for the prisoner as well as against him, and that they might, still, if they thought proper, believe one part of it and disbelieve another. *R. v. Clewes*, 4 C. and P. 225. **B**

1.—“If such a confession is otherwise relevant.”—(Continued).

2.—CONFESSION.—(Continued).

(2) Sufficiency for conviction of uncorroborated extra-judicial confessions.

“Whether, on ordinary indictments for felony or misdemeanour, extra-judicial confessions, uncorroborated by any other proof of the *corpus delicti*, are, of themselves, in general, sufficient to justify the conviction of a prisoner, has been gravely doubted.” Tay. Ev., 10th Ed., S. 868. pp. 609, 610. **C**

(3) Force and effect of admissible extra-judicial confessions.

(a) With reference to the force and effect of extra-judicial confessions, when receivable, it has now been settled in England, that, at least, where there is proof *aliunde* of a *corpus delicti*, a full and free confession of the accused is sufficient, without any confirmation whatever, to warrant a conviction. *R. v. Lambe*, 2 Leach 552. **D**

(b) When the proof of the *corpus delicti* is imperfect, the statement of the accused may be taken to complete it. *R. v. Eldridge*, R. & R. C. C. 440. **E**

(4) *Corpus delicti* not proved—Confession whether sufficient for conviction.

“In the United States, a prisoner’s confession, when the *corpus delicti* is not otherwise proved, has been held insufficient to warrant his conviction, and this opinion certainly accords with the humanity of the criminal law, with the great degree of caution applied in receiving and weighing the evidence of confessions in other cases, and is countenanced by approved writers on this branch of the law.” Tay. Ev., 10th Ed., S. 868, p. 610, referring to *Guild’s case*, 5 Halst. 168, 185 (Am.); *Lony’s case*, 1 Hayw. 524 (Am.) & *R. v. Edgar*, cited 2 Russ. C. & M. 255, 826 n. b. **F**

(5) Cases where some circumstances corroborate extra-judicial confessions.

(a) Where a prisoner, who confessed, was indicted for horse-stealing, the horse was found in his possession, and he had sold it for £. 12, after asking £. 35, which was its fair value. (Confessions were solemnly made before Magistrate and taken down in due form). *R. v. Eldridge*, R. & R. 440, Tay. Ev., 10th Ed., S. 868, p. 610. **G**

(b) Where a person robbed was called upon his recognisance, it was proved that one of the prisoners, who confessed, had endeavoured to send a message to him to keep him from appearing. (Confessions were repeated once to the officer who apprehended the prisoners and again on hearing the depositions read over which contained the charge). *R. v. Falkner & Bond*, R. & R. 481; Tay. Ev., 10th Ed., S. 868, p. 610. **H**

(c) In this case, there was strong circumstantial evidence both of the larceny from the prosecutor’s stable, and of the prisoner’s guilt. (Confessions solemnly made and duly taken down). *R. v. White* R. & R. 508; Tay. Ev., 16th Ed., S. 868, p. 610. **I**

(p) In the case of another prisoner, who was indicted for the same larceny, part of this evidence was also given, together with the additional proof that such prisoner was an under-ostler in the same stable. (Confessions solemnly made before Magistrate and duly taken down). *R. v. Tippet*, R. & R. 509; Tay. Ev., 10th Ed., S. 868, p. 610. **J**

1.—“If such a confession is otherwise relevant.”—(Concluded).

2.—CONFESSION.—(Concluded).

(6) Retracted confession requires corroboration.

A retracted confession must be supported by independent reliable evidence corroborating it in material particulars. 12 M. 123 = 2 Weir, 376; see, also, 2 Weir 509. See, also, under S. 24, *supra*, pp. 354 to 361. **K**

(7) Confessions made in police custody.

(a) Where a confession, deposed before the Panch, was made while the accused was in police custody, it was held to be inadmissible in evidence, as the Legislature, choosing the lesser of two evils, has excluded confessions taken under such circumstances. 6 B. 288 (291). See, also, under S. 26, *supra*, pp. 415-6. **L**

(b) Where the accused were, at the time they confessed, in police custody, under S. 26 of the Evidence Act, no confessions then made by them can be proved against them, unless made in the immediate presence of the Magistrate. 10 O.C. 112 (115). **M**

(8) Relevancy of statements, made in lawful judicial proceedings, in other legal proceedings.

The statements made by a person in a lawful judicial proceeding may be admitted in evidence against him in other legal proceedings. *R. v. Chidley*, 8 Cox. C. C. 365; Ros. Cr. Ev., 13th Ed., p. 45. **N**

3.—OTHERWISE RELEVANT.

(1) Confession that is fake on a material point.

A confession, which contains a false statement on a material point, does not become inadmissible in evidence, merely for that reason. 3 A. W. N. 148. **O**

(2) Inadmissible confession might be admissible for other purposes.

A confession, which might be inadmissible for the purpose of proving against an accused person to establish an offence, would, yet, for other purposes be admissible, as an admission under S. 18 against the person who made it (S. 21) in his character of one setting up an interest in property, the object of litigation or judicial enquiry, for example, in an enquiry held by a Magistrate under S. 523, Cr. P. C., 1882. 9 B. 131 (134). **P**

(3) Relevancy of document not amounting to confession.

Where the contents of a document did not amount to a confession, it was observed that the document itself could be relevant as an admission under S. 21 of the Evidence Act. 15 C. 595. **Q**

2.—“It does not become irrelevant.”

Reason for term “irrelevant” being used in section as distinct from “proved” in Ss. 25, 26 and 27.

For the reason that induced the Legislature to use the terms “relevant” and “irrelevant” in Ss. 24, 28 and 29, as distinguished from the term “proved” used in Ss. 25, 26 and 27, see 6 A. 509 (538), per *Mahmood, J.*, dissentient; and 2 L.B.R. 168 (174), per *Birks, J.* **R**

3.—“Merely because it was made under a promise of secrecy.”

(1) Confession made under promise of secrecy admissible.

- (a) A confession obtained from the accused by a promise of secrecy will not be excluded. *R. v. Shaw*, 6 C. & P. 372; *Philp. Ev.*, 4th Ed., p. 244; *Ros. Cr. Ev.*, 13th Ed., p. 44; *Tay. Ev.*, 10th Ed., S. 881, p. 620; See, also, *Com. v. Knapp*, 9 Pick. 507 (Am.) **S**
- (b) Where a prisoner, after a committal, said to another prisoner, “I wish you would tell me how you murdered the boy, pray split,” and the other replied, “will you be on your oath not to mention what I tell you?” and the former made the oath, a statement thereupon made by the latter was admitted in evidence. *Ibid.* See, also, 8 Bom. L. R. 507 (512), *infra.* **T**

4.—“Or in consequence of a deception practised on the accused person for the purpose of obtaining it.”

(1) General principle.

- (a) “Since the exclusion of confessions is not due to any principle of public faith or of private pledge of secrecy, it follows that the use of a *trick* or *fraud* (however reprehensible in itself) does not of itself exclude a confession induced by means of it. So far as the trick involved a promise which would tend to produce an untrue confession, it would operate to exclude,—not, however, because it was a trick (*i.e.*, because the representations were false)—but because, even if true, its tenor would have stimulated a confession irrespective of guilt.” *Wigm. Ev.*, ‘05 Ed., S. 841, p. 957. **U**
- (b) “Where a confession has been obtained by artifice or deception, but without the use of promises or threats, it is admissible.” *Ros. Cr. Ev.*, 13th Ed., p. 44. **Y**
- (c) Where a confession is obtained from an accused person by false representations made to, or deception practised upon him it will not be inadmissible in evidence. *R. v. Burley*, 2 Stark. Ev., 3rd Ed., 13n & *R. v. Derrington*, 2 C. & P. 418; *Philp. Ev.* 4th Ed. p. 244; *Tay. Ev.* 10th Ed., S. 881, p. 620—1; *Ros. Cr. Ev.*, 13th Ed., p. 44; *Wigm. Ev.*, 1905 Ed., S. 834, p. 950. **W**

(2) Statement overheard by policemen and third persons admissible.

- (a) The evidence of a policeman who overheard a prisoner's statement made in another room, and in ignorance of the policeman's vicinity, and uninfluenced by it, is not legally inadmissible. 7 W.R. (Cr.) 56. **X**
- (b) A person, charged with an offence and while in prison, made a confession to a fellow prisoner. The police overheard it by means of a hole bored in the wall. *Held*, though with hesitation, that the confession was admissible in evidence. *R. v. Boughton*, 70 J. P. Rep. 508; *Philp. Ev.*, 4th Ed., p. 252. **Y**
- (c) Where an accused person is overheard muttering something to himself, or saying something to his wife or to any other person in confidence, that statement is admissible in evidence. *R. v. Simons*, 6 C. & P. 541; *Tay. Ev.*, 10th Ed., S. 881, p. 621; *Philp. Ev.*, 4th Ed., p. 246; *Wigm. Ev.*, ‘05 Ed., S. 2339, p. 8268; See, also, 22 M. 1 (4). **Z**

4.—“Or in consequence of a deception practised on the accused person for the purpose of obtaining it.”—(Concluded).

(3) Confession induced by false representations admissible.

- (a) Where a police officer caused the accused to make a confession before the Magistrate by falsely stating that the accused's brother-in-law had given out that he was guilty, it was held that the confession was admissible. 20 W.R. (Cr.), 33. **A**
- (b) A constable in the gaol represented to a prisoner that his accomplice had been taken into custody, which was not the truth. The prisoner thereupon made a confession. He denied all knowledge of the case, when, afterwards, he was cited as a witness for the prosecution. His confession was admitted in evidence against him, when he was subsequently tried for the offence himself. *R. v. Burley*, 2 Stark. Ev. 13 n; Tay. Ev., 10th Ed., S., 881, p. 620-1. **B**

(4) Confessions induced by a promise, subsequently violated, admissible.

- (a) Where a confession was obtained from an accused person by the commissioned officer of his regiment, who stated to the accused that he had already obtained information from another person and promised secrecy if the truth were told, it was held that the alleged deception and inducement appeared to be covered by the provisions of S. 29 of the Evidence Act. 8 Bom. L. R. 507 (512). **C**
- (b) Where a turnkey promised to post a letter, containing a confession given him by a prisoner and addressed to the prisoner's father, but violated his promise by sending it on to the prosecutor, the confession was held to be voluntary and the manner in which it came into the prosecutor's possession was held to be immaterial. *R. v. Derrington*, 2 C. & P. 418; Tay. Ev., 10th Ed., S. 881, p. 620; Wign. Ev., 1905 Ev., S. 841, p. 957; Phip. Ev., 4th Ed., p. 244; Ros. Cr. Ev., 13th Ed., p. 44. **D**
- (c) Where a witness promised that what a prisoner said should go no further, having previously told him, when he asked if he should confess, that he had better not, a confession subsequently made by the prisoner was held to be admissible in evidence, Coleridge, J., observing that the tendency of what had passed here was to make the confession true. *R. v. Thomas*, 7 C. & P. 345. Ros. Cr. Ev., 13th Ed., p. 44; see, also, 9 B. H.C.R. 358 (367). **E**

5.—“Or when he was drunk.”

(1) Principle governing confessions made under intoxication.

“Confessions made while in a state of intoxication are governed by the general principle of testimonial capacity (e.g., capacity of observation, capacity of recollection, capacity of intelligent and truthful narration etc.), and, are, therefore, usually held admissible. It is only where the intoxication is produced by a person desirous of obtaining a confession that its trustworthiness becomes really doubtful. (So, too, of a confession made during sleep or hypnotic influence)”. Wign. Ev., 05 Ed, S. 841, p. 957. **F**

(2) Mere fact of intoxication will not exclude confession.

A confession must be judged with reference to the time of its utterance, and the mere fact of intoxication at the time does not of itself exclude the confession. *Vaughan's Trial*, 13 How. St. Tr. 507; Wign. Ev., 05 Ed., S. 499, p. 636. **G**

5.—“Or when he was drunk.”—(Concluded).

(3) Confession obtained by making accused drunk for the purpose.

A confession that is obtained from an accused person by his having been made drunk for the purpose will be admissible in evidence. *R. v. Spilsbury*, 7 C. & P. 187; Phip. Ev., 4th Ed., p. 245; Tay. Ev., 10th Ed. S. 881, p. 620. Ros. Cr. Ev., 13th Ed., p. 44; Wig. Ev., 1905. Ed. S. 499, *p. 636. H

6.—“Or because it was made in answer to questions which he need not have answered, whatever may be the form of those questions.”

1.—CONFESSIONS ELICITED BY QUESTIONS.

(1) Confession elicited by question—English and Indian Law.—S. 132, Evidence Act.

“A confession elicited by questions put by a Magistrate has been held admissible in England (see *R. v. Ellis*, R. & M. 432, Phip. Ev., 4th Ed., p. 245). In India, the law expressly provides for the examination of the accused person by the Magistrate. Where the confession is contained in an answer given by a witness to a question put to him in the witness box, the provisions contained in S. 132 *post*, must be borne in mind.” Field Ev., 6th Ed., p. 108; for *R. v. Ellis*, see, also, Rat., Unrep. Cr. C. 679 (680). See, also, the case in Ratnalandat p. 679.

(2) Confessions elicited by questions held admissible. I

(a) Where an accused person is made to confess by means of questions which he need not have answered, put to him by a private person, (*R. v. Wild*, 1 Moo C.C. 452), or by a Magistrate, (*R. v. Rees*, 7 C. & P. 568, *R. v. Bartlett*, 7 C. & P. 832, & *R. v. Ellis*, 6 B. & C. 145), that confession will be admissible in evidence. Phip. Ev., 4th Ed., p. 245. J

(b) A confession obtained from an accused person by questions, which he need not have answered, having been put to him by the police before arrest (*R. v. Dougal*, 67 J.P. 325 & *R. v. Kershaw*, 18 T.L.R. 357), or even when in custody, provided there was no promise or threat, though such a practice is highly improper, *R. v. Thornton*, 1 Moo.C.C. 27; *R. v. Kerr*, 8 C. & P. 176 & the other cases there cited), will be admissible in evidence. See Phip. Ev., 4th Ed., p. 245. K

(c) It being impossible to discover the facts of a crime without putting questions, where the questions were properly put after due warning, the prisoner's answers were held to be admissible in evidence, as every case must be decided with reference to the whole of its circumstances and as the prisoner was not in custody when interrogated. *R. v. Miller*, 18 Cox. C.C. 54; per *Hawkins*; J. Ros. Cr. Ev., 13th Ed., p. 45; Phip. Ev., 4th Ed., p. 245. L

(d) Where a confession is elicited by questions put by a person in authority, it is admissible in evidence. (The question here were put by a constable to a boy, fourteen years of age, under circumstances of considerable harshness. The Court thought the confession good, as there was no threat or promise). *R. v. Thornton*, 1 Moo. C.C. 27; Ros. Cr. Ev., 13th Ed., p. 44. M

6.—“Or because it was made in answer to questions which he need not have answered, whatever may be the form of those questions.”—(Continued).

1.—CONFESSIONS ELICITED BY QUESTIONS.—(Continued).

- (e) Statements made to a constable by a prisoner were held to be admissible in evidence, though they were made in answer to questions put by constable. *R. v. Brackenbury*, 17 Cox. C.C. 628, dissenting from *It. v. Gavin*, 15 Cox. C.C. 656; Ros. Cr. Ev., 13th Ed., p. 44-5. **N**
- (f) It might not be in some cases improper for a policeman to interrogate a prisoner, though the practice is generally condemned. *R. v. Kerr*, 8 C. & P. 176; Ros. Cr. Ev., 13th Ed., p. 44. **O**

(3) Such confessions held inadmissible.

- (a) Admissions elicited by the questions of a police constable who read over to the prisoner the statement of a fellow prisoner incriminating them and himself were held to be inadmissible in evidence, the Court observing that this was in the nature of a cross examination, but, before the prisoner is charged or is in custody he may be asked what he has to say in explanation, or in answer. *R. v. Gavin*, 15 Cox. C. C. 656; per *A. L. Smith J*; dissented from in *R. v. Brackenbury*, 17 Cox. C.C. 628; Ros. Cr. Ev., 13th Ed., p. 44. **P**
- (b) Where an accused person was examined about a confession which was not admissible in evidence as having been induced by the police, it was held that it could not be said that these questions and the answers to them were duly recorded, for the questions were such as were not allowed by the law to be put, and that the answers to those questions as well as the confession which was admitted in evidence by the Sessions Judge through the medium of those answers, were not admissible in evidence against the accused. 4 L.B.R. 244 (245). **Q**
- (c) An accused person should not be asked questions of an incriminating character, which is highly improper, and a confession so obtained is inadmissible. *Weir* 822; see 6 C.W.N. ccxx. **R**
- (d) “It would be monstrous if the law permitted a police officer to go, without any one being present to see how the matter was conducted, and put a prisoner through an examination and then produce the effect of that examination against him. A policeman is not to discourage a statement, and certainly not to encourage one. It is no business of his to put questions.” What the prisoner said in answer to such questions was held to be inadmissible in evidence. *It. v. Male*, 17 Cox. C. C. 683, per *Cave, J*; carefully qualified by *Rogers v. Hawkins*, 19 Cox. C. C. 124; Ros. Cr. Ev., 13th Ed., p. 45. **S**

(4) Admissibility of answers to questions depends upon the circumstances of each case.

The admissibility of answers to questions put by the police before arrest to a person to find out whether or not an offence has been committed by him must depend upon the circumstances of each case. *Rogers v. Hawkins*, 67 L.J.Q.B. 526; Tay. Ev., 10th Ed., S. 881, p. 622. **T**

6.—“*Or because it was made in answer to questions which he need not have answered, whatever may be the form of those questions.*”—(Continued).

2.—CONFESSIONS TO MAGISTRATES.

(1) Judicial record of special circumstances necessary for credibility of recorded confessions.

- To give weight to confessions of prisoners recorded under S. 149, Crim. Pro. Code, 1861, there should be a judicial record of the special circumstances under which such confessions were received by the Magistrate, showing in whose custody the prisoners were, and how far they were quite free agents. 5 W.R. Cr. 6. U

(2) Duty of a Magistrate before recording confessions.

It is the imperative duty of a Magistrate before recording a confession, to carefully examine the accused person and, to the best of his ability, ascertain that he is not wishing to speak owing to any inducement, threat, or promise, but that his confession is purely voluntary. The omission of the Magistrate to question the accused, before recording the confession, is a fatal defect that renders the confession inadmissible in evidence. 3 L.B.R. 213-4 Cr. L.J. 385; see, also, under S. 24, *supra*, pp. 361 to 378. Y

(3) Magistrate not to certify confession days after, but at the time, it is made.

- (a) It is not permissible for a Magistrate, after a statement of a person has once gone out of his hands, to attach to it, several days afterwards, the certificate that it was voluntarily made. To enable him to do so, he must either depend solely upon his own memory or have his memory refreshed by the impression of some one else, perhaps by a police-officer, who was present at the time the statement was taken down. This is unsatisfactory. 6 B. 288 (291). W

- (b) A confession, upon which the necessary certificate is not recorded at the time, or at any rate, on the day the confession was reduced to writing, is bad, and cannot be admitted in evidence. 6 B. 288 (291). X

(4) Ss. 164 and 364, Cr. P.C., 1882—Language in which confessions should be recorded.

The provisions of S. 164 read with S. 361 are imperative as to the language in which a confession is to be recorded and S. 533 does not contemplate or provide for any non-compliance with the law in this respect. Under Ss. 164 and 364, the confession is to be recorded in the language in which it was made, or, if that is not practicable, in the language of the Court or English. It would be for the prosecution to establish the impracticability if any existed. When there is none, the record is inadmissible. 17 C. 862 (870). See, also, under S. 24, *supra*, pp. 365 to 368. Y

(5) Duty of Magistrate recording confession where accused has been in police custody.

Where the confessing accused had been for ten days in detention by the police, the first question which a Magistrate recording the confession under S. 164, Crim. Pro. Code, should put in order to satisfy himself that the confession will be a voluntary one, is “how long has the

6.—“*Or because it was made in answer to questions which he need not have answered, whatever may be the form of those questions.*”—(Continued).

2.—CONFESSIONS TO MAGISTRATES.—(Continued).

accused been in the custody of the police?”; and, where there is no record of the questioning, it is the duty of the Sessions Judge, before holding the confession to be relevant under S. 24 of the Evidence Act, to have sent for the Magistrate and satisfied himself on the point. 25 B. 543 (546), see, also, Bombay Government Resolution, Judicial Department, No. 1333, 27th February 1886. **Z**

(6) Confession presumed to be improperly induced from long custody of accused.

An accused person, charged with murder, made a confession before a first class Magistrate, which he subsequently retracted during the preliminary enquiry before the Committing Magistrate. The Committing Magistrate, in the committal proceedings, did not formally examine the accused or ask him to explain the circumstances of the confession. *Held*, upon the facts of the case and the natural inferences from them, that the length of time during which the accused was in custody made it unreasonable to suppose that no pressure was put upon him and that it was irrelevant as being improperly induced. 25 B. 543 (547) = 3 Bom. L.R. 122 (125) **A**

(7) Judicial nature of making a memorandum

The making of such a memorandum as is required by the law (see S. 122, Crim. Pro. Code, 1872) is a judicial, or, at least, a quasi-judicial act. A good many acts of a ministerial nature may properly be performed not precisely at the time contemplated when they are of a kind leading up to, or following, judicial functions; but when those latter are performed, the necessary formalities should be promptly and strictly gone through. 6 B. 288 (291). **B**

(8) Operation of S. 80 of the Evidence Act.

(a) When a confession has been duly recorded in accordance with the provisions of Ss. 164 and 364, Crim. Pro. Code, and is produced before a Court, S. 80 of the Evidence Act provides that it may be presumed that the document is genuine, that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true and that such confession was duly taken. 10 O.C. 112 (115). **C**

(b) Where it could not be presumed without some evidence that the statements made by an accused person before a Magistrate had to be recorded in English as they could not be recorded in the language in which they were made, there was held to be no justification for their being recorded in English, and it was held that no presumption under S. 80 of the Evidence Act could be made in respect of the record made in English; and, as no evidence was taken to prove that the accused had actually made those statements, the Sessions Judge was held to be wrong in admitting such a record of the statements against the accused. 10 O.C. 112 = 6 Cr. L.J. 94. **D**

6.—“*Or because it was made in answer to questions which he need not have answered, whatever may be the form of those questions.*”—(Continued).

2.—CONFESSIONS TO MAGISTRATES.—(Continued).

(9) Effect of properly attested confessions before Magistrate.

The properly attested confessions of prisoners before a Magistrate are sufficient for their conviction without corroborative evidence, and notwithstanding a subsequent denial before the Sessions Court. 12 W.R. (Cr.) 49. **E**

(10) Examination of accused, object of.

The examination of an accused person is for the purpose of enabling him to explain any circumstances appearing in evidence against him and not for the purpose of filling up a gap for the prosecution. 4 L.B.R. 244 (245). **F**

(11) Confessions recorded in disregard of all legal formalities.

It is not proper to admit as evidence against the accused an examination which appears to have been recorded with utter disregard of the forms prescribed by law. 7 W.R. (Cr.), 49 (50). **G**

(12) Objection regarding non-observance of legal formalities is not technical objection.

It is obviously necessary that, before you can criminate a man upon his own statement under examination, you should be satisfied that such statement has been deliberately made and recorded; that, after being recorded, it has been shown or read to the accused, so that he might be assured that his words have been correctly taken down; and it is proper that those important circumstances should be attested by the signature of the Magistrate following the certificate which is to be given under his own hand. 7 W.R. (Cr.), 49 (50). **H**

(13) Oral evidence to prove inadmissible confession.

Where a confession taken down under S. 122, Cr. P.C., 1872, is inadmissible in evidence, owing to the non-observance of the required formalities, oral evidence to prove that such a confession was made, or what were the terms of the confession, is inadmissible also. 1 B. 219 (223); following 10 B.H.C.R. 166. See, also, under S. 24, *supra*, p. 375. **I**

(14) Defects which will not fatally contravene the express provisions of S. 164, Cr. P.C.

(a) A confession recorded, not in the form of questions and answers, but in the form of a narrative. 8 C. 616; 14 C. 539; 12 C.L.R. 120; and 5 A. 253 (256). See 6 C.W.N. ccxx. **J**

(b) Not obtaining the signature or attestation of the accused person to the recorded confession. 8 C. 618 n (F.B.) = 1 C.L.R. 6 and 23 B. 221; see 6 C.W.N. ccxx. **K**

(c) Variance of the form of the memorandum, attached by the Magistrate to the statement, from the form given. 3 A. 338; see 6 C.W.N. ccxx. **K1**

(d) The want of an English memorandum. 14 C. 539 and 22 M. 15; see 6 C.W.N. ccxx. **L**

(e) The certificate attached to a confession not being written on the day the confession was recorded. 6 B. 288; see 6 C.W.N. ccxx. **M**

6.—“*Or because it was made in answer to questions which he need not have answered, whatever may be the form of those questions.*” — (Concluded).

2.—CONFESSIONS TO MAGISTRATES—(Concluded).

(f) The absence of the full signature of the Magistrate. 8 W.R. (Cr.), 55 and 15 W.R. (Cr.), 63. See 6 C.W.N. cccx. N

(g) A confession, which was not signed by the accused person, was admitted and parol evidence taken on the point. 23 B. 221; see 6 C.W.N. cccx. O

7.—“*Or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.*”

(1) S. 163, Crim. Pro. Code, 1898—Accused not to be prevented from making voluntary statement.

(1) No police-officer or person in authority shall offer or make, or cause to be offered or made, any such inducement, threat or promise as is mentioned in the Indian Evidence Act, 1872, S. 24. P

(2) But no police-officer or other person shall prevent, by any caution or otherwise, any person from making, in the course of any investigation under this Chapter, any statement which he may be disposed to make of his own free will. Q

(2) S. 342, Crim. Pro. Code, 1898—Warning not rendered necessary by Crim. Pro. Code.

(1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial, without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined, and before he is called on for his defence. R

(2) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed. S

(3) Magistrate not bound to warn accused person.

(a) It is no part of the duty of a Magistrate to tell an accused person that anything he may say will go as evidence against him. 10 C. 775 (777). T

(b) Where, in consequence of an accused person being told by a Magistrate that what he would say would go as evidence against him and so he had better tell the truth, the accused person made a confession; held that the use of this language has been repeatedly decided to render a confession inadmissible, and that in consequence of this inducement having been held out to the prisoner, the confession must be rejected. (*Ibid.*) U

(c) A Magistrate of the first class ought to know that to tell a prisoner that he had better tell the truth is a violation of the provisions of the law. (See S. 163, Crim. Pro. Code, 1882). (*Ibid.*) Y

7.—“Or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.”—(Concluded).

(4) Law regarding the warning of accused persons about to make confessions.

“The law or practice outside the Presidency towns in India never required that an accused person should be warned that he is not bound to make a confession. In the Presidency towns in the case of European British subjects, the question of this pre-requisite to the admissibility of a confession was not altogether settled. The matter was discussed in the case at 1 B.L.R.O. Cr., 15 = 15 W.R. (Cr.), 71, in which the accused was tried for an offence committed in Calcutta. He was arrested and taken before a Mufassal Magistrate. His statements made in answer to questions put by this Magistrate, who had not warned him, were held admissible. The Evidence Act has on this point practically followed this decision, and its provisions are applicable to the Presidency towns and to European British-born subjects.” Field. Ev., 6th Ed., p. 108. **W**

(5) Admissibility of accused's statements without previous caution.

(a) Where a confession is obtained from an accused person by his having been allowed to speak without previous caution, it will be admissible in evidence. *R. v. Coote*, L.R. 4 P.C. 605; Phil. Ev., 4th Ed., p. 245, Tay. Ev., 10th Ed., S. 899A, p. 636; Ros. Cr. Ev., 13th Ed., p. 52. **X**

(b) In a case of bigamy, there was no evidence of identity. A detective confronted the accused, without any caution, with a clergyman and said, “Do you know this gentleman?” The accused replied, “You are the Mr. C. who married me, etc., etc.” This statement was not allowed to be given in evidence, the Court observing that it was “entrapping” and a “trick” and that, without the usual caution, a policeman should ask no questions at all of those in custody. *R. v. Histed*, 19 Cox. C.C. 16, approving *R. v. Gavin*, 15 Cox. C.C. 656; per *Hawkins. J*; Ros. Cr. Ev., 13th Ed., p. 45. **Y**

(6) Admissibility of statements after caution.

Where two accused persons were jointly charged and a statement voluntarily made and signed by one of them and implicating the other was read over to the other by the police, who warned him, a confession then made and signed by the second accused was held to be voluntary and admissible. *R. v. Hirst*, 18 Cox. C.C. 374; Ros. Cr. Ev., 13th Ed., p. 45. **Z**

30. When more persons than one are being tried jointly for

Consideration of proved confession affecting person making it and others jointly under trial for same offence.

the same offence,⁽¹⁾ and a confession made by one of such persons⁽²⁾ affecting himself and some other of such persons⁽³⁾ is proved,⁽⁴⁾ the Court⁽⁵⁾ may take into consideration such confession⁽⁶⁾ as against such other person as well as against the person who makes such confession.⁽⁷⁾

Explanation.—“Offence,” as used in this section, includes the abetment of, or attempt to commit, the offence.⁽⁸⁾

Illustrations.

(a) A and B are jointly tried for the murder of C. It is proved that A said, 'B and I murdered C.' The Court may consider the effect of this confession as against B.

(b) A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said, 'A and I murdered C.'

This statement may not be taken into consideration by the Court against A, as B is not being jointly tried. *

(Notes).**General.****(1) S. 30 entirely new.**

"S. 30 is an entirely new provision of the law, which was absent from Act II of 1855, the first Evidence Act, and had no place in the Crim. Pro. Codes of 1861 and 1872." 5 M.L.J. Art. p. 219. **A**

(2) S. 30 an exception to the general rule about the admissibility of confessions.

S. 30 of the Evidence Act is an exception to the general rule that the confession of one person is entirely inadmissible against any other. 6 C.W.N. cclxiv. **B**

(3) Law prior to the passing of the Evidence Act.

(a) The law, previous to the Evidence Act, was that an accused person's confession was relevant only against himself and not against his fellow-prisoners. 6 W.R. 81 Cr. **C**

(b) The admission of an accused person cannot be taken to be corroborative evidence, or indeed any evidence at all, against anybody other than himself. 8 W.R. (Cr.), 35 (36). **D**

(c) The confession of one prisoner cannot be used as corroborative evidence against another prisoner. 13 W.R. (Cr.), 14. **E**

(d) Till the passing of the Indian Evidence Act, such dangerous material as this (confessions of co-accused) could not be used against the accused. 21 W.R. 69 (70) (Cr). **F**

(e) Prior to the passing of the Evidence Act, the statement of an accused person was not evidence against a fellow-prisoner or one who was jointly tried with the person making it. 44 P.R. 1866 (Cr.); 103 P.R. 1866 (Cr.); 124 P.R. 1866 (Cr.); 125 P.R. 1866 (Cr.); 23 P.R. 1867 (Cr.); 27 P.R. 1867 (Cr.); 28 P.R. 1867 (Cr.) **G**

(4) Section flatly contradicts English Law.

"This provision is flatly in contradiction to the law of England, where Judges always take the greatest pains to prevent the statements of a prisoner affecting the case of a fellow-prisoner; and I do not think that Judges in India have looked with much favour on the section. It has been held that the confessing prisoner must implicate himself to the same extent as he implicates his fellow-prisoner. If he tries to screen himself, the evidence will not be admissible. Probably almost any Judge or Jury would treat the evidence rendered admissible by this section as of little value." Mark. Ev. p. 28. **H**

English Law.

(a) A prisoner cannot be affected by the confessions of his accomplices. Tay. Ev., 10th Ed., S. 904, p. 637. **I**

General.—(Continued).

(b) If, where two accused persons are indicted together, the principal were to plead guilty, a confession by the principal that he was guilty of theft is no evidence of that fact as against a receiver. *Tay. Ev.*, 10th Ed., S. 904, p. 638. **J**

(c) In cases of conspiracy where the common enterprise is at an end, whether by its realisation or the giving up of it, no one is permitted by any subsequent act or declaration to affect the other conspirators, and his confession subsequently made is only evidence against himself and not against the other. *R. v. Appleby*, 3 Stark. 33; *Tay. Ev.*, 10th Ed., S. 904, p. 638. **K**

(d) A person was charged for receiving stolen property from another, who was alleged to have stolen it. A confession, made by the thief to a Magistrate, at the trial, in the presence of, and not denied by, the alleged receiver, that the latter had stolen the goods was held to be inadmissible against the former to prove that fact. *R. v. Appleby*, 3 Stark. 33; *Philp. Ev.*, 4th Ed., p. 238. **L**

(e) Where a person was accused of receiving stolen property, a confession by the principal that he was guilty of theft was held to be no evidence of that fact against the receiver. *R. v. Turner*, 1 Moo. C. C. 347; *Tay. Ev.*, 10th Ed., S. 904, p. 378; *Philp. Ev.*, 4th Ed., p. 238; *Ros. Cr. Ev.*, 13th Ed., p. 49. **M**

(6) S. 30 to be strictly construed.

S. 30, Act I of 1872, introducing as it does, an entirely new, and rather dangerous, element in the conduct of criminal trials, ought to be construed with strictness. 19 W.R. (Cr.), 57 (64); *per Glover, J*; see, also, 14 Ind. Jur. N.S. 19. **N**

(7) Effect of construing section strictly.

(1) A person pleading guilty is not being tried jointly within the meaning of the section. **O**

(2) The words "same offence" imply an offence coming under the same definition or section of the law, so as to exclude abetments and attempts. **P**

(3) The term "proved" is to be construed strictly according to the law laid down in Ss. 164 and 364, Cr. P.C., 1882. See 5 M.L.J. Art., p. 221. **Q**

(8) Policy of law in enacting section.

(a) Where several accused persons are being tried jointly for the same offence, and one of them makes a confession implicating the others, it seems impossible to avoid in such cases producing an effect upon the mind, when that confession is read, extending to every person named in the confession; even the Judge, with the best balanced mind conceivable, if he spoke with absolute sincerity and self-examination, would probably admit that his mind was in some degree affected by the confession of one man criminating another, provided that he believed the confessing prisoner to be in the main veracious. 4 C. 483 (493), *per Jackson, J.* **R**

(b) It may be, therefore, that the legislature did wisely in recognizing and taking under its control the impression thus unavoidable, which might actually do more harm if unrecognized. 4 C. 483 (493) (F.B.), *per Jackson, J.* **S**

General. -(Continued).

- (c) "The policy of the law in allowing a confession by one prisoner to be considered against another who is being jointly tried for the same offence, seems to rest on the recognition of the palpable fact that such a confession cannot fail to make an impression on the Judge's mind, which it was, therefore, better to control within limits than altogether to ignore." 29 P.R. 1880 (Cr.); *per Rattigan, J.* **T**

(9) Principle underlying section.

- (a) What was intended with regard to S. 30, Evidence Act, was that where a prisoner, to use a popular phrase, *makes a clean breast of it* and unreservedly confesses his own guilt, simultaneously implicating another jointly tried for the same offence, his confession may be taken into consideration against such other as well as against himself, because the admission of his own guilt operates as a sort of sanction, which, to some extent, affords some guarantee of the truth of the whole statement. But where there is no full and complete admission of guilt, no such sanction or guarantee exists. 7 A. 646 (648). **U**

- (b) Where a person admits guilt to the fullest extent, and exposes himself to the pains and penalties provided for his guilt, there is a guarantee for his truth, and the Legislature provides that his statement may be considered against his fellow-prisoners charged with the same crime. 6 B. 288. **V**

- (c) Where an accused person did not, by his statement, intend to criminate, but only to exculpate, himself and to incriminate his co-accused, *held*, that by exculpating himself he failed to provide this guarantee and that his statement must be set aside in weighing the evidence against his co-accused. 6 B. 288 (291-2). **W**

- (d) The object sought by the rule of law is a safeguard for sincerity and for information. 8 B. 223 (226). **X**

(10) Principle sound in theory only.

The principle enunciated by *West, J.*, in 8 B. 223 is sound in theory rather than in practice. 5 M.L.J. Art., p. 220. **Y**

(11) Criticism of principle underlying section.

For a criticism of the principle supposed to underlie S. 30, see 5 M.L.J. Art., p. 220. **Z**

(12) S. 30 must be read with Ss. 24 to 27.

- (a) S. 30 is to be read with the previous sections 24 to 27, and cannot make relevant confessions rendered irrelevant by those sections. 5 M.L.J. Art. p. 221. **A**

- (b) "S. 30 must be read subject to the preceding sections on confessions." 6 C.W.N. cclxxiv. **B**

(13) Effect of so reading section.

- (a) "Therefore, if a confession is inadmissible under Ss. 24-26 and there is no discovery of facts through it under S. 27, it will be inadmissible under this section both against the confessor and his co-accused." 6 C.W.N. cclxxiv. **C**

General.—(Concluded).

(b) "If it is admissible against the confessor, it is admissible also against the others affected by it. (Sec 3 B. 12). If excluded by Ss. 24--26, but some facts are discovered through that statement, so much of it as leads directly to the discovery, being admissible under S. 27, is also admissible under S. 30 against the confessor and the co-accused, if it is a confession and affects the maker and his co-accused." 6 C.W.N. colxxiv. **D**

(14) S. 30 does not limit S. 32.

S. 30 merely enacts a special exception to the general rule that a confession (admission) can be proved (only) against the person who made it. It does not limit the operation of S. 32. Illustration (b) to S. 30 cannot be construed to have this effect. U.B.R. (1906), 3rd Quarter, Evidence Act, p. 3 (4). **E**

1.—"When more persons than one are being tried jointly for the same offence."**1.—TRIED JOINTLY.****(1) Confession must be of a person tried.**

The confession which is to be used must be that of a person who is *being tried*. 6 C.W.N. colxxiv. **F**

(2) Section relates to confession of accused jointly tried for the same offence.

(a) S. 30 of the Evidence Act only relates to confessions made by accused persons who are being *jointly tried for the same offence*. 5 C.P.L.R. 9 (10) Cr. **G**

(b) Two persons were charged with murder, and one of them made a statement before a Magistrate; it was held that that statement was that of an accused person and could be only taken into consideration as against the other under S. 30 of the Evidence Act, if the two accused were being tried jointly for the same offence. 22 C. 50 (72). **H**

(3) Tried jointly means legally tried jointly.

The words 'tried jointly' mean "*legally* tried jointly" and not simply tried jointly as a matter of fact. 22 C. 50 **I**

(4) Illustration.

The confession of an accused person jointly tried in fact with another cannot be used against that other, if, from any cause, such as *the absence of a legal commitment*, the prisoner alleged to have confessed has to be thrown out from the proceedings. 22 C. 50 (72). **J**

(5) Sense in which word "trial" used in Act.

After a prisoner pleads guilty, his "trial" in the sense of a "trial of his guilt or innocence" has ended, though the question of sentence, which is a different matter altogether, remains. It is in this narrow sense that the word "trial" would seem to be employed in S. 30 and to be the view taken in 19 B. 195. See 5 M.L.J. Art., p. 224. **K**

(6) Accused pleading guilty ceases to be tried jointly with those who do not plead guilty.

(a) A prisoner who pleads guilty at the trial and is convicted and sentenced cannot be said to be jointly tried with the other prisoners committed on the same charge who pleaded not guilty. 11 B.H.C.R. 146, referred to in 25 M. 69. **L**

1.—“When more persons than one are being tried jointly for the same offence.”—(Continued).

1.—TRIED JOINTLY.—(Continued).

(b) Where the statement of an accused person followed his plea of guilty, it was held that it was not entitled to be considered even under S. 30 and that, in those circumstances, it ceased to be the statement of a person jointly tried, for the trial ended with his plea. 22 M. 491 = 2 Weir 746 (747), *following* 17 A. 524 and 19 B. 195. **M**

(c) Where a person accused pleads guilty, whether his sentence is at once passed or deferred, his confession cannot be taken into consideration against others who would take their trial. 7 M. 102; 19 B. 195; 17 A. 524; **but** see 23 M. 151, *contra*. See 6 C.W.N. cclxiv. **N**

(7) Plea of guilty by accused closes all questions between him and the Crown.

The cases, in which it has been held that, when one of two persons jointly charged pleads guilty, his confession is not admissible against the other, are illustrations of the proposition that, when an accused person has pleaded guilty, nothing remains to be tried between him and the Crown. 25 M. 61 (69). **O**

(8) Plea of guilty does not terminate trial.

(a) A trial does not necessarily come to an end with a plea of guilty. 23 M. 151, *cited in* 25 M. 69. **P**

(b) Where the plea of guilty made by an accused person is recorded under S. 271, Cr. P.C., and his trial is continued without convicting him, when, for the purpose of fixing the amount of punishment, it is thought necessary to know the actual part taken by him in the matter out of which the trial has arisen, the trial of the confessing accused does not terminate with his plea of guilty, and a confession made by him might be taken into consideration under S. 30, against any of the persons who have been jointly tried with him for the same offence and the trial does not strictly end, unless the accused has been either acquitted, discharged, or convicted. (*Ibid.*) **Q**

(9) Plea of guilty not accepted—Effect.

Where the plea of guilty made by an accused person under trial with others is not accepted, he is still being jointly tried with the rest. 6 C.W.N. cclxiv. **R**

(10) Trial ends, not with conviction, but with sentence.

The contention that the trial ends with the conviction, and not with the sentence, can hardly be maintained in India. 3 Bom. L.R. 438 (440); *per Fulton, J.* **S**

(11) Immediate conviction and sentence unnecessary on plea of guilty to exclude confession.

Immediate conviction and sentence are not necessary to exclude the confession of a co-prisoner who has pleaded guilty. 19 B. 195. **T**

(12) Confession of accused pleading guilty and awaiting conviction not to be considered against co-accused.

Where the accused, who has pleaded guilty is left in the dock merely to see what the evidence will show as against him, though the Court intends ultimately to convict him on that plea, it would not be fair to allow

I.—“When more persons than one are being tried jointly for the same offence.”—(Continued).

1.—TRIED JOINTLY.—(Continued).

his confession to be considered as against his co-accused, for that would be, in effect, to comply with the forms of justice, while violating it in substance. 23 M. 151 (151), referring to *Rex v. Gardner*, 9 Cox. C.C. 332. U

(13) Unfair to defer convicting accused pleading guilty.

It is unfair to defer convicting accused persons, who plead guilty, merely in order that their confession may be considered as against other accused persons, who are being tried with them. 23 A. 53 (55). Y

(14) Accused pleading guilty not to remain in the dock unconvicted.

It is improper to allow an accused person who pleads guilty to remain in the dock unconvicted merely to see what the evidence will show. 19 B. 195 (197). W

(15) Procedure to be adopted by Courts when accused pleads guilty.

(a) The proper course to be adopted, when an accused person pleads guilty, is either to convict him on his plea and remove him from the dock, in which case his trial would be manifestly at an end, so as to warrant his being called as a witness for or against any persons who had been accused along with him, or, else, to allow the trial to go on as if the plea had been one of not guilty. When this is done, it is clear that the trial does not end with the plea of guilty, and, therefore, any confession made by the persons so pleading could be taken into consideration, under S. 30 of the Evidence Act, as against any other person who was being jointly tried with him for the same offence. 23 M. 151 (151). X

(b) The proper course, where one of several accused persons pleads guilty and the trial of the rest is pending, is to sentence him and either (1) to put him aside—11 B.H.C.R. 146—or (2) to remove him from the dock and call him as a witness—7 M. 102 and 19 B. 195. See 5 M.L.J. Art., p. 224. Y

(c) On an accused, under trial with others, pleading guilty, the Court observed that he should have been sentenced and put aside, or the Assistant Sessions Judge, without immediately passing sentence, ought to have waited to see what the evidence disclosed. 11 B.H.C.R. 146 (148); see, also, 8 A. 306 (309). Z

(d) The course adopted by an Assistant Judge of keeping a convicted prisoner, who was tried with others, but who had pleaded guilty, without sentencing him and putting him aside, with the rest, with the object of taking his statement into consideration, under S. 30 of the Evidence Act, was not approved. 11 B.H.C.R. 146 (148). A

(16) Confession of deceased accused person implicating accomplice—Admissibility.

The confession of an accused person, who is dead, implicating himself and an accomplice in a crime, is admissible under S. 32 (3), Evidence Act, and is not excluded by illustration (b) to S. 30. 5 Cr.L.J. 300 = U.B.R. (1906), Evidence, 3. B

1.—“When more persons than one are being tried jointly for the same offence.”—(Continued).

1.—TRIED JOINTLY.—(Continued).

(17) Accused persons jointly tried on evidence not identical—Direction to Jury.

Where several accused persons are being tried together on evidence which is not identical, it is important that the evidence affecting each individual should be clearly and carefully placed before the Jury and that their attention should be prominently drawn to the considerations by which they may properly be guided in estimating the value of the evidence. 6 C.W.N. 553 (554). **C**

(18) Accomplice competent witness against co-accused separately tried.

An accomplice is a competent witness against a co-accused tried separately. U.B.R. (1906), Evidence, 3=5 Cr. L.J. 300. **D**

(19) Instances of trials held not to be joint and of confessions held inadmissible.

(a) Two persons were charged with murder and abetment of murder respectively. During the preliminary enquiry before a Magistrate, the second accused was offered a pardon and the tender having been accepted, her deposition was recorded and she was sent up to the Court of Session as a prosecution witness. In that Court, she was the first witness examined and, as she deviated from the statements made by her to the Magistrate, the Sessions Judge stopped her examination, made an order that she should be tried for the offence for which the pardon was tendered, and then and there transferred her from the witness box to the dock. Her name was inserted in the charge at the same time by the Judge and the trial proceeded against both the accused jointly. The statements made by her before the Magistrate were held to be inadmissible against the first accused, as her trial in the absence of any commitment by a Magistrate was bad in law. 22 C. 50 (72,73). **E**

(b) Where several prisoners were charged together with having committed a house-breaking and some of them pleaded guilty, it was held that the confessions made by those who pleaded guilty were not evidence against a prisoner who was tried, under S. 30 of the Evidence Act, as they were not tried at all, and, therefore, were not being tried jointly with the other prisoners. They were convicted on their own plea and the only course to make their statements admissible against the other prisoners would have been to remove them from the dock and call them as witnesses. 7 M. 102=2 Weir 740 (741). **F**

(c) Where a number of persons are jointly tried for the same offence and one of them pleads guilty, the person so pleading ceases to be on his trial and must not be considered as being jointly tried with the others; and a confession by such a person affecting himself and others cannot be taken into consideration as against the others, under S. 30. 22 M. 491. **G**

(d) Where, in 1873, two persons were concerned in the murder of a third person, the first absconded, but the second, having been arrested, was tried in that year. The second person during his defence at the Sessions trial made a statement that the first person admitted to him having committed the murder. In 1877, the first person having been arrested and placed upon his trial—the second person had meanwhile

1.—“When more persons than one are being tried jointly for the same offence.”—(Continued).

1.—TRIED JOINTLY.—(Continued).

died—the Court of Sessions used the statement of the deceased made at his trial in 1873, as evidence against the first. *Held*, that the deceased person's statement was not admissible against the first either under S. 327, Cr. P.C., 1872, or Ss. 30 and 133, Evidence Act. 13 P.R. 1878 (Cr.) **H**

(e) Two persons committed for trial were charged, the first with murder and the second with abetment of it. The first pleaded guilty at the trial and the prosecution attempted to prove the guilt of the second through the confession of the first. *Held*, that the first was no longer on his trial and that his confession could not be taken into consideration against the second under section 30. 11 P.R. 1900 (Cr.) **I**

(f) A prisoner, escaping from custody during trial, but before charge, who has been tried separately after re-arrest, cannot be said to have been jointly tried with a person whose trial, from a stage prior to the charge, was separate owing to the escape from custody, and the confession of the co-accused, first tried, was held to be inadmissible against the prisoner, as the trial was not joint. 29 P.R. 1901 (Cr.) **J**

(g) A conviction, based on the statement of a prisoner, made in the absence of his fellow-prisoners, is bad, as the confession is illegally admitted. 13 C.L.R. 275. **K**

(h) Where a number of persons were charged together with offences under Ss. 148, 302, 324 and 326 read with S. 149, I P.C., the Court of Sessions ordered, when about to examine the prisoners, every one but the accused under examination to retire from the Court till he should in turn be examined, and convicted each prisoner mainly upon what was stated by his co-prisoners during his absence. The evidence so taken was held inadmissible by the High Court. 7 C. 65. **L**

(i) The confessions which some of several accused persons make in the absence of the others are not deserving of any weight at all, except as against those who make them. 10 C. 970 (975). **M**

(j) Confessions of prisoners who were tried previously, and not simultaneously with an accused person, were held to be inadmissible in evidence. 21 W.R. 65 (66) (Cr.) **N**

(k) Where the Sessions Judge stated that he examined the prisoner separately, in order that neither of them might hear what the other had said, and it appeared that the statements so obtained were not read over to, or in any way proved against, those, against whom it was intended to use them, the Court was of opinion that the so-called confession made by each prisoner could not be taken into consideration against the other prisoners, if for no other reason, because the examination of each prisoner took place in the absence of the other, and that other had no opportunity of denying, or even of knowing, what his fellow-prisoner had said. 6 B. 124 (125), referring to 7 C. 65. **O**

*** J.—“When more persons than one are being tried jointly for the same offence.”—(Continued).**

1.--TRIED JOINTLY.—(Continued).

- (l) Where an accused person pleaded guilty, but his trial was suspended immediately after his plea was taken, and he was set aside as he appeared to be insane, but the Court of Sessions proceeded with and completed the trial of the other accused, and, subsequently finding that he was not insane, tried him, it was held that the confession of the first person should not be used against the others, as he was not jointly tried with them. His plea of guilty had not the effect of making his admissions relevant against them. (*Aliter*, if his trial had proceeded with theirs on the principle of 11 B.H.C.R. 146) 1 A.W.N. 99. **P**
- (m) A confession made by a person in 1879, while he was on his trial for murder, implicating the present accused who was on his trial for being a *thug*, was held to be inadmissible in evidence. 1 A.W.N. 164. **Q**
- (n) It has been held in more than one case that, after a prisoner has pleaded guilty, he cannot be treated as being tried with his co-accused, and confessions, made by the accused who pleaded guilty, could not, under S. 30, be taken into consideration against the other accused. 23 A. 53 (54), referring to 17 A. 524; 22 M. 491 and 19 B. 195. **R**
- (o) Certain accused persons were on their trial for a dacoity jointly. Some of them pleaded guilty and made certain statements before the Court of Session. It was held that their statement could not be taken into consideration as evidence against the other accused, for the persons, who made those statements, by pleading guilty, were not on their trial any longer. 17 A. 524 (526). **S**
- (p) Where the sole evidence, of the identity of the goods stolen at a dacoity with those found in the possession of the accused B, was the confession to the Committing Magistrate by the accused J, who pleaded guilty to the charge of dacoity—a charge different from that made against B, viz., receiving property knowing it to be stolen, held that the evidence, therefore, was inadmissible against B, as he and J were not “being tried jointly for the same offence” (S. 30). 5 B. 63 (64-5), referring to 10 B.H.C.R. 497. **T**
- (q) P and M were charged with murder. P pleaded guilty, but was not convicted and sentenced till the conclusion of the trial of M. M pleaded not guilty and claimed to be tried. The Sessions Judge admitted into his consideration as against M the confessions made by P, considering that, after the plea of guilty had been recorded, although no issue affecting P was raised at the time, he was nevertheless being jointly tried with M, within the meaning of S. 30, because it was possible that the evidence elicited at the trial of M, P being still at the bar and unconvicted and not sentenced, might enable the Sessions Judge to determine whether to pass a sentence of death or transportation. Held that, after P pleaded guilty, the Court below ought not to have treated him as being jointly tried with M and that the confessions of P were inadmissible against M. 19 B. 195 (198), following *Winsor's case*, 1 Q.B. 289 (390); *Reg v. Gardner*, 9 Cox. C.C. 332 and 7 M. 102. **U**

I.—“When more persons than one are being tried jointly for the same offence.” (Continued).

1.—TRIED JOINTLY.—(Continued).

- (r) After a prisoner has pleaded guilty and has been convicted and sentenced to punishment and his evidence had then been taken on solemn affirmation as a witness, he could not any longer be considered as one jointly tried with the others. 11 B.H.C.R. 146 (148). **Y**
- (s) A prisoner, who pleads guilty at his trial and is thereupon convicted and sentenced, cannot be said to be tried jointly with the other accused, committed on the same charge, who pleads not guilty. 14 Ind. Jur. N.S. 125. **W**
- (t) Where certain accused persons were tried on a charge of dacoity, two of them pleaded guilty and were at once convicted, but their sentences were postponed till the end of the trial. They were then taken from the dock and examined as witnesses against the other accused. *Held* that their evidence should be rejected as the procedure followed was illegal under S. 342, Cr. P.C., which provided that no oath should be administered to the accused, that these accuseds, when solemnly affirmed as witnesses, were still under trial and under examination by the Court; and that the trial of these accused did not end with their convictions. 3 Bom. L.R. 437, *referring to* 23 B. 213. *Per Fulton, J.* **X**
- (u) Four accused, B, C, M and T, being committed for trial on a charge of murder. B was made an approver, and M and T pleaded guilty; and the trial thereupon proceeded against C alone *held* that the statements of M and T could not be used against C to corroborate the evidence of the accomplice B; and that, as M and T pleaded guilty, and, as the trial proceeded against C alone, he was not being tried together with them, and S. 30 of the Evidence Act had no application to their statements. Rat. Unrep. Crim. Cas. 400. **Y**

(20) Instances of trials held to be joint and of confessions held admissible.

- (a) An accused person and another co-accused were tried together for an offence. The accused, though only liable for abetment of the offence, was found to have been present at the time of the commission of the offence. *Held*, that, under S. 114, I.P.C., the accused stood in the same position as if he himself had committed the offence; that his trial with the co-accused for the offence was proper, and that the confession made by the co-accused in such trial could be taken into consideration under S. 30 against the accused. 32 P.R. 1882 (Cr.) **Z**
- (b) Straight, J., observed “that Piru, who pleaded guilty in the Sessions Court, was nevertheless tried jointly with the other accused, and, therefore, his confession made.....might be taken into consideration as against the other prisoners.” 8 A. 306 (309). **A**
- (c) It was observed that, where it is open to the Court, under certain circumstances, to continue the trial without convicting accused persons upon their plea of guilty in order that their confessions might be used against their co-accused, according to the decision in 23 M. 151, in strictness, the confessions of the persons who pleaded guilty might be considered against the rest, and that, in point of law, the Court was not prepared to say they must be necessarily excluded. 23 A. 53 (55). **B**

1.—“When more persons than one are being tried jointly for the same offence.” (Continued).

1.—TRIED JOINTLY.—(Concluded).

- (d) A Sessions Judge based his conviction of an accused person on the statement of another prisoner under trial, at the same trial, who had implicated himself as well as the accused, it was held that the statement of the co-prisoner might, under S. 30, be taken into consideration; but as it was not made on solemn affirmation, and the other prisoner had no opportunity of cross-examining him, its probative force was of the very weakest kind. 10 B. 319 (326), *referring to* 4 C. 483 (F.B.). **C**
- (e) Where the Court of Session had not dealt with a plea of guilty as if it were such, but had allowed the prisoner so pleading to remain on trial, so that he could cross-examine, and the opinion of the assessors were also taken about his guilt, *held* that the prisoner was being still jointly tried with the rest. *Confirmation case No. 22 of 1893, cited in* 19 B. 195 (198). **D**
- (f) Certain accused persons were tried on a charge of dacoity before the Court of Sessions. The first and the ninth accused pleaded guilty and were forthwith convicted on their own plea, but their sentences were postponed till the end of the trial. They were taken from the dock and examined as witnesses. It was observed that, if the Sessions Judge had for any reasons refrained from accepting the plea of guilty and the trial of these two men had proceeded with that of their co-accused, their statements could have been taken into consideration under S. 30 of the Evidence Act. 3 Bom. L.R. 137 (438). *Per Candy, J.* **E**
- (g) Confessions of prisoners jointly tried with another for the same offence may be taken into consideration against him. 19 W.R. 57 (60) (Cr.). **F**

2.—FOR THE SAME OFFENCE.

(1) Requisites for using confession mentioned in section.

It is requisite, in order to such use of a confession as is described in S. 30, that there should be a joint trial for the same offence. Suppose, A is charged with murder, B with abetting it, and C with concealing evidence of it, so as to screen the offender; and C confesses to the offence charged against him. In such a case, although the three accused are jointly tried, it is not a joint trial for the same offence; and, therefore, the confession would be inadmissible except as against C himself. 10 B.H.C.R. 497 (499). **G**

(2) “Same offence,” meaning of expression.

- (a) The meaning of the expression “for the same offence” is an offence coming under the same legal definition. See 8 B. 223 (226). **H**
- (b) The expression ‘for the same offence’ connotes ‘same substantive offence’ (see 2 Weir 742; 22 C. 164) or “same specific offence” (7 M. 579=2 Weir 742; 14 Ind. Jur. N.S. 19, 20) or “an offence coming under the same definition of the law” (8 B. 223 and 14 Ind. Jur. N.S. 19, 20), that is, an offence under the same section of the law. See 5 M.L.J. Art., p. 225. **I**

1. —“ *When more persons than one are being tried jointly for the same offence.*” —(Continued).

2. —FOR THE SAME OFFENCE —(Continued).

(3) Test whether accused are jointly tried for same offence.

The practical test to determine whether accused persons are being jointly tried for the same offence is the identity of the section of the Penal Code or other law, under which the charge is laid against them. 5 M.L.J. Art. p. 225. J

(4) Section covers confession implicating both accused in act arising out of same transaction

Where a confession made by one accused person implicates both the accused persons in an identical act, as well as when two persons are accused of an offence arising out of a single transaction, the safeguard for sincerity and for information, sought by law, equally subsists. 8 B. 223 (226-7). K

(5) Admissibility against each other of confession of persons accused of offence arising from single transaction.

(a) When two persons are accused of an offence of the same definition arising out of a single transaction, the confession of the one may be used against the other, though it inculcates himself through acts separable from those ascribed to his accomplice, and capable, therefore, of constituting a separate offence from that of the accomplice. 8 B. 223 (226). L

(b) Where, of two persons jointly tried for uttering counterfeit coin, one confessed that he had obtained the coins from the other and had passed them to several persons at his request, *held* that the confession was relevant against the other. 8 B. 223. M

(6) Joint trial on different charges Subsequent amendment into one Effect.

Two persons were jointly tried on different charges, the first for murder and the second for abetment of it. The first confessed to a Magistrate that he, at the instigation of the second, committed the murder, and this was put in as evidence against him. Subsequently, the charge against the first accused was amended to one of abetment of murder and the Court of Sessions, under S. 30 of the Evidence Act, used the confession of the first against them both and convicted them. *Held* that the original and amended charges were so nearly related to each other that, in the absence of technical objection urged on behalf of the second prisoner, the trial might, without any unfairness, be deemed, for the reception of evidence and all other purposes, to have been a trial on the amended charge from its commencement and that the confession of the first was rightly admitted against the second. 11 B.H.C.R. 278 (280). N

(7) Confessions held inadmissible for joint trial not being for same offence.

(a) In a case of theft, where any statement made before the trial against an accused person by his fellow accused (which would not be evidence anyhow) had been withdrawn, it was observed that even if the co-accused person had stuck to the story, it would not have been evidence against the accused, as he was not being jointly tried for the same offence, but for a different one from the co-accused. U.B.R. (1897—1901), Cr. 159 (161). O

1.—“When more persons than one are being tried jointly for the same offence.”—(Continued).

2.—FOR THE SAME OFFENCE.—(Continued).

(b) Where a Magistrate used against an accused person, charged with assisting in the concealment or disposal of stolen property, confessions made by others tried for theft, it was held that the confessions were not admissible under S. 30 against the first, who was not charged with the same offence. 31 P.R. 1885 (Cr.) **P**

(c) An accused person was tried, under S. 411, I.P.C., for receiving stolen property knowing it to be stolen, simultaneously with the thief. Another person was also charged under the same section with receiving stolen property, the proceeds of the same theft, from the same thief; but the property was different. *Held* that the two persons were being tried jointly, not for the same offence, but were tried together for different offences punishable under the same section and that a confession made by the latter could not be legally considered against the former. 9 P.R. 1886 (Cr.) **Q**

(d) Four persons were jointly tried, one for an offence under S. 411, I.P.C., and the rest under S. 380, I.P.C. The confession of the latter was used against the former and all the accused were convicted; *held* that the Magistrate was wrong in admitting the confession against the first. 1 C.W.N. 35 (36). **R**

(e) Where it was contended that, as the offence for which an accused person was tried, *viz.*, the selling of the minor girls whom another accused person bought, was in reality an abetment of the latter's offence, the confession of the former was legally admissible as evidence against the latter, *held*, that it could not prevail; for, although the former might have been tried for the abetment of the offence with which the latter was charged, as a matter of fact he was not so tried; he was tried for a substantive offence under the Penal Code, under S. 372—whereas the latter was tried under S. 373—and it would be improper to extend the explanation as contended. 22 C. 164 (173). **S**

(f) A, B and C were tried together on charges arising out of the same transaction, but the charge against A was under a section of the Penal Code different from that under which the others were charged. It was held that a confession made by A was inadmissible against B and C, although it might appear from the facts that B and C should have been charged only for abetment of the offences charged against A. 19 A.W.N. 63. **T**

(8) Joint trial under the same (and single) section with a single head of charge.

Where several persons are tried together under a single section of the law with a single head of charge, the confession of one of the accused persons implicating a co-accused would be admissible against the co-accused. See 5 M.L.J. Art., p. 225, referring to 8 B. 223. **U**

(9) Joint trial under same single section with many heads of charge applicable to all.

For an application of the section to the case of a joint trial under the same (and single) section with two or more heads applicable to all. See 5 M.L.J. Art., p. 226. **Y**

1.—“When more persons than one are being tried jointly for the same offence.”—(Continued).

2.—FOR THE SAME OFFENCE.—(Concluded).

(10) Joint trial under same single section with heads of charges inapplicable to all.

- For an application of the section to the case of a joint trial under the same (and single) section with two or more heads inapplicable to all the accused. See 5 M.L.J. Art., p. 226-7. W

(11) Joint trial under same plural sections with many heads of charge applicable to all.

- For an application of the section to the case of a joint trial under the same (plural) sections with two or more heads of charge applicable to all. See 5 M.L.J. Art., p. 227. X

(12) Same with heads of charge inapplicable to all.

- For an application of the section to the case of a joint trial under the same (plural) sections with two or more heads of charge inapplicable to all. See 5 M.L.J. Art., p. 227. Y

(13) Joint trial partly under same section.

- For an application of the section to the case of a joint trial partly under the same section. See 5 M.L.J. Art., p. 228. Z

(14) Joint trial under entirely different sections.

- For an application of the section to the case of a joint trial under entirely different sections. See 5 M.L.J. 228, referring to 10 B.H.C.R. 497; 5 B. 63; 2 Weir 742; 14 Ind. Jur. N.S. 19 and 22 C. 161. A

3.—EXAMINATION OF JOINTLY TRIED ACCUSED PERSONS AS WITNESSES.

(1) English Law.

- (a) So long as the co-accused is not being tried jointly, he can be called as a witness. This is the English Law. 23 B. 213 (215), referring to Ros. Cr. Ev., and Winsor's case 4 F. and F. 363. B
- (b) Another case in which one accused person was called as a witness on behalf of his co-accused, is the well-known case of, *Reg. v. Brailaugh*, 15 Cox 217; cited in 23 B. 213 (216). C

(2) Instances.

- (a) Where certain accused persons were tried on a charge of dacoity, two of them pleaded guilty and were at once convicted, but their sentences were postponed till the end of the trial. They were then taken from the dock and examined as witnesses against the other accused. Held that they were competent witnesses, as they were no longer accused persons but convicts; the fact that they had not been sentenced would affect the value of their evidence, as they might naturally think that it would be to their advantage to tell a story as much as possible in favour of the prosecution. *Per Candy, J.* 3 Bom. L.R. 437 (438), referring to 17 A. 524. D

1.—“When more persons than one are being tried jointly for the same offence.”—(Continued).

3.—EXAMINATION OF JOINTLY TRIED ACCUSED PERSONS AS WITNESSES.—(Continued).

(b) Two *sonars* A and B were convicted of theft and duly sentenced. R and G, who had given evidence as witnesses against them, were afterwards prosecuted under S. 411, I.P.C., in connection with the same property, and convicted on the evidence of A and B. *Held* that the Prisoner's Testimony Act had no bearing on the point in decision and that the two convicts were competent and compellable witnesses, there being no exclusion of them, nor privilege given them by the law. Rat Unrep. Crim. Cas. 776. **E**

(c) At a joint trial of three accused persons, two were discharged and the third was convicted. The conviction was upheld in appeal. The order of discharge was set aside and further enquiry was directed to be made as regards those discharged. In the course of the further enquiry, the Magistrate ordered that the evidence of the convicted person could not be taken against the other two co-accused, as proposed by the prosecution. *Held* that the convicted person was, in no sense, an accused person when tendered as a witness, his appeal having been dismissed, and that the Magistrate's order must be set aside. 70 P.L.R. 1904. **F**

(3) **Accused person convicted—Co-accused discharged Discharge set aside—Examination of accused as witness not permitted—Revision.**

The Chief Court can in revision interfere with an order of a Magistrate refusing to allow an accused person, who had been convicted when two of his co-accused were discharged, to be examined as a witness at the trial of those co-accused, after the order of their discharge had been set aside. 70 P.L.R. 1904. **G**

(4) **Instances of such examination held improper.**

(a) Where two prisoners are tried together for different offences committed in the same transaction, it is improper and illegal to take one prisoner from the dock, and examine him as a witness against the other prisoner. 5 C.L.R. 571 (575). **H**

(b) Where an accused person jointly under trial with others pleads guilty and is convicted and sentenced, it is improper to take his evidence on solemn affirmation as a witness and to admit his examination as evidence in the case. 11 B.H.C.R. 146 (148). **I**

(c) It is illegal for a Magistrate to convert an accused person into a witness, except when a pardon has been lawfully granted to him under S. 347, Crim. Pro. Code, 1872. Where certain accused persons were not legally pardoned, *held*, they could not be examined as witnesses, until they had been acquitted, discharged or convicted and their evidence must be rejected as absolutely inadmissible. 1 B. 610 (618). **J**

(d) Certain accused persons were placed before the Sessions Court on a charge of dacoity. The first and the ninth accused pleaded guilty and were at once convicted, but their sentences were postponed till the end of the trial. They were taken from the dock, in the interval, and examined as witnesses. *Fulton, J.*, held that the evidence of these witnesses was not legally admissible against the other accused basing the rejection on the express provisions of S. 342, Cr. P.C., 1898. 3 Bom. L.R. 437 (440). **K**

1.—“ *When more persons than one are being tried jointly for the same offence.* ”—(Concluded).

3.—EXAMINATION OF JOINTLY TRIED ACCUSED PERSONS AS WITNESSES.—(Concluded).

(e) It was held that an accused person could not be examined as a witness on behalf of another co-accused, because it is a principle of English Law that the jury, which has to decide on the guilt or innocence of the accused, cannot hear that person examined and cross-examined. *Payne's case*, L.R. 1 C.C.R. 319, cited in 23 B. 213 (216). **L**

(5) Reason why accused, convicted but awaiting sentence, should not be examined as witness.

The reasons why an accused person, who has been convicted and is awaiting sentence, should not be examined as a witness seem to be similar in kind to, though different in degree from, those which prevent his being examined after the trial has begun and before a conviction or acquittal has been arrived at, it is evident that, in many cases, an accused person, when awaiting sentence after conviction, could not, with any freedom, give evidence as to the circumstances of the crime: and it does not appear to be desirable that he should be compelled to do so. 3 Bom. L.R. 437 (440), per *Fulton, J.* **M**

(6) Joint trial—Improper course.

It is not a proper course, where two persons are being tried, to allow a witness to say, “they said this,” or, “they said that,” or, “the prisoners then said.” It is certainly not at all likely that both the persons should speak at once, and it is the right of each of them to have the witness required to depose as nearly as possible to the exact words he individually used. 6 A. 509 (519) (**F.B.**), per *Straight, C.J.*; cited in 4 L.B.R. 116 (119). **N**

2.—“ *And a confession made by one of such persons.* ”

1.—CONFESSION.

(1) Term “confession” to be interpreted strictly for purposes of section.

For the purposes of S. 30 of the Evidence Act, the term “confession” must be interpreted in a strict sense; such confessions must be confessions of guilt or confessions of facts, which constitute, in law, the offence charged. 1 L.B.R. 133 (136). **O**

(2) “Confession” within S. 30, meaning of.

A confession within the meaning of S. 30 is a full and unqualified admission of guilt on the part of the person making it and of a character to justify his conviction upon it. Where such statements are not of the nature above described, the statement of a person jointly tried with another for the same offence cannot be taken into consideration against such other person. 1 A.W.N. 20, following 2 A. 444. **P**

(3) Statement must amount to confession on the maker's part.

(a) Before a statement can be taken into consideration against a fellow prisoner under S. 30, it must amount to a confession on the part of the maker in respect of the offence with which all are charged. 5 M.L.J. Art. 232. **Q**

2.—“*And a confession made by one of such persons.*”—(Continued).

1.—CONFESSION.—(Continued).

(b) Although a confession may be accepted for what it is worth against the person making it, yet if it does not amount to such a confession of his own guilt as is contemplated in S. 30 of the Indian Evidence Act, it could not be taken into consideration by the Court as against the other persons being tried with him. *Rat. Unrep. Crim. Cas. 84.* **R**

(c) An accused person ought not to be convicted where the only evidence against him is the confession of a co-accused and circumstantial evidence which, although true, would not itself support a conviction, especially where that co-accused's statements do not amount to a confession. *6 O.C. 204 (209), following 4 O.C. 69 (70).* **S**

(d) Held that the statement made by an abettor jointly tried, before a Magistrate, with those with whom he abetted must not be applied against prisoners other than himself, further than those same statements amounted in themselves to a confession of guilt on his part. *19 W.R. 16 (23) Cr.* **T**

(e) When the statement of an accused person containing exculpatory matter and matter inculcating others, which, taken with the other evidence, might establish an offence against him, is to be used against those jointly charged and tried with him, it must be a confession in its strict sense. Its inherent quality must be that of a confession. *10 B.H.C.R. 497 (500).* **U**

(4) Admission, as distinguished from confession, not admissible against co-accused.

“An admission, as distinguished from a confession, is not admissible under S. 30 ‘as against such other person,’ but only against the person who made it; though it may implicate the former fully in the commission of the crime charged against both.” *6 M.L.J. Art., p. 104, referring to 5 N.W.P. 213, as wrongly decided.* **V**

(5) Mere statement not admissible against co-accused.

The mere statement of a co-accused person, as distinguished from a confession, cannot be used for or against another co-accused person. *39 P.R. 1888 (Cr.)* **W**

(6) Statement of person jointly tried—Court not holding him guilty—Effect.

The statement of a person jointly tried with others for the same offence is not made less an admission regarding all that the person knew about the offence affecting himself and the other persons, merely by the fact of the Court not holding him guilty of the offence with which he is charged. *5 N.W.P. 213.* **X**

(7) Judicial and extra-judicial confessions.

S. 30 makes no distinction between judicial and extra-judicial confessions. *5 O.C. 321 (327).*

(8) Effect of S. 10, being limited by S. 30, on such confessions.

If the provisions of S. 10 are limited by those of S. 30, they are so limited in the case of extra-judicial, as well as judicial, confessions. *5 O.C. 321 (327).* **Z**

2.—“*And a confession made by one of such persons.*”—(Continued).

1.—CONFESSION.—(Continued).

(9) Confession of co-accused and accomplice's evidence are different.

- (a) Confessions made by accused persons at a joint trial cannot be treated as the evidence of accomplices against one another. Rat. Unrep. Crim. Cas. 370. **A**
- (b) The confession of a co-accused cannot, though it may be taken into consideration under S. 30 of the Indian Evidence Act, be treated as of the same value as the evidence of an accomplice taken on oath or solemn affirmation, and tested by cross-examination. Rat. Unrep. Crim. Cas. 456. **B**
- (c) The confession of an accused person, implicating a co-accused under S. 30 of the Evidence Act, is not the same thing as the testimony of an accomplice referred to in S. 133 of the Evidence Act. 9 C.P.L.R. 35 (Cr.) **C**
- (d) The confession of a co-accused under the provisions of S. 30 stands on a perfectly different footing from the testimony of an accomplice. 9 C.P.L.R. 37 (Cr.). **D**
- (e) Where co-prisoners make confessions, their statements stand upon an even lower footing than accomplice evidence. 4 C. 483 (496) (F.B.). **E**
- (f) The confession of an accused person jointly tried with another was held not to be entitled to even as much consideration as the testimony of an accomplice, examined on oath and subject to cross-examination. 10 B. 231 (233). **F**
- (g) The difference between the confession and the testimony of an accomplice has been pointed out in 10 B. 231 and 4 C. 483 (F.B.). Rat. Unrep. Crim. Cas., p. 456. **G**
- (h) An accomplice, when under examination as a witness for the prosecution, is placed upon his oath, and if he gives false evidence, is liable to a prosecution, and the pardon which has been conditionally given him may be withdrawn. Yet, no Judge would act on the uncorroborated evidence of such a witness. L.B.R. (1872-1892), 388. **H**
- (i) The confessing prisoner is in a position very different from that of an accomplice. His statement is not made upon oath, he runs no risk of incurring a penalty if his statement is not true; he gains no reward for a truthful statement. If, then, the approver cannot be relied on without corroboration, much more is corroboration necessary in the case of one prisoner implicating another. L.B.R. (1872-1892), 388 (389). **I**

(10) Confession of co-accused is not substantive evidence.

A confession of a co-accused under the provisions of S. 30 of the Evidence Act is not in itself substantive evidence. The Courts may not start with it as a basis, proceeding to inquire how far it is corroborated. It can be used only in a subsidiary manner in connection with the substantive evidence adduced in the case. It thus stands on a perfectly different footing from the testimony of an accomplice, under S. 133, Evidence Act. 9 C.P.L.R. 37 (Cr.). **J**

2. — “And a confession made by one of such persons.”—(Continued).

1.—CONFESSION.—(Continued).

(11) Testimony of accomplice is strictly substantive evidence.

The testimony of an accomplice is substantive evidence in the strict sense of the term; a conviction may legally proceed upon it without corroboration, though the general practice of the Courts is to require corroboration, because a presumption naturally arises against such evidence from its tainted character. Whether corroborated or uncorroborated, it may form the basis of a conviction. It is entirely otherwise with the confession of a co-accused. 9 C.P.L.R. 37 (Cr.). **K**

(12) Confession of co-accused where proved equal to evidence of accomplice.

The confession of a co-accused, if proved, is, at best, the evidence of an accomplice, and illustration (b) to S. 114, Evidence Act, indicates, at any rate, what value ought to be placed upon such evidence. 2 C.W.N. 749 (750). **L**

(13) Confessions of co-accused no better than approver's evidence.

The confessions made by prisoners implicating persons other than themselves are of no higher value, and indeed are of less value, than the evidence of an approver, for, while a prisoner under trial has the advantage of cross-examining the approver, the statement of his fellow prisoner is subject to no such test, nor is it given under the sanction of a solemn affirmation. 2 Weir 712 (744). **M**

(14) Confessions of co-accused and approver's evidence are tainted.

The evidence of an approver and the confessions of some of many accused persons must be regarded as tainted; because, from the position occupied by the persons making them, they are not entitled to the same weight as the evidence of an independent witness. 10 C. 970 (975). **N**

(15) Statements held to be confessions.

(a) Where the co-accused made a statement imputing the actual killing to the first accused, but admitted only being present and assisting, his statement was held to be a confession, and he was convicted upon it. 21 W.R. 69 (70) (Cr.). **O**

(b) Inculpatory statements short of an actual admission of guilt, but from which an inference of guilt may be drawn, are within the meaning and import of S. 30. 5 M.L.J. Art., p. 19. **P**

(16) Statements not held to be confessions.

(a) The statement of an accused person jointly tried with another was held to be no sort of evidence against the other, under S. 30, for, it was not a confession, it did not amount, in any sense, to an admission by the accused himself that he was in any degree guilty of the offence charged, but simply an endeavour, on his part, to explain his own presence on the occasion, in such a manner as to exculpate himself. Any mention, made by him in such a statement, of other persons having been engaged in the riot for which they were all charged, was held to be altogether irrelevant and not evidence against them either under S. 30, or otherwise. 6 C. 279 (282). **Q**

2.—“And a confession made by one of such persons.”—(Continued).

1.—CONFESSION.—(Continued).

- (b) Certain statements made by an accused person were held not to satisfy the requirements of S. 30 of the Evidence Act and that they were not confessions in the sense of that section. 2 A. 444 (446). **R**
- (c) Where an accused person's account of the transaction of a dacoity was in no sense a confession, but, on the contrary, the accused deprecated altogether any guilty knowledge, and sought to clear himself at the expense of his co-prisoners, it was held that his statement should have had no weight against the rest of the accused. 2 A. 646, *following* 2 A. 111 and 10 B.L.R. 453. **S**
- (d) A number of persons jointly tried for murder made statements before a Magistrate disavowing all complicity in the murder and directly fixing the guilt of the crime on their co-accused. The Sessions Judge, seeing that the prosecution evidence would be totally insufficient by itself to establish the charge, convicted some of them, taking into consideration the statement of the accused against their accomplices. *Held* that the statements were inadmissible in evidence under S. 30, as they did not amount to a confession. 1 A.W.N. 135, *following* 10 B.L.R. 453, 455; 2 A. 444 and 6 C. 279. **T**
- (e) Where, looking at the statement of the prisoner as a whole, it appeared that it did not amount to a confession and was no more than a statement by a person who admits having witnessed the perpetration of a crime, but denies having participated in it and alleges having protested against it, it was held to be admissible in evidence. 7 A. 646 (649). **U**
- (f) Where some of the accused persons made certain statements not admitting, but denying, their participation in the commission of any crime and incriminating a co-accused, *held* that those statements were not confessions and were inadmissible in evidence and that they could not be taken into consideration against a co-accused person, under S. 30 of the Evidence Act. 2 A.L.J. 53—2 Cr. L.J. 22. **V**
- (g) The dead body of a boy was found buried under the wall of a woman's house. S, who was suspected of the murder, absconded. The woman was examined as a witness under S. 164, Cr. P.C., and deposed that S had committed the murder. Subsequently, she and S were tried for the murder. The woman withdrew her statement alleging that she was coerced into making it. *Held* that her statement was not a confession of guilt by her, that it was not admissible in evidence against S, as she was not a witness at the trial, but a co-accused, and that her conviction was bad. 2 A.L.J. 100—2 Cr. L.J. 59. **W**
- (h) Where the inherent quality of the statement made by an accused person was not that of a confession, *held* that it could not be used against the other accused and ought not to have been laid before the jury. 10 B.H.C.R. 497 (500). **X**
- (i) The statement of a person, who said he went with the rest of the accused to the scene of offence in pursuance of a preconcerted arrangement for the purpose of beating the deceased but withdrew before the actual perpetration of the murder, and strove to dissuade his associates from beating or killing the deceased, was held not to amount to a confession, and, hence, to be inadmissible against his associates. (*Ibid.*) **Y**

2.—“*And a confession made by one of such persons.*”—(Continued).

1.—CONFESSION.—(Continued).

(17) **Confessions to be admissible must be voluntary.**

A confession to be admitted at all in evidence must be proved to have been made voluntarily; and when it is admitted in evidence, it has to be dealt with like any other piece of evidence, and acted on only if it is believed to be true. Rat. Unrep. Crim. Cas. 952. Z

(18) **When confession may be held to be true.**

Where a confession appears to be made voluntarily, and where it agrees with all the circumstantial evidence in the case and the account contained in it is not an improbable or unlikely one, the confession can be accepted as true. Rat. Unrep. Crim. Cas. 867. A

(19) **Confessions under inducement.**

(a) The accused, who was charged with the offence of murder, had made two confessions: the first before the First Class Magistrate of Junnar, and the second before the Committing Magistrate. On his trial before the Court of Sessions, he retracted the confessions and alleged that he was beaten by the police and that the confessions were caused by inducement offered by the police. *Held* that, for the proper disposal of the case, it should have been determined whether the confession was first induced by the illegal promise to which the Police Patel deposed, and whether that inducement still existed, or had been effectually dispelled when the Magistrate recorded the confessions. If such inducement had been given, and had not been effectually dispelled until after the respective confessions had been recorded, it must be held that they were inadmissible. Rat. Unrep. Crim. Cas. 245. B

(b) Where it was objected that a confession was not receivable in evidence as some inducement was held out by the son of a Village Magistrate, who was styled acting Village Magistrate, a person in authority, to the prisoner in order to obtain such confession, *held* that the confession was receivable in evidence, it not having been caused by any inducement sufficient to give the accused person reasonable ground for supposing that, by making it, he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. (S. 24). 2 Weir 733, following *Rex v. Court*, 7 C. & P. 486. C

(c) Where a Magistrate held out to a prisoner, who had already confessed, the inducement that, if he should make a further confession, he would be admitted as an approver, his conduct was held to be most improper. 2 Weir 137. See, also, the rulings on S. 164 in 2 Weir 136, Cr. Ap., No. 565 of 1885 and 2 Weir 137, Referred trial No. 2 of 1886. D

(20) **Duty of Judge to inquire into alleged tutoring.**

Under S. 298 of the Code of Criminal Procedure, it is the duty of the Judge, “at his discretion, to prevent the production of inadmissible evidence whether it is or is not objected to by the parties”; and also “to decide upon all matters of fact, which it may be necessary to prove in order to enable evidence of particular matters to be given.” The Judge ought, therefore, to have made some inquiry into the allegation of the prisoner about the tutoring, which, he said, had resulted in his confessions. Rat. Unrep. Crim. Cas. 245. E

2.—“*And a confession made by one of such persons.*”—(Continued).

1.—CONFESSION.—(Continued).

(21) Statement of accused made to police.

Where evidence was given of a statement made by a prisoner to a police constable, *held* that the statement should not have been admitted in evidence. 1 M. 163=2 Weir 740. **F**

(22) Confessions not to be treated, on the mere record, as conclusive of themselves.

The Courts, being well aware of the safeguards with which the law expressly surrounds the action of the police, are bound to approach confessions in the same spirit as the Legislature, and to remember that these intended safeguards would become little better than pitfalls, if the confessions were treated, on the mere record, as conclusive of their own validity. Rat. Unrep. Crim. Cas. 254. **G**

(23) Confessions leading to discovery of things connected with crime.

(a) Where an accused person was promised by a constable that she would be released if she pointed out the jewels belonging to the deceased, whom she was charged with having murdered, *held* that the pointing out of jewels by the prisoner after that promise was a relevant fact legally admissible in evidence, though, owing to the improper inducement, her sentence was commuted to transportation for life. 2 Weir 736 (737). **H**

(b) An accused person stated that he received Rs. 65 as his share of the money obtained by the murder of Kon Min, in which he was concerned, and that he gave Rs. 6 to his wife, and buried Rs. 59 under a water-pot stand, but that, when the police came, he was frightened and told Po Sin to dig up the Rs. 59 and give them to Kyaw Din. In consequence of this statement, Rs. 55 were obtained from Kyaw Din, and Rs. 4 from below the water-pot stand, where Po Sin had left them. Rs. 6 had been already obtained from appellant's wife before he confessed. *Held* that that part of the statement, which related to the Rs. 6 and the part relating to the accused having been concerned in the murder of Kon Min were admissible in evidence and that the accused's statement, that Rs. 65 or Rs. 59 was money which he got from Kon Min as part of the produce of the robbery, was as clearly inadmissible under S. 27, Evidence Act, as the statement that he was concerned in the murder. 5 Or. L.J. 300 (304)=U.B.R. (1906), Evidence, 3. **I**

(c) Where several mahazars setting out confessional statements were drawn up after the discovery of various items of property, in a case of house-breaking, setting out confessional statements, and adduced in evidence, it was held that they could not be proved at all, having been made to the police and not relating to the discovery of the property, within the meaning of S. 27 of the Evidence Act. 7 M. 102=2 Weir 740. **J**

(24) Confession induced by false allegations.

A confession induced by false allegations is irrelevant even if it be true. Rat. Unrep. Crim. Cas. 153. But see *infra* and cases under S. 29, *supra*. **K**

(25) Confession induced by deceit.

A confession, otherwise voluntarily made, is not inadmissible, merely because it was induced by deceit. Rat. Unrep. Crim. Cas. 756. **L**

2. - "And a confession made by one of such persons."—(Continued).

1. --CONFESSION.--(Continued)

(26) Suspicious and improbable confessions.

Where a confession is a suspicious one and grossly improbable in certain parts, it must altogether be set aside. 17 P.W.R. 1907 (Cr.) 6 Cr.L.J. 141. **M**

(27) Confession not to be expanded

A confession cannot be expanded or extended to make it available for incriminating persons other than the confessing accused. 17 P.W.R. 1907 (Cr.) 4 Cr. L.J. 141. **N**

(28) Confession to be taken as a whole.

(a) A confession must be taken as a whole and considered along with the admitted facts of the case, and the accused must be judged by his whole conduct. Rat. Unrep. Crim. Cas. 370. **O**

(b) It is the practice of the High Court of Bombay to deal with confessions in connection with all the facts of the particular case, and, while not ignoring the difficulties that surround retracted confessions, it has not avoided these difficulties by applying any stringent rule. Rat. Unrep. Crim. Cas. 719; referring to 11 B.H.C. 137; and Crim. Rat. 22 of 1889 **P**

(29) Duly proved confession requires no corroboration.

(a) There is no rule of law which requires a duly proved confession* to be corroborated and the Bombay High Court has never laid down a rule of practice or prudence such as has been apparently adopted by the learned Judges of Madras. (10 M. 295 and 12 M. 123). Rat. Unrep. Crim. Cas. p. 719 (720). **Q**

(b) When a confession has been made in the manner required by law as a condition of admissibility, and when there is no suspicion of cruelty or improper inducement, and it is amply sufficient to prove the guilt of the accused, it may be accepted as conclusive in itself without material corroboration. Rat. Unrep. Crim. Cas. 463. **R**

(c) A prisoner may be convicted on his own confession without any corroborating evidence, even when a confession is retracted. If a Judge believes that that confession contains a true account of that prisoner's connection with the crime, he is bound to act, so far as that prisoner is concerned, on the confession which he believes to be true. 1 A.L.J. 310 A.W.N. (1907), 140-5 Cr.L.J. 360-29 A. 134. **S**

(30) Confession of being present at murder not sufficient for conviction.

A confession by an accused of his mere presence at a murder, as a neutral onlooker, is not, in the absence of any other evidence, sufficient to convict him of that murder. Rat. Unrep. Crim. Cas. 771. **T**

(31) General rule about retracted confessions.

(a) It is a recognised rule of the law of evidence that a retracted confession may be used against the person making it, but not against others accused jointly with him. 28 P.W.R. 1907 (Cr.). **U**

(b) A retracted confession should carry practically no weight as against a person other than the maker; it is not made on oath, it is not tested by cross-examination, and its truth is denied by the maker himself, who has thus lied on one or other of the occasions. The very fullest corroboration would be necessary in such a case, far more than would be demanded for the sworn testimony of an accomplice on oath. 28 C. 689-690). **Y**

2.—“And a confession made by one of such persons.”—(Continued).

1.—CONFESSION. — (Continued).

(c) Statements of accomplices, co-prisoners, who may not be cross examined and who may have motives in telling lies against the other co-prisoners, cannot be accepted as the criterion of guilt or innocence of the accused, especially in a capital case and where they have retracted their stories. Rat. Unrep. Crim. Cas. 771. **W**

(32) Confessions retracted—Allegation of improperly extracting them—Enquiry.

(a) Where a confession is subsequently retracted and the police are alleged to have improperly extracted the confession, some step at least should be taken to test the truth of the charge against the police, and it is unsafe to convict upon such confession alone. 5 A.W.N. 221 **X**

(b) It is obviously important that, in cases where a retracted confession is the evidence chiefly relied on by the prosecution, not only should the Court be satisfied as to the falsity of any allegations as to improper pressure by the police, but should use every reasonable effort to ascertain to what extent, if any, the details of the confessions are corroborated. Rat. Unrep. Crim. Cas. 242. **Y**

(33) Unsafe to convict accused on his retracted confession.

It is not safe to convict an accused person on his retracted confession standing by itself uncorroborated and the production by an accused person, while in the hands of the police, of a thing unconnected with the commission of the crime, is not admissible in evidence against him. 3 P.W.R. 1907 (Cr.). **Z**

(34) Retracted confession not valueless—If true, it may be acted upon

(a) Where an accused person's confession is retracted, it does not become useless as evidence of his guilt, but the Court trying him should consider whether it is properly proved and consistent with the evidence in the case believed by the Court to be true, and, if it be so, the Court should, despite its retraction, act upon it. 18 A.W.N. 69. **A**

(b) Where a Judge believes that a confession made by a prisoner, although subsequently withdrawn, contains a true account of that prisoner's connection with the crime, the Judge is bound to act, so far as that prisoner is concerned, on that confession, which he believes to be true. 20 A. 133 (131). **B**

(35) Statement before Magistrate subsequently retracted not substantial evidence for prosecution.

It never was the intention of the Legislature that the substance of a statement before a Magistrate, when retracted and repudiated, should be used by the prosecution as substantial evidence of the allegations made in it. 22 A. 445 (447). **C**

(36) Statements made by accused on different occasions.

Where an accused makes a confession before one Magistrate, and again confesses before the Committing Magistrate, it is not open to the latter to read to the accused his statement before the former Magistrate and to ask him if it was true; in such cases, it is very desirable to test the value of statements made on different occasions by taking them fully and in detail and seeing in what respects they agree and in what particulars they differ. Rat. Unrep. Crim. Cas. 153. **D**

2.—“And a confession made by one of such persons.”—(Continued).

1.—CONFESSION.—(Continued).

(37) Statement of accused to whom pardon is illegally tendered.

A pardon was tendered to a person alleged to have been concerned with others in certain offences, none of which was exclusively triable by a Court of Session, and such person was examined as a witness in the case. It was held that the tender of pardon to such a person and his examination as a witness were illegal and not authorised by S. 347, Cr.P.C., 1872, and that, not being liable to be examined on oath, his evidence was inadmissible, and that the statement made by him was irrelevant and inadmissible as a confession. 2 A. 260. **E**

(38) Failure of Magistrate to record the fact of accused being in custody—Effect.

The omission of the Magistrate, before whom a confession is made, to record the circumstance that the accused was not then in the custody of the police, cannot invalidate the confession, if the requirements of the Criminal Procedure Code are complied with by the Magistrate when he recorded them. Rat. Unrep. Crim. Cas. 534. **F**

(39) Accused being in police custody for a long time—Admissibility of his confession.

A confession, under S. 164, Cr. P.C., 1882, made to a Magistrate other than the Committing Magistrate, if tendered on the part of the Crown, cannot be rejected on the sole ground that the accused had been a long time in the hands of the police. Rat. Unrep. Cr. C., p. 720 (721). See 25 B. 543 = 3 Bom. L.R. 122. **G**

(40) Duty of Judge where confession is unsupported by evidence of witnesses.

Where a confession is not supported by the evidence of witnesses, a Judge must examine very carefully to see whether it gives those details which indicate that it is a natural narrative of what took place in the presence of the man making it, not at variance with any evidence in the case which is believed, and is not merely a parrot-like repetition of a story put into the man's mouth. 20 A. 132 (134-5). **H**

(41) Accused making different statement before Magistrate and Sessions Court—Statement before Magistrate relevant against him.

The fact that an accused person, who has been examined by the Committing Magistrate, makes other and different statements, in his examination by the Court of Session, does not make his statements before the Committing Magistrate no evidence. On the contrary, such statements are still evidence and may be used against the accused. 1 A.W.N. 89. **I**

(42) Practice of taking prisoners before Magistrates not having jurisdiction.

The practice of taking prisoners before Magistrates not having jurisdiction in the case, for the purpose of getting a confession, is not generally desirable. It is still more objectionable to send prisoners before different Magistrates, each of whom would have imperfect knowledge of the matter from only taking one or two examinations. Rat. Unrep. Crim. Cas. 254. **J**

2.—“*And a confession made by one of such persons.*”—(Continued),

1.—CONFESSION.—(Concluded).

(43) **Objection to admissibility of confession not taken in Court below.**

Where a confession was objected to on the ground that it was improperly received into evidence by the Lower Court, the High Court declined to disturb the discretion exercised by the Lower Court on the grounds that the objections now advanced could well have been advanced before the Lower Court, and that there was nothing improper on the facts of the case in the Lower Court's admitting the confessions. Rat. Unrep. Crim. Cas. 163. **K**

2.—MADE.

(1) **How section should not be read.**

S. 30 of the Indian Evidence Act is not to be read as if the words “at the trial” were inserted after the word “made” and the word “recorded” substituted for the word “proved.” Rat. Unrep. Crim. Cas. 510. **L**

(2) **Co-accused's confession need not have been made in presence of accused against whom it is used.**

(a) S. 30 of the Evidence Act provides that, when a confession made by one prisoner is proved, it may be taken into consideration against any other person jointly tried with him, but it is not enacted that the confession must have been made in the *presence* of that person. 2 Weir 745. **M**

(b) In order that a confession may be admissible for the purposes of S. 30, it is not essential that it should have been made in the presence of the other prisoners against whom it is tendered in evidence. See 6 M.L.J. Art., p. 88. **N**

(c) For the confession referred to in S. 30 to be admissible, it must be proved that the person or persons against whom it is sought to use it are on their joint trial, together with the person proved to have made it, but it is not necessary that such confession should have been made during the joint trial, or even in the presence of the persons against whom it is sought to be used. 14 A.W.N. 11, *referring to* 6 B. 124. **O**

(3) **Confession may be made at any time for purposes of S. 30.**

A confession duly made, at any time, by one of several accused persons who are under trial jointly for the same offence, can be taken into consideration, under S. 30 of the Evidence Act, as against the other accused persons. Rat. Unrep. Crim. Cas. 510. **P**

(4) **Confessions made in absence of co-accused.**

Confessions of some, of a number of, accused persons made in the absence of the others, were held to be of no weight as against the latter. 10 C. 970. **Q**

(5) **Confession may be made at any time before trial, whether made before or after accusation or charge.**

Confessions made at any time before trial are relevant under S. 30, whether they are made before or after being accused or charged with an offence; the section itself shows no restriction such as that the confession should be made after accusation or charge. 6 M.L.J. Art., p. 88, *referring to* 4 C. 488 (F.B.) and 14 Ind. Jur. N.S. 516. **R**

2.- "And a confession made by one of such persons."--(Concluded).

2.—MADE.--(Concluded).

(6) Safeguard contemplated by Legislature exists in the case of such confessions.

A confession made before accusation or charge is within the section, as the safeguard, alleged to be its basis, exists independently of the time of making the confession, whether before or after accusation or charge. 6 M.L.J. Art., p. 88. **S**

(7) But confessions must be made by accused tried at the same time.

S. 30 of the Evidence Act, which alone makes the confession of one prisoner evidence, in any degree, against persons other than the man who made the confessions, applies only to cases in which the confessions are made by prisoners tried at the same time with the accused person against whom the confessions are used. 21 W.R. (Cr.), 65 (66). **T**

3. "Affecting himself and some other of such persons."

(1) Confession can be relevant against person other than maker only so far as section permits.

Though, where a prisoner, charged with abetment, jointly tried with those whom he abetted, made a long detailed statement of what he knew of the case, every word of it might be taken and acted upon as against himself, it was only admissible against the other prisoners, whether for the purpose of corroboration of an accomplice's testimony or otherwise, so far as it was made available by S. 30. 19 W.R. 16 (23) Cr. **U**

(2) Test intended to be applied to statements of accused used against another co-accused.

The test that S. 30 of the Evidence Act intended should be applied to a statement of one prisoner proposed to be used in evidence as against another is to see whether it is sufficiently itself to justify the conviction of the person making it of the offence for which he is jointly tried with the other person or persons against whom it is tendered; that is, the confessing prisoner must tar himself and the person or persons he implicates with one and the same brush. 2 A. 444 (446). **Y**

(3) Self-implication affords guarantee of truth of confessions implicating others.

(a) It is this implication of himself by the confessing person which is intended by the Legislature to take the place, as it were, of the sanction of an oath, or rather which is supposed to serve as some guarantee for the truth of the accusation against the other. 19 W.R. 67 (Cr.). **W**

(b) The principle underlying the section seems to be that, when a person makes a confession involving himself and others, some guarantee for the truth of the criminal implication of others is afforded by the fact of self-implication, 5 M.L.J. Art., p. 219. **X**

4) Confessions exculpating maker lack this guarantee.

Confessional statements exculpating the maker, but inculcating his fellow-prisoners, lack the sanction of an oath, or of that substitute for it, viz., implication of the maker on the charge for which all the accused are tried. See 19 W.R. (Cr.), 67. **Y**

3.—“Affecting himself and some other of such persons.”—(Continued).

(5) Interpretation of section.

S. 30 must be interpreted to mean that the statement of fact made by the prisoner, which amounts to a confession of guilt on his part, may be taken into consideration so far, and so far only, as that particular statement of fact extends, against the other prisoners who are being tried, as well as himself, for the offence which is thus confessed. The two illustrations given to this section bear out this view. 19 W.R. (Cr.), 16 (23). Z

(6) Instances where confessions were held to require implication of maker substantially to the same extent as the rest.

(a) Before a confession of a person jointly tried with the prisoner can be taken into consideration against him, it must appear that that confession implicates the confessing person substantially to the same extent as it implicates the person against whom it is to be used in the commission of the offence for which the prisoners are being jointly tried. 19 W.R. (Cr.), 67. A

(b) Confessions which are made use of in S. 30 can only be used so far as they make the confessing prisoner guilty of the offence for which all are being tried. 23 W.R. (Cr.), 24. B

(c) The statement of one prisoner cannot be taken as evidence against another prisoner, under S. 30, unless the parties are admittedly *in pari delictu*, that is, when the confessing prisoner implicates himself to the full as much as his co-prisoner whom he is incriminating. 25 W.R. (Cr.), 43. C

(d) It is settled law that, before the confession of the accused can be taken into consideration against others jointly tried with him for the same offence, it must appear that the confession implicates the confessing person substantially to the same extent as it implicates those against whom the confession is to be used. 17 P.W.R. 1907 (Cr.)=6 Cr. L.J. 141. D

(e) Before a confession of a person jointly tried with a co-accused can be taken into consideration against such co-accused, it must appear that the confession implicates the confessing person substantially to the same extent as it implicates the person, against whom it is to be used, in the commission of the offence for which they are being jointly tried. L.B.R. (1893—1900), 7. E

(f) “A confession to be admissible against co-prisoners must affect the person making it substantially to the same extent as the others, but so long as it fulfills this condition, and provided the evidence adduced in corroboration relates not simply to the general drift of the confessing prisoner's story but to those particular points which affect the co-accused, the actual weight to be attached to the confession must depend upon the circumstances of each case.” 29 P.R. 1880 (Cr.). Per Rattigan, J. F

(g) To render the confession of one prisoner jointly tried with another prisoner admissible in evidence against the latter, the confession must implicate the confessing person substantially to the same extent as it implicates the person against whom it is to be used in the commission of the offence for which the prisoners are being jointly tried. S. C. 98 (Oudh), referring to 10 B.L.R. 453 and 6 B. 291; see, also, S.C. 158 (Oudh), *infra*. G

3.—“Affecting himself and some other of such persons.”—(Continued).'

(h) To render the evidence of an accused person's statements admissible in evidence against his fellow prisoners, they must implicate that person substantially to the same extent as they implicate the persons against whom they are to be used, in the commission of the offence for which the prisoners are being jointly tried. S.C. 153 (Oudh). **H**

(i) If a confession substantially implicates to the same extent, the person making it, as well as the other accused, in the offence for which they are jointly tried, it is quite unnecessary to go beyond the actual confession to ascertain the object with which it is made. Rat. Unrep. Crim. Cas. 84. **I**

(7) Statements exculpating maker and reducing his guilt not admissible.

(a) Statements, however criminating, which are made by a prisoner in self-exculpation, or to reduce his guilt to something lower than what is alleged against the others and against himself, should not be taken into consideration against anybody but himself. 2 A. 444 and 646; 7 A. 646; 6 C. 279 and 6 B. 238. **J**

(b) Statements, made by some of the accused persons, not amounting to confessions, and in no way incriminating them, are not admissible against any others than those making them. 25 C. 711. **K**

(8) Confession of co-accused, though admissible, should be independently corroborated.

Where the confession of a co-accused is admissible, it is even then necessary that there should be its corroboration, which must be furnished by independent evidence and should incriminate each accused individually, in respect of the offence charged. 17 P.W.R. 1907 (Cr.) = 6 Cr. L.J. 141. **L**

(9) Confessions held inadmissible as not sufficiently implicating maker.

(a) Statements made by one set of prisoners incriminating the prisoners of the other party, who, although they were tried together, were tried upon totally different charges respectively, where each individual prisoner made a case for himself on which he was free from criminal offence, could not be taken into consideration, under S. 30, against the prisoners of the other set. 21 W.R. (Cr.), 53. **M**

(b) Where, in the statements made by some of the prisoners before the committing officer, generally agreeing more or less with the deposition of the eye-witnesses, the person making the statement, while implicating some of his fellow-prisoners, carefully exculpated himself, such statements were held not worthy to be considered as evidence under S. 30. 25 W.R. (Cr.), 8. **N**

(c) An accused person was offered a pardon, the conditions of which were accepted by him. On being examined, he described the details of the offence and named the prisoner as an accomplice. He afterwards withdrew his statement. Held that his statement was inadmissible against the prisoner. 5 N.W.P. 217. **O**

(d) Where an accused person, in every one of his statements, sought to fix the guilt on his co-accused and to excuse himself, it was held that his so-called confessions did not implicate him to the same extent as they implicated the persons against whom they were proposed to be used. 2 A. 444 (446), following 10 B.L.R. 453. **P**

3.—“Affecting himself and some other of such persons.”—(Concluded).

(e) The confession of one co-accused, where he does not substantially implicate himself to the same extent as he implicates the other co-accused, is not admissible, under S. 30, in evidence against the latter, but would be evidence only against the person who made it. Rat. Unrep. Crim. Cas. 370. **Q**

(f) An accused person made a statement before a Magistrate exculpating himself and inculcating his fellow-prisoners. Held that this statement was not admissible in evidence against the others and could not be taken into consideration as against them under S. 30. Rat. Unrep. Crim. Cas. 436 (439), referring to 10 B.H.C.R. 497; 10 B.L.R. 453 and 2 A. 444. **R**

(g) In a certain case of murder, it was held that the admission of accused persons jointly tried with another could be considered against him only when those prisoners admitted having had some actual hand in the murder or made themselves out to be equally guilty with him. 25 W.R. (Cr.), 43 (44). **S**

(10) Implication held sufficient.

Where each accused person acknowledges having taken an active part in a murder, the implication was held to be sufficiently substantial to warrant the use of the confession of one accused person against the other or others, if the confessions were voluntary and true. 3 Cr. L.J. 312. **T**

(11) Confessions exculpating maker and inculcating the rest.

For instances of statements exculpating the maker and inculcating his fellow-prisoners held to fall outside the section. See 19 W.R. (Cr.), 16 and 67, 10 B.H.C.R. 497; 21 W.R. (Cr.), 8 and 53; 23 W.R. (Cr.), 24; 25 W.R. (Cr.), 8 and 43; 2 A. 444 and 646; 6 C. 279 and 6 B. 288. See 5 M.L.J. Art., p. 241. **U**

(12) Confessions implicating maker in lesser degree than his co-accused.

For instances of confession implicating the confessor in a lesser degree than his fellow-prisoners. See 5 M.L.J. Art., p. 241 (referring to 8 B. 223). **V**

(13) Confession implicating maker and other accused substantially to the same extent.

For cases where only confessions implicating the confessor and his fellow-prisoners substantially to the same extent were held admissible. See 19 W.R. (Cr.), 16; 19 W.R. (Cr.), 67; 25 W.R. (Cr.), 43; 2 A. 444; 14 Ind. Jur. N.S. 175; 10 B.H.C.R. 497; 2 A. 646; 6 C. 279 and 6 B. 288. See 5 M.L.J. Art., p. 239. **W**

(14) Confessions implicating maker more than his co-accused.

For confessions implicating the confessor more than his co-prisoners, in the commission of the offence charged against all, held admissible. See 5 M.L.J. Art. 238, referring to 19 W.R. (Cr.), 57, 67 and 11 B.H.C.R. 278. **X**

4.—“Is proved.”**(1) Confession to be relevant under S. 30 must be proved.**

(a) No doubt S. 30 of the Evidence Act allows a confession to be used against another prisoner, although made in his absence, but it requires that such confession should be “proved” as against the prisoner to whose prejudice it is to be used. 6 B. 124 (125). **Y**

4. — "*Is proved.*"—(Continued).

- (b) S. 30 requires that a confession made by one prisoner, which is to be used for the purpose of affecting another, must be proved. 24 W.R. (Cr.), 42 (43). Z

(2) **Person against whom another's confession is to be used entitled to demand strict legal proof of it.**

When a confession made by one person has to be used for the purpose of affecting another accused person, the person to be affected by it has a right to demand that it be strictly proved, and shown to have been in all essential respects taken and recorded as prescribed by law—Cr. P.C. 1872, Ss. 122, 345 and 346. 24 W.R. 42 (43). A

(3) **Term "proved" refers to confessions made beforehand.**

The word "proved" in S. 30 must refer to a confession made beforehand. Per *Garth, C.J.* 4 C. 483 (488) (F.B.) B

(4) **Definition of "proved."**

The definition or explanation of the expression "proved" is, "a fact is said to be proved when, after considering the circumstances before it, the Court either believes it to exist, etc." 4 C. 483 (492). Per *Jackson, J.* C

(5) **When Court should hold such confession as "proved."**

The confession of a person jointly tried with others may be considered with the other evidence, and, if, in taking all together and considering the matter before it, the Court believes that the fact described did exist or that their existence was so probable that a prudent man ought under the circumstances of the particular case to act on the supposition that they existed, a Court should then hold the events deposed as proved. 29 P.R. 1880 (Cr.). Per *Brandreth, J.* D

(6) **Effect of proving confession makes it evidence.**

- (a) It seems to follow, therefore, that if a relevant fact is proved, and the law expressly authorises its being taken into consideration, that is, considered for a certain purpose, or against persons in a certain situation, the fact in question is "evidence" for that purpose, or against such persons, although the result has not been expressed in those words by the legislature; and being "evidence," it must be used in the same way as everything else that is "evidence." 4 C. 483 (492). Per *Jackson, J.* E

- (b) Under S. 30, the confession of a prisoner which affects himself and some other prisoner charged with the same offence, becomes, when duly proved, admissible in evidence as against both prisoners, and must be so dealt with by the Court. 4 C. 483 (490). Per *Garth, C.J.* F

- (c) Where a confession is duly proved afterwards, it does not matter whether or not the other accused persons were present when it was made. 6 M.L.J. 89, referring to 7 C. 65 and 6 B. 124. G

(7) **Course of proof is a question of convenience.**

If the confession made by one person jointly tried with another for the same offence is corroborated by other evidence, it matters not whether, in proving the case at the trial, the confession precedes the other evidence, or the other evidence precedes the confession. The course of proof in such a case is a question of convenience for the prosecution; and they have a right to bring forward the evidence in any order they may think fit. 4 C. 483 (491) (F.B.). Per *Garth, C.J.* H

4.—“*Is proved.*”—(Concluded).(8) **Proved confession admissible, though withdrawn or denied.**

There is nothing in S. 30 of the Evidence Act to exclude, as against persons being jointly tried for the same offence, a confession made by one of the accused and duly proved, simply because at the trial the confession is withdrawn or denied. 1 L.B.R. 133 (136). I

(9) **Irregularities which prejudice accused.**

The reception as evidence against an accused person of a confession which ought not to have been proved, and which is not in accordance with law, and the grounding of a case against him upon such confession are irregularities which seriously prejudice him. 24 W.R. (Cr.), 42 (44). J

(10) **Confession held to be not proved.**

(a) A confession was taken during the absence of the maker's co-accused, when the latter had no opportunity of denying or even of knowing what their fellow-prisoner said, that is, it was not even read over to them subsequently; it was held that the confession could not be said to have been proved. 6 B. 124 (125). K

(b) The objection to the admissibility of the evidence of certain confessions taken and recorded by the Sessions Judge at the trial was not to the fact of those confessions having been made at the trial, but to the circumstance of their not having been “proved,” owing to the fact that the Sessions Judge, when about to examine the prisoners, required each to withdraw from the Court till his turn for examination should come round. 7 C. 65. L

5.—“*The Court.*”(1) **“Court,” meaning of term.**

(a) In a jury trial, the word “Court” here means not Judge but Jury; Mark. Ev., p. 28. M

(b) The word “Court” in S. 30 must mean the Court before which the trial of the prisoner is to be held, and, in a jury trial, must mean the Judge and Jury. The word “Court” is not intended to mean the Judge and Jury as regards one portion of the confession, and Judge only, exclusive of the Jury, as regards the other portion. 4 C. 483 (490-1) (F.B.). Per Garth, C.J. N

(c) If a case is left to go to a Jury at all, the whole of the admissible evidence must go to the Jury, and, therefore, the word “Court” in S. 30 must include the jurors who are to determine on the evidence. 4 C. 483 (495). Per Ainslie, J. O *

(d) The word “Court” in S. 30 meant only the Judge, and not the Jury. *Queen v. Narain Tel*, 27th May, 1875; cited and overruled in 4 C. 483. P

(e) And the statement of a person jointly tried with others for the same offence in a case tried by a Jury should not be put before the Jury. (*Ibid.*) Q

(2) **“Court” in Ss. 24 and 28.**

The word “Court” in Ss. 24 and 28 refers clearly to the Court in which the confession is made. Per Jackson, J. 4 C. 483 (490). R

5.—“*The Court.*”—(Concluded).

(3) Value and sufficiency of evidence to be considered by Judge.

Although the section does make the confession admissible in evidence against either prisoner, the weight which ought to be attached to such evidence, and the question, whether, taken by itself, it is sufficient, in point of law, to justify a conviction, are questions for the Judge who tries the case. 4 C. 483 (490) (F.B.). Per Garth, C.J. **S**

(4) Duty of Judge towards the Jury regarding approver evidence.

(a) A Judge, in cases where the material supporting the charge against the prisoner is afforded by the evidence of an approver, is bound very carefully to warn the jury of the infirmity which necessarily attaches to that evidence. He is bound also to call their attention to the circumstance, if, in fact, it be the case, that the approver is speaking under the influence of a conditional pardon, *i.e.*, a pardon conditional upon his telling the truth to the satisfaction of the Crown, who is the prosecutor. 19 W.R. (Cr.), 16 (20), *citing* 3 B.L.R. (F.B.), 2. **T**

(b) In all cases where an accomplice's testimony is admitted, it is incumbent on the Judge to inform the jury of the results of the law bearing on this point as sanctioned by the Evidence Act. 21 W.R. (Cr.), 69 (71). **U**

(5) Judge to decide whether accused was or was not in police custody.

It is the duty of the Judge, not of the jury, to decide the point, whether an accused person, while making a confession, was or was not in police custody as it is a matter which it is necessary to be proved in order to enable the confession to be admitted in evidence [Criminal Procedure Code, S. 298, cl. (b)]; and his omission to state to the jury his finding on the point is not a misdirection and could not prejudice the accused. 18 M.L.J. 66. **Y**

(6) Discretion of Magistrate.

The discretion of a Magistrate would be soundly exercised if he took the prosecution evidence first, instead of hurrying the prisoner fresh from the hands of the police to give evidence against himself. 1 A.W.N. 166. **W**

6.—“*May take into consideration such confession.*”

(1) Court's favour only limited and cautious use of section.

The general view of the Courts is, in the highest degree, unfavourable to any but a very limited and cautious use of the S. (30). It must be regarded as a dangerous exception to the general rule, and its wording shows that the confession is merely an element in the consideration of the evidence. This view is fully borne out by 1 M. 163; 15 B. 66 and 4 C. 483. L.B.R. (1893-1900), 368; *citing* Cunningham's Evidence. **X**

2) Confession only an element in the consideration of the evidence.

S. 30 is an exception, and its wording shows that the confession is merely to be an element in the consideration of the evidence. Unless there is something more, a conviction upon it will still be a case of no evidence and bad in law. 2 Weir 740=7 M.H.C.R. Ap. XV. **Y**

6.—"May take into consideration such confession."—(Continued),

(3) Guarded language of section—"May be taken into consideration."

When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons is proved, S. 30 provides, not that such confession is evidence, still less does it say that it shall be the foundation of a case against the person implicated, but it very guardedly says that it may be 'taken into consideration.' 24 W.R. 42 (43). Z

(4) Intention of Legislature.

The intention of the Legislature in so saying was that when, as against any such person, there is evidence tending to his conviction, the truth or completeness of this evidence being the matter in question, the circumstance of such person being implicated by the confession of one of those who are being jointly tried with him should be taken into consideration as bearing upon the truth or sufficiency of such evidence. 24 W.R. (Cr.), 42 (43). A

(5) Meaning of "taken into consideration."

(a) It is not perhaps necessary or easy to define precisely what is meant by the words "taken into consideration" in S. 30 of the Evidence Act. At all events, they must mean that the confessions referred to in the section are not to have the force of sworn evidence. 22 A. 445 (448) = 20 A.W.N. 169, *referring to* 15 B. 66. B

(b) The meaning of the words, "the Court may take into consideration such confession as against such other person as well as against the person who makes such confessions," is that, if there is other evidence, which, if true, would establish the charge, the confession of a person being tried jointly for the same offence may be taken into consideration by the Court and be used for the purpose of corroborating the other evidence. 4 O.C. 69 (70), *followed in* 6 O.C. 204 (209). C

(c) It does not mean that a person can be convicted on such a confession, if there is corroboration. 4 O.C. 69 (70), *followed in* 6 O.C. 204, (209). D

(d) The words "taken into consideration," in S. 30 of the Indian Evidence Act, mean "taken into consideration" for the purpose of arriving at a conclusion of fact, and though a co-accused's statement is not technically "evidence" within the definition given in S. 3, it may still be used *quantum valeat* for the basis of a reasonable inference, and if a jury think it sufficiently supported by a partial or qualified admission of guilt on the part of the accused himself and by admitted physical facts pointing to his connection with the crime imputed to him, they are not precluded by law, any more than by reason, from a finding of guilty thus sustained. Rat. Unrep. Crim. Cas. 311. E

(6) Words "may take into consideration" give a Court discretion only.

Even by the Evidence Act, the Legislature only bestowed a *discretion* upon the Court to "*take into consideration*," such confession as against such other person as well as against the person who makes such confession. 21 W.R. 69 (71) (Cr.), *referring to* 19 W.R. 16 (Cr.), and 19 W.R. 67 (Cr.). F

(7) Words not discretionary, but imperative.

(a) The words "may take" are not intended to be permissive or discretionary, but *imperative*. 6 M.L.J. Art., p. 90. G

6.—“ May take into consideration such confession.”—(Continued).

- (b) “ Whenever there is a confession relevant under S. 30, in satisfying the terms of it, the Court is not at liberty to take it into consideration or not, at its discretion, against the others, but must do so, though it may attach no *weight* at all to it, if it is not corroborated as required by law.” 6 M.L.J. Art., p. 90. But see 21 W.R. (Cr.), 69, *supra*. **H**

(8) Accused's statements not technically “ evidence.”

- (a) Statements made by accused persons are not evidence within the definition of “ evidence ” given in S. 3 of the Evidence Act. An accused person does not make these statements on oath or solemn affirmation and cannot be cross-examined by his co-accused. S. 133 of the Act does not apply to such statements; they can only be taken into consideration under S. 30. L.B.R. (1893-1900), 368. **I**

- (b) Technically speaking, the statement of a co-accused is not evidence within the meaning of S. 3 of the Evidence Act. 14 Ind. Jur. N.S. 884. **J**

- (c) Under S. 30 of the Evidence Act, confessions of persons jointly tried with an accused for the same offence could be taken into consideration as against him; but they are not technically “ evidence ” within the definition given in S. 3 of the Act as was pointed out in *Imperatrix v. Bayaji*, Bom. H.C.Crl. Rul. 18th November 1886, and they could not, therefore, alone form the basis of a conviction. They could only be taken into consideration along with the evidence. 15 B. 66 (67), followed in 22 A. 445 (447). **K**

- (d) Held that the confession of one prisoner, jointly tried with others, not being “ evidence ” as defined in S. 3 of the Evidence Act, the Jury ought not to be allowed to take it into consideration as against his fellow-prisoners. *Queen v. Narain Tel.* 27th May, 1875, cited and overruled in 4 C. 483. **L**

- (e) Where the only evidence for the prosecution was that of the witnesses whom the Judicial Commissioner considered unworthy of any belief, it was held that the prisoners who were charged with rioting ought not to have been convicted on the statements of the opposite party who were also charged with rioting, for such statements were not evidence against the accused in this case. 21 W.R. 48 (Cr.) **M**

(9) Legislature has avoided calling accused's statement “ evidence.”

It has been pointed out that the Legislature has avoided calling the statement of an accused person jointly tried with others “ evidence.” See 23 W.R. 24 (Cr.); 24 W.R. 42 (Cr.) and *Queen v. Narain Tel.* 27th May, 1875, *unrep.*, cited and overruled in 4 C. 483. **N**

(10) Legislature has not avoided it.

The Legislature has not avoided calling the confession of an accused person “ evidence ” against a co-prisoner. It has not so called it, because that is not the phraseology of the Act. 4 C. 483 (492), per *Jackson, J*; overruling *Queen v. Narain Tel.*, see *supra*. **O**

6.—“*May take into consideration such confession.*”—(Continued).(11) **Confession of prisoner affecting himself and another jointly tried with him is evidence when duly proved.**

(a) The confession spoken of in S. 30 is ‘evidence’; it is also evidence for a Jury at a Sessions trial in India; but it is not singly sufficient to support a conviction, that is to say, an accused person, other than he who has confessed, cannot lawfully be convicted upon such confession alone, nor ought he to be convicted on the ground of such confession corroborated by circumstantial evidence, unless the circumstances constituting corroboration would, if believed to exist, themselves support a conviction. 4 C. 483 (491) (F.B.). Per *Jackson, J.* P

(b) A confession is an admission, and by S. 21 admissions are relevant. 4 C. 483 (492). Per *Jackson, J.* Q

(c) Ordinarily such admissions can only be proved against the person making them, and, therefore, if the prosecutor, at a trial before the Court of Session, proved a confession made by a person then under trial, the Court would be obliged to hold that it was relevant, and could be considered only against the person making it. 4 C. 483 (492). Per *Jackson, J.* R

(d) But S. 30 expressly says that such confession when proved may be considered as against other persons being jointly tried for the same offence who are affected by it. 4 C. 483 (492). Per *Jackson, J.* S

(e) That a confession made by one person who is being jointly tried with others for the same offence, and affecting himself and some other such person (and which is proved), is to be treated as ‘evidence’ against such other person under S. 30 seems, therefore, made out by the terms of the Act itself. 4 C. 483 (492). Per *Jackson, J.* T

(f) The confession of an accomplice is, by the law of India, evidence against his fellow-prisoner. 4 C. 483 (495). Per *Markby, J.* U

(g) All confessions which can be legally used under S. 30 are “evidence.” Such confessions may legally go to make up the proof of the offence as against any other person who is being jointly tried for the same offence, and, if so, it is impossible to describe them as anything but “evidence.” 4 C. 483 (495). Per *Ainslie, J.* Y

(h) The meaning of the legislative enactment in S. 30 of the Evidence Act, that a confession may be taken into consideration by the Court, is that the Court may treat the confession, in the circumstances provided for by the section, as “evidence.” 4 A.L.J. 310=A.W.N. (1907), 140 =5 Cr. L.J. 360=29 A. 434. W

(12) **But such confessions are evidence of defective character.**

The mere confessions of prisoners, tried simultaneously with the accused for the same offence, which are, in a very qualified manner, made operative as evidence by the Evidence Act, S. 30, are only to be rated and valued as evidence of a defective character, at best as accomplice’s testimony, and they require a specially careful scrutiny before they can be safely relied upon. 21 W.R. (Cr.), 69 (71). X

6. -- "May take into consideration such confession." - (Continued).

(13) And a conviction cannot be based on them.

Though, under S. 30, confessional statements made by prisoners implicating persons other than themselves may be 'taken into consideration' against other persons than the person making them, they are not evidence on which a conviction can be based. 2 Weir 742 (744). **Y**

(14) Meaning of "evidence."

What the legislature intended to denote whenever the word "evidence" is used in the Act, is carefully explained in the interpretation clause. 4 C. 483 (492). Per *Jackson, J.* **'Z**

(15) Same general tests to be applied to confessions and other kinds of evidence.

"The same general tests must be applied to confessions by co-accused as to other kinds of evidence, when it is intended to use them against persons other than those who make them; except that it must not be forgotten that the confessing prisoner is not giving his statement on oath, and that his fellow-prisoners have not the liberty of cross-examining him and thus possibly of exposing his falsehood." 29 P.R. 1880 (Cr.). Per *Rattigan, J.* **A**

(16) Weight to be given to confessions of accused jointly tried.

The weight to be attached to the confessions of accused persons jointly tried, as against each other, after their admission in evidence, will depend upon the probable force of such confessions. 6 M.L.J. Art., p. 90. **B**

(17) Highest value of such confessions.

The utmost value that can be claimed for the confessions made by prisoners implicating persons other than themselves is that, if there is other untainted evidence against the accused, they may be considered together with such evidence. But, when the other evidence is not untainted, such statements are no legal corroboration of the tainted evidence of an approver. 2 Weir 742 (744). **C**

(18) Direction to Jury regarding such confessions.

The Jury should be directed that the confessions, made by prisoners implicating persons other than themselves, regarded as evidence corroborating the approvers, are useless, except against those who made them. 2 Weir 742 (744). **D**

(19) Corroboration necessary for conviction on co-accused's confession.

- (a) The confession of a co-accused, if proved, is evidence against the accused, but is evidence of the weakest kind, and, if uncorroborated, it is not sufficient to warrant a conviction. 2 C.W.N. 749, following 4 C. 483. **E**
- (b) The statement of a co-prisoner may, indeed, be taken into consideration; but where it is not made on solemn affirmation and the other prisoners have had no opportunity of cross-examining him, its probative force is very much weakened. 10 B. 319. **F**
- (c) Where an accused person was convicted on the confessions of his fellow-prisoners who were tried jointly with him for the same offence, held that, standing alone, they could not, even if they could be regarded as evidence—which they were not within S. 3 of the Evidence Act (see Bom. H.C. CrI. Rul. dated 18th November, 1886)—be allowed such weight as can legally be given to the sworn testimony of an accomplice, who gives evidence subject to cross-examination. Conviction reversed. 15 B. 66 (67). **G**

6.—“*May take into consideration such confession.*”—(Continued).

- (d) The statement of a fellow-prisoner jointly tried is, by itself, evidence of the weakest kind. Rat. Unrep. Crim. Cas. 436 (439). **H**
- (e) It would be unsafe to convict the accused on the evidence of an accomplice, uncorroborated by the evidence of any independent witnesses. Rat. Unrep. Crim. Cas. 400. **I**
- (f) The retracted confessions of accomplices may be taken into consideration, under S. 30 of the Indian Evidence Act, when there is evidence tending to conviction, but they cannot form the basis of a conviction when there is no evidence whatever. Rat. Unrep. Crim. Cas. 108. **J**
- (g) Some corroborative evidence was held to be necessary to warrant a Court in convicting upon a retracted confession, and without such evidence a conviction is illegal. 6 A.W.N. 22. **K**
- (h) An accomplice must be corroborated as to all of the persons affected by his evidence. If he is corroborated in his evidence as to one prisoner, there will still be need for corroboration of his testimony with respect to the other prisoners. 1 A.L.J. 110, *approving* 8 A. 306. **L**
- (i) If, as has been established by experience, the evidence of an approver, examined on oath and liable to cross-examination, ordinarily should not be accepted without corroboration on a material point, *a fortiori*, such corroboration should be required to support the statement of a person, naturally desirous of earning the favour of a Court in the hope of a lenient sentence, who makes a statement which does not expose him to the penalty of perjury, and who cannot be cross-examined by the other accused in turn. 1 A. 664 (666). **M**
- (j) There must be some corroboration, independent of the accomplice, of the accomplice and the co-confessing prisoner to show that the party accused was actually engaged directly in the commission of the crime charged against him. The accomplice must be corroborated, not only as to one, but as to all, of the persons affected by the evidence, and because he may be corroborated in his evidence as to one prisoner, it does not justify his evidence against another being accepted without corroboration. 8 A. 306 (312), referring to *R. v. Webb*, 6 C. & P., 595; *R. v. Dyke*, 8 C. & P. 261; *R. v. Addis*, 6 C. & P. 388; and *R. v. Wilkes*, 7 C. & P. 272. **N**
- (k) Where an accomplice is a co-prisoner, the corroborative evidence must be more cogent and should be more strictly examined by the Court than when an accomplice gives evidence as a witness. Rat. Unrep. Crim. Cas. 456. **O**
- (l) A conviction based upon the confession of an accused person, jointly tried with another, would alone be illegal; and not only so, but such confession will not legally suffice, when corroborated by other facts of which evidence is offered, unless those facts are such that, if believed to exist, they would of themselves suffice to support a conviction. 4 C. 483 (494) (**F.B.**). Per *Jackson, J.* **P**
- (m) If there is absolutely no other evidence in the case, or the other evidence is inadmissible, such a confession alone will not uphold a conviction. 6 M.L.J. Art., p. 90, referring to 7 M.H.C.R. App. XV; 1 M. 163; 1 A. 664, 675; 4 C. 483 and 15 B. 66. **Q**

6.—“May take into consideration such confession.”—(Continued).

(n) The evidence of an accomplice cannot be safely acted upon as against persons accused by him, excepting when it is corroborated in regard to the particulars which implicate them. 19 W.R. 16 (20). **R**

*
(o) Confessions made by an accused person jointly tried with others for the same offence were held to be of little weight, unless corroborated by other testimony, to have all the infirmity attaching to an accomplice's evidence, and to be of less weight, as not being given on oath, the party making them not being subject to cross-examination. See 11 B.H.C.R. 196; 19 W.R. (Cr.), 16, 57 and 67; 21 W.R. 69; 20 W.R. 24; 24 W.R. 42; 25 W.R. 8 and 42 (Criminal) and *Queen v. Narain Tel*, 27th May, 1875, cited and overruled in 4 C. 483. **S**

(20) English and Indian Law.

The law in this country as expressed in Ss. 133 and 114 of the Evidence Act, which is in no way different from the law of England, is that a conviction based upon the uncorroborated testimony of an accomplice is not illegal, i.e., it is not unlawful. But experience teaches that it is not safe to rely upon the evidence of an accomplice unless it is corroborated, and, hence, it is the practice of the Judges both in England and in India, when sitting alone, to guard their minds carefully against acting upon such evidence when uncorroborated, and, when trying a case with a jury, to warn the jury that such a course is unsafe. There must be corroboration not only in material particulars, but the corroboration must extend to the identity of the accused person. 8 A. 306 (310). **T**

(21) Corroboration must come from an independent source.

(a) Corroboration of an accomplice's testimony must come from an independent and reliable source. Former statements made by the accomplice himself, though consistent with the evidence given by him at the trial, are not sufficient for corroboration. 11 B.H.C.R. 196. **U**

•
(b) The corroboration, which is needed in order to make the testimony of an approver-witness trustworthy, should be corroboration derived from evidence, which is independent of accomplice's, and not vitiated by the accomplice-character of the witness, and, further, should be such as to support that portion of the accomplice's testimony which makes out that the prisoner was present at the time when the crime was committed, and participated in the act of commission. The statement must not merely be generally true, but true in the particular points which affect the persons accused. 19 W.R. (Cr.), 16. **V**

(c) The confession of an accused person jointly tried with others could not be legally used against the others at all, excepting to such an extent as it was substantially corroborated by unimpeachable evidence *aliunde*. 20 W.R. 1 (3) (Cr.). **W**

(d) Confessions of persons tried jointly for the same offence may, by S. 30, be “considered” as against other parties then on their trial with them, but such confessions, when used as evidence against others, stand by themselves in need of corroboration, and cannot be used to corroborate other evidence against parties not making confessions; tainted evidence is not made better by being doubled in quantity. 19 W.R. (Cr.), 57 (58). **X**

6.—“May take into consideration such confession.”—(Continued).

- (e) A prisoner cannot be legally convicted upon the uncorroborated confession of another jointly tried for the same offence. Unsupported by other evidence, its evidentiary value is of the weakest kind; but, if supported by other evidence, it is immaterial for purposes of a conviction upon it, whether the confession succeeds or precedes the evidence that supports it. 4 C. 483 (F.B.). *Per Garth, C.J.* **Y**
- (f) A confession by prisoner A, which involves the guilt of prisoner B, is of itself, unsupported by other testimony, evidence of the weakest possible kind against B. It is simply the statement of a third person, not made upon oath or affirmation, and no Court ought to convict prisoner B upon such evidence. 4 C. 483 (490) (F.B.). *Per Garth, C.J.* **Z**
- (g) Where some, out of a number of accused persons charged with dacoity, told a story which was *prima facie* improbable about being forced to go with the dacoits, and not actually joining in the dacoity, such story told by accomplices was held to require independent corroboration. 3 Bom. L.R. 437 (438). *Per Candy, J.* **A**
- (h) The evidence of an accomplice cannot be acted upon without corroboration in material particulars, unless it is such that the Court can unhesitatingly believe it. Such corroboration must be independent of the accomplice or of a co-confessing prisoner. 1 A.L.J. 110. **B**
- (i) The conviction of a person who is being jointly tried with others for the same offence cannot be based barely upon an uncorroborated statement in the confession of one person amongst such others. 1 A. 664; *followed* in 1 A. 675, not reported in detail. **C**
- (j) Where a prisoner is jointly tried with another for the same offence, the confession of the other is not sufficient to support a conviction, even if corroborated, unless the corroborating circumstantial evidence is such as to itself support a conviction independently. 4 C. 483 (F.B.). *Per Jackson, J. and McDonnell, J.* **D**
- (k) Where the confession of an accused person jointly tried with another was not corroborated by any independent evidence to show that his co-accused was one of the persons who took part in the commission of the offence, the conviction of the co-accused was reversed. 10 B. 231 (233). **E**

(22) Examples.

- (a) The only evidence against a prisoner was a confession made by a co-prisoner. It was held that a conviction based solely upon the evidence of a co-prisoner is bad in law and the conviction was set aside. 1 M. 163= 2 Weir 740. **F**
- (b) The Chief Court held it as a rule of practice, not of law, that a conviction based upon the unsupported evidence of an accomplice was bad. (Decision made prior to the passing of the Evidence Act). 31 P.R. 1866 (Cr.) and 23 P.R. 1867 (Cr.). **G**
- (c) A conviction, which was based on the confession of a co-accused and which was not corroborated in any material particulars, was held to be untenable. 20 P.R. 1880 (Cr.). **H**
- (d) Where a confession of an accused person jointly tried with another was not corroborated by any independent evidence to show that the other was one of the persons who committed the offence, the other's conviction was reversed. 10 B. 231 (233). **I**

6. — “May take into consideration such confession.”—(Continued).

(23) Corroboration necessary both as to personal identity and *corpus delicti*.

(a) The confessions of co-prisoners to be rendered trustworthy must be corroborated by independent evidence *aliunde*, and not by the testimony of accomplices or approvers both as to the identity of all the persons affected by it and as to the *corpus delicti*. 6 M.L.J. Art., p. 98. **J**

(b) The testimony of accomplices should be corroborated by evidence *aliunde* regarding the identification of the persons whom they charge, as well as to the facts they state; other evidence should corroborate their testimony as against every individual whom they name. 21 P.R. 1866 (Cr.); 31 P.R. 1866 (Cr.); 1 P.R. 1868 (Cr.). **K**

(c) Where there is no substantial difference between the sworn statements of pardoned accomplices and the confessions of unpardoned co-accused accomplices, the Court observed that the latter could be taken into consideration under S. 30, but were not sufficient by themselves to support a conviction, and that independent corroboration was necessary in both cases, corroboration not only about personal identity, but also as to the *corpus delicti*, i.e., the circumstances which constitute the participation of the accused tried in the offence charged. Rat. Unrep. Crim. Cas. p. 750 (752), referring to 11 B.H.C. 196 and B.L.R. Sup. Vo. (F.B.), 459. **L**

(d) Not only as to persons spoken of by an accomplice must there be corroboration, but what is more important still, as to the *corpus delicti*, there must be some *prima facie* evidence pointing the same way to make the evidence of an accomplice satisfactory. The man who charges another with the commission of a crime, in which he is himself implicated, requires corroboration as to the particular person, but still more as to the existence itself of any crime, or of the particular crime from the penalty of which he is made free on the understanding that his testimony will be available for the prosecution. *R. v. Chatur Purshotam*, cited in 1 B. 475, following *The trial of Colonel Despard*, 28 St. Tr. 346. **M**

(24) Sufficient corroboration, what is.

(a) Where the recorded confession of an accused person is inadmissible in evidence, the evidence of the Magistrate, as to the fact of a confession having been made to him, would be corroboration of the approver or the confessing accused. 19 W.R. (Cr.), 60. **N**

(b) Certain confessions made by an accused person, when coupled with the confessions of his co-prisoners implicating him, were held to be most effective corroboration of the latter. 19 W.R. (Cr.), 59, 60. **O**

(c) Confession by prisoners accused of murder directly implicating them in the commission of the crime and made before a Magistrate and subsequently retracted were held to be sufficient to support a conviction, as the confessional statements were corroborated in material particulars by other evidence on the record. 19 M. 452. **P**

(d) For various kinds of facts held to corroborate and not to corroborate such confessions as are meant in S. 30. See 6 M.L.J. Art., pp. 98, 99 and 100. **Q**

6.—“*May take into consideration such confession.*” —(Continued).(25) **Confessions of co-accused no better than accomplice evidence.**

(a) The statements made by persons jointly tried with the accused cannot be put higher than the evidence of an accomplice. It is even doubtful whether they can be put so high. They, therefore, require corroboration as much as the latter. 4 A.W.N. 820. **R**

(b) The confession mentioned in S. 30 cannot stand higher as to probative force than the testimony of an accomplice who is declared to be a competent witness against an accused person (S. 133) and the law does not say of the confession, as it says of such testimony, that “a conviction is not illegal, merely because it proceeds upon the uncorroborated testimony of an accomplice.” 4 C. 483 (494). Per *Jackson, J.* **S**

(c) Though the statement of an accused person, under S. 30 of the Evidence Act, may be considered against another accused person jointly tried with him for the same offence, it is not, in fact, of equal weight with the evidence of an accomplice, and, by S. 114 of the Act, the Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars. 22 M. 491 (493). **T**

(26) **Meaning of requiring corroboration for accomplice evidence.**

In saying that, before the evidence of an accomplice can be safely depended upon, so far as it affects the prisoner, it ought to be corroborated, the meaning is, that other evidence, from sources independent of the approver, should be forthcoming relative to facts which implicate the prisoner, in the same way as the story of the approver does. 19 W.R. 16 (21). Cr.; citing 3 B.L.R. (F.B.), 2. **U**

(27) **Duty of Court dealing with accomplice evidence**

The legislature has laid it down as a maxim or rule of evidence, resting on human experience, that an accomplice is unworthy of credit against an accused person, i.e., so far as his testimony implicates an accused person, unless he is corroborated in material particulars in respect of that person; that is, it is the duty of the Court, which, in any particular case, has to deal with an accomplice's testimony, to consider whether this maxim applies to exclude that testimony or not, i.e., to consider whether the requisite corroboration is furnished by other evidence or facts proved in the case, though, at the same time, the Court may rightly, in exceptional cases, notwithstanding the maxim, and in the absence of corroboration, give credit to the accomplice's testimony against the accused, if it sees good reason for doing so, upon grounds other than the personal corroboration. 21 W.R. (Cr), 69 (70). **Y**

(28) **Direction to Jury regarding corroboration..**

(a) To tell a jury generally, with regard to some of the accused, that they “have the approver's deposition and the corroborative evidence” without pointing out, as regards each person, what the corroborative evidence is, is to give them no guidance at all; especially, where the principal evidence against most of the accused is that of an approver. 6 C.W.N. 553 (554). **W**

(b) With regard to evidence corroborating approvers, Courts should be careful to advise the jury to require confirmation not only as to the general facts, but as to the individual prisoners charged. 2 Weir 742 (744). **X**

6.—“*May take into consideration such confession.*”—(Continued).(29) **Extent of corroboration.**

(a) “The extent of corroboration which would be sufficient, coupled with the confession, to convict a prisoner must depend upon the circumstances of each case.” 29 P.R. 1880 (Cr.). Per *Rattigan, J.* **Y**

(b) If a prisoner were convicted upon such evidence, whether by a Jury or otherwise, and were to appeal to the High Court, the conviction ought to be set aside; and, any Sessions Judge, trying such a case before a Jury, ought to direct them to acquit the prisoner. How far any corroborative evidence would be sufficient, coupled with the confession, to convict a prisoner, must depend upon the circumstances of each particular case. 4 C. 483 (490). Per *Garth, C.J.* **Z**

(30) **Instances of insufficient corroboration.**

(a) Corroboration as to the details of a crime without corroboration as to the person of the accused is worthless. 13 W.R. (Cr.), 14. **A**

(b) Facts which do not show the connection of the prisoner with the commission of the offence with which he is charged, are no corroboration in the sense in which the word is used in such cases, although they may tend to show that certain portions of what the accomplices say is true. 8 W.R. (Cr.), 19.(26), *referred to* in 10 C. 970 (973). **B**

(c) An attempt to use one accomplice's evidence to bolster up and corroborate that of another ought to be condemned. 19 W.R. 16 (25) (Cr.) **C**

(d) The mere confessions of prisoners tried simultaneously with the accused for the same offence, which are in a very qualified manner made operative as evidence by S. 30, do not come within the scope of this legislative declaration that, under the special circumstances mentioned, the account given by one accomplice may be treated as corroboration of the account given by another. 21 W.R. (Cr.), 69 (71). **D**

(e) Tainted evidence is not made better by being corroborated by other tainted evidence. 25 W.R. Cr. 43. **E**

(f) S. 133 of the Evidence Act contemplates the examination of the accomplice as a witness. This being so, the provision that “a conviction is not illegal merely, because it proceeds upon the uncorroborated testimony of an accomplice” has no application to the case of an uncorroborated confession taken into consideration as against a co-accused jointly tried with the confessing accused under S. 30. 9 C.P.L.R. 35 (Cr.). **F**

(g) Confessions of prisoners which were made, when their fellow-prisoners were absent, are not such corroborative evidence, as against those fellow-prisoners, of the statement of an approver as to justify the conviction of the other prisoners upon it. 10 C. 970. **G**

(h) An accused person's own absence from home would be no legal corroboration of the evidence of the approver, unless there was *prima facie* sufficient legal evidence to convict him of the offence for which he was tried; he would not be bound to account for his movement. 10 C. 970 (975). **H**

(i) The exact correspondence in details of several statements made by an approver in the course of a trial, is not corroborative evidence such as is ordinarily required to make it safe to convict any particular prisoner. 10 C. 970 (974). **I**

6.—“*May take into consideration such confession.*”—(Continued).

- (j) Where there are two sets of evidence, neither of which can alone be accepted without corroboration, they cannot, therefore, each in turn be taken to corroborate the other, and the two sets of evidence cannot be joined together and held as mutually corroborating each other, so as to justify a Court acting upon such evidence. 27 C. 295 (307). J
- (k) Where a conviction is grounded upon the testimony of the approver, without corroboration as to the identity of the accused person, it cannot be upheld, and the confessions of co-prisoners implicating him cannot be accepted as evidence to corroborate the testimony of these approvers. 1 B. 475 (476), referring to 11 B.H.C.R. 196 and *R. v. Chatur Purshotam*. K
- (l) Evidence to prove that certain accused persons were seen on certain occasions with the gang of dacoits before and after a dacoity, and particularly when that evidence is not satisfactory, is not sufficient to corroborate the approver's statement so as to make it admissible against the said accused. 28 P.W.R. 1907 (Cr.). L
- (m) The statement of a co-accused cannot be held to be corroborated by the testimony of accomplices or approvers. 8 A. 306. M
- (n) The confessions of co-prisoners cannot be used as corroborating in any way the evidence of accomplices or approvers, either as to the identity of the persons charged, or as to the *corpus delicti*. 6 M.L.J. Art., p. 101. N
- (o) Though, under S. 30 of the Evidence Act, a Court may take into consideration the confession of one accused person against another jointly tried with him, it could not be used to corroborate the evidence of the other, because it could not be put upon a higher footing than the evidence of the former, if he also were admitted to give evidence as an accomplice. In such a case, the evidence of one accomplice could not be taken to corroborate the evidence of the other; but the evidence of either would require corroboration before it could be acted upon. 11 B.H.C.R. 196 (198). O
- (p) The chief evidence sought to be used against an accused person was the confession of each of the three accused, who stated that they were ordered to sell the goods in question by the accused. The Magistrate was of opinion that each of the confessions was conclusively corroborated by that of the other two in the same manner as the evidence of one accomplice is corroborated by that of another; *held*, this view of the law was erroneous. Conviction set aside on the ground that evidence against the accused was insufficient. 10 C.W.N. xvi. P
- (q) A was charged under S. 409, I.P.C., and B with abetting it and also upon an alternative charge under Ss. 411 and 380, I.P.C. Both were tried together. A was convicted upon his own confession and plea of guilty. He implicated B in it, which was used against B, who was convicted separately for the abetment and also on the alternative charges. *Held* that B's conviction for abetment was bad, in the absence of any corroboration of A's confession, and that B was prejudiced by the joint trial, owing to A's confession having been used and treated as a substantial part of the evidence against him on the second charge. 5 C.W.N. 294. Q

6.—“*May take into consideration such confession.*”—(Continued).

(r) Where, beyond the confessions of prisoners who pleaded guilty and stated that they with *another accused person* and some others, committed an offence, there was no evidence against *that other accused*, which could be accepted to prove the charge on which the *other accused* person had been convicted, his conviction was quashed. 4 O.C. 69 (70). **R**

(s) The confession of one accused person, admitted, under S. 30 of the Evidence Act, against another accused person, was held not to be sufficiently corroborated by the circumstance that the other accused persons, some months after the commission of the offence, pointed out the stolen property, this act being in itself ambiguous, and not inconsistent with the theory of innocence, and it was held not to be entitled to even as much consideration as the testimony of an accomplice examined on oath and subject to cross-examination. 10 B. 231 (233). **S**

(31) **Conviction on unsupported confession of co-accused not illegal.**

(a) A conviction of an accused person, even on the unsupported evidence of the confession of a co-accused, would not be illegal. But, in all cases, the Court should approach the consideration of such evidence with the greatest caution and with at least the caution, with which the Courts have always approached the consideration of the evidence of an accomplice or an informer. If the Court believes the confession, it is not unlawful to convict. 4 A.L.J. 310=A.W.N. (1907), 140=5 Cr. L.J. 360=29 A. 434. **T**

(b) The dictum of *Garth, C. J.*, in 4 C. 483 (191), “A confession by prisoner A, which involves the guilt of prisoner B, is, of itself, unsupported by other testimony, evidence of the weakest possible kind against B. It is simply a statement of a third person, not made upon oath or affirmation, and I am of opinion that no Court ought to convict prisoner B upon such evidence,” was dissented from and not followed in 4 A.L.J. 310=A.W.N. (1907), 140=5 Cr. L.J. 360=29 A. 434. **U**

(32) **Even where withdrawn.**

The law does not anywhere forbid a Court in this country from considering, against persons tried jointly for the same offence, a confession made by one of such persons affecting himself and the persons who were being tried jointly, when such confession has been subsequently withdrawn. To do so would be not to follow the law as it stands in S. 30, Evidence Act, but to legislate. 4 A.L.J. 310=A.W.N. (1907), 140=5 Cr. L.J. 360=29 A. 434. **V**

(33) **Instances of such confessions taken into consideration.**

(a) M and N were convicted under S. 395, I.P.C. As against M, there was his own confession and proof that some of the articles stolen in the dacoity were found in his house, and he was also implicated by the confession made by N. As to N, the case against him depended upon his statement made by him before the District Magistrate, which was subsequently withdrawn, and further upon the fact that he was named as one of the dacoits in the confession made by M. *Held*, upholding the conviction, that, where a confession was full of detail, circumstantial, and true, and nothing existed in the evidence to suggest that it was false in any particular, and it being made before a District Magistrate who would see that no advantage was taken of the prisoner, its truth was not affected by subsequent retraction. 20 A. 133 (135). **W**

6.—“*May take into consideration such confession.*”—(Conclude*d*).

(b) Where two persons were convicted under Ss. 312 and 203 of the Penal Code and there was not a particle of evidence against the second prisoner except the confession of the co-prisoner, the Court observed that by S. 30 it may be taken into consideration. 7 M.H.C.R. App. XV=2 Weir 740. X

(c) K was tried for an offence and acquitted. The Local Government appealed against the acquittal, before the admission of which he was arrested by the District Magistrate's order. While the appeal was pending and he in custody, he was made by the Magistrate a witness for the prosecution in the case of one B, who was charged with being concerned in the same offence. B was committed to Sessions, tried and acquitted, while the appeal was still pending. The Local Government appealed to the High Court against B's acquittal. *Held*, that the statement made by K, after his re-arrest and pending his appeal, was admissible in evidence and that it ought to have been considered by the Judge in the Court below, against B, as K's arrest was lawful. 2 A. 386 (390) (*Spankie, J., dubitante*), referring to 6 W.R. (Cr), 91.Y

(d) In the same case, *Spankie, J.*, held that, if the Magistrate looked upon K as still in the position of an accused person under trial, he should not have made him a witness against B, against whom the enquiry preliminary to commitment, for the same offence for which K had been committed, was proceeding, and, assuming that K's reapprehension after an acquittal and on the same charge was unlawful, and that when he made his statement he was a free man, it may be that under S. 118 of the Evidence Act, his evidence was admissible, but it was not evidence on which a Court would place much reliance. 2 A. 386 (391-2). Z

(34) **Confession not taken into consideration.**

Where two persons were under trial, one of them for the murder of the husband of the other, and the other for abettment of the murder, it was held that the trial of the other accused person, in the absence of any commitment by a Magistrate, was bad in law, and that her statements made to the Magistrate were not admissible against the first. 22 C. 50 (73). A

7.—“*As against such other person...confession.*”

(1) **Confession of co-accused must be cautiously dealt with.**

A confession of an accused person, though evidence against another accused person jointly tried with him, is not conclusive evidence or evidence of any value and must be dealt with the greatest caution and discrimination, for the principle is novel and not free from danger. 4 A.W.N. 318. B

(2) **Confession cannot be received against one and rejected as against another.**

When this confession has been duly proved, it may, by the express language of the section, be taken into consideration against either prisoner; and there seems to be no other way in which it can be taken into consideration than as “evidence.” There is no provision in the section by which the confession is to be receivable against one prisoner in one way, and against the other prisoner in another way. 4 C. 488 (490). *Per Garth, C.J.* C

7.—“As against such other person...confession.”—(Continued).

(3) Person against whom it is to be used entitled to demand due proof.

When a confession has to be used for the purpose of affecting another—when more persons than one are being tried for the same offence—the person to be affected by it has a right to demand that it be strictly proved, and shown to have been in all essential respects taken and recorded as prescribed by the law, (Cr.P.C., 1872, S. 122), *i.e.*, in the manner provided by Ss. 345 and 346). 24 W.R. (Cr.), 42 (48). **D**

(4) Confession relevant against co-accused under Ss. 24-26 also relevant under S. 30.

(a) Where a confession made by one of several accused persons is not irrelevant under Ss. 24-26 against the person making it, it is relevant under S. 30, if it otherwise satisfies its terms, as well against the one as against the rest. 6 M.L.J. Art., p. 102. **E**

(b) Where a number of persons were jointly tried for the same offence, the confession of one of them, if admissible at all, was admissible for the purpose of the Court's taking it into consideration against his co-accused, as well as affording the strongest evidence against himself. It was an error on the part of the Sessions Judge to suppose that it could first be entirely rejected as unduly obtained and then brought in again to convict one prisoner. If circumstances made it wholly or partly admissible, it ought not to have been set aside at all, but weighed for all purposes with care and discretion. 3 B. 12 (16). **F**

(5) Confession inadmissible under Ss. 24, 25 & 26 against confessor and co-accused admissible for latter.

(a) A confession made by one of several prisoners, but not admissible under Ss. 24 and 26, and where there is no discovery under S. 27, is equally inadmissible under S. 30 and should be entirely excluded as against both the confessor and the person therein implicated, but it is admissible on behalf of the latter. 6 M.L.J. p. 102, *referring to* 2 B. 61. *But see, infra.* **G**

(b) S. 25 of the Evidence Act does not preclude the counsel for one accused person, on behalf of his client, asking questions to prove a confession made by another accused person tried jointly with him. The confession is not to be proved as *against* either the confessing person or his co-accused, but *on behalf* of the latter. 2 B. 61 (64); see, also, pp. 408 and 409, *supra*, under S. 25. **H**

(6) S. 30 does not permit confession coming under it to be used for co-accused.

Section 30 of the Evidence Act which permits the confession of one of a number of persons jointly tried for the same offence, affecting himself and some others of the co-accused to be taken into consideration against such others as well as against the person making it, does not enable it to be used in favour of some other of the co-accused persons. 39 P.R. 1888 (Cr.) **I**

(7) Confession falling under S. 27—Portion of statement leading to discovery admissible against both.

(a) Where a confession made by one of several accused persons does not fall under Ss. 24-26, but there is discovery within the meaning of S. 27, then as much of the whole statement, as directly leads to the making of the discovery, admissible under that section, is also admissible under S. 30 against both, provided it is a ‘confession’ on the part of the maker and affects himself and some other accused person, *but not otherwise.* 6 M.L.J. Art., p. 103. **J**

7. —“ As against such other person..confession.”—(Concluded).

(6) Where an accused person makes a confession, the most that could be taken into consideration on such statement against a co-accused would be, under Ss. 27 and 30 of the Act, so much of the information as was the immediate cause of the discovery of some relevant fact against him. 18 M.L.J. 66. **K**

(8) Confession partly admissible against maker under S. 27 admissible against both, if it is a confession and affects both.

Where a confession is partly admissible against the maker under S. 27, it is also admissible under S. 30 against his co-accused, only when the part which is admissible is a confession of the guilt of the maker and when it affects both himself and other persons. 6 M.L.J. Art., p. 103. **L**

(9) Such confession cannot be rejected against co-prisoners.

If the admissible part is a “confession” and “affects” both persons, it cannot be first rejected as against the co-prisoner, on the ground that the whole confession was unduly obtained, and then that very part admitted as against the maker on the ground of discovery, but should be admitted, under S. 30, as against both (3 B 12), though, of course, in taking it into consideration, no weight would be attached to it, as against the person implicated, unless it was ‘sufficiently’ corroborated. Mere discovery would be no corroboration. 6 M.L.J. Art. p. 104. **M**

(10) Confession of co-accused no evidence against accused of facts necessary to constitute offence.

Confessions made by accused persons may be considered against persons who are tried with them, but they cannot be accepted as evidence of any fact necessary to constitute the offence. 2 Weir 741 (742). **N**

(11) Magistrate's record of confession admissible against each accused.

Where two persons were convicted under S. 396, I.P.C., it was held that the record of each of the confessions of the accused persons, made by the Magistrate and signed by the person who made it, was admissible as against him; the question whether the confession of one man would be admissible against the others was not decided, as the Court did not propose to use the confession of one man as against the other. 12 A. 595 (597). **O**

8. —“ Explanation.—‘ Offence,’ as used in this section, includes the abetment of, or attempt to commit, the offence.”

(1) Rulings prior to the Explanation added by the Amending Act III of 1891, S. 4.

(a) It is in the highest degree unlikely that the Legislature, having before it the definition contained in the Penal Code, S. 108, expln. (4), should in framing S. 30, Evidence Act, have omitted to explain that the word “offence” contained therein was to be deemed to include the “abetment of an offence,” if it had really intended S. 30 to be so understood. S. C. 143 (Oudh). **P**

(b) Where two accused persons were being jointly tried, but not for the same offence, the one accused being tried for dacoity with murder, the other with the abetment of that offence, it was held that the confession of the latter should not have been used against the former and that the Jury were misdirected so far. 19 W.R. (Cr.), 57 (64). **Q**

8.—“Explanation.—‘Offence,’ as used in this section, includes the abetment of, or attempt to commit, the offence.”—(Continued).

(c) The confession of an accused is not admissible against another accused, where it amounts only to a confession of abetting the principal offence charged against him and the other. Rat. Unrep. Crim. Cas. 153. **R**

(d) A Sessions Judge was held to have been wrong in altogether omitting to point out to the jury that all the prisoners were not being jointly tried for one offence some being for dacoity, and some for abetment of dacoity, which is a different substantive offence. 2 Weir 742, 4th Ed. **S**

(e) Murder and abetment of murder are not the same specific offence so as to warrant the confessions of accused persons charged with murder being taken into consideration, under S. 30 of the Evidence Act, against another charged with abetment only. 7 M. 579 (580). **T**

(f) Two persons were jointly tried, one for committing an offence and the other for abetting it. Held that they were not tried for the same offence within the meaning of S. 30, so as to authorise a Court to take into consideration a confession made by one of the co-accused against the other. 8 P.R. 1874 (Cr.) **U**

(g) Where a number of persons are tried together for the same offence, it was held that the confession of one of them implicating the others in acts which constitute an abetment of that offence only—and where S. 114, I.P.C., has no application—should not be considered against the latter under S. 30. 39 P.R. 1885 (Cr.) **V**

(2) Explanation renders old rulings obsolete.

The explanation to S. 30 which was added by S. 4, Act III of 1891 altered the law and rendered obsolete those rulings (19 W.R. Cr. 57; 7 M. 579; 2 Weir 742 and the others cited), as “offence” now includes an abetment or attempt. 6 C.W.N. 61xxx. **W**

(3) When ‘explanation’ applies.

The explanation to S. 30 applies only where one is charged with an offence and the other is actually charged with the abetment of it. See 5 M.L.J. Art., p. 230. **X**

(4) Presence before and during commission of offence by another—Joint trial.

Two persons jointly tried, one for theft, the other for abetment of it before hand and being present during its commission, were held to be jointly tried for the same offence within the meaning of S. 30. 3 P.R. 1879 (Cr.) **Y**

(5) Offence committed in consequence of abetment—Abettor commits substantive offence.

Where the act abetted is committed in consequence of the abetment and the abettor is present at the commission, he shall be deemed to have committed the substantive offence itself. S.C. 143. **Z**

(6) Who is not an abettor.

A person answering the description contained in S. 114, I.P.C., cannot be correctly designated an abettor, his position being for all practical purposes similar to that of a principal offender. 3 P.R. 1879 (Cr.) **A**

8.—“Explanation.—‘Offence,’ as used in this section, includes the abetment of, or attempt to commit, the offence.”—(Concluded).

(7) Statement held to be no evidence of abetment.

A statement made to the police by an accused person to the effect that, if certain other accused persons were sent for, he would see that the stolen property was traced out and restored, was held to be no evidence, on which any Court could find, that the accused abetted in committing theft. 2 A.L.J. 53 = 2 Cr. L.J. 22. **B**

(8) Extension of explanation.

For a case where a certain construction of the explanation, attempting to extend its scope, was rejected. See 22 C. 164 (173), *supra*. 1 (2) (7) (e). **C**

31. Admissions are not conclusive proof of the matters admitted (1), but they may operate as estoppels under the provisions hereinafter contained (2).
Admissions not conclusive proof, but may estop.

(Notes).

General Construction of section.

(1) Scope of section.

S. 31 declares that admissions are not conclusive proof of the matters admitted, but that they may operate as estoppels. U.B.R. (1897-1901), Civil, p. 377. **D**

(2) Meaning of section.

The provision that admissions may operate as estoppels is sometimes attempted to be used as if, instead of saying that an admission is not *conclusive* proof, the section said that an admission is not sufficient proof without corroboration. But this is not the meaning. U.B.R. (1897-1901), Civil, p. 377. **E**

(3) “Conclusive proof,” definition of.

“Conclusive proof” is defined in S. 1 of the Evidence Act, and when one fact is declared to be conclusive proof of another, a Court cannot allow evidence to be given for the purpose of disproving the fact conclusively proved. U.B.R. (1897-1901), Civil, p. 377. **F**

(4) Party may show admission to be untrue or mistaken.

All that S. 31 provides is that an admission, unless it operates as an estoppel, is not conclusive. The person against whom it is proved is at liberty to show that it was mistaken or untrue. U.B.R. (1897-1901), Civil, p. 377. **G**

(5) Effect of proving “admission.”

But if the admission is duly proved and if the person against whom it is proved does not satisfy the Court that it was mistaken or untrue, there is nothing in the Evidence Act, and there is no general principle or rule of law to prevent the Court from deciding the case in accordance with it. U.B.R. (1897-1901), Civil, p. 377. **H**

1.—“Admissions are not conclusive proof of the matters admitted.”

(1) General rule as to binding force of admissions.

- (a) The rule of law appears to us to be that any statement made by a party may be used against him, and may be evidence more or less weighty, possibly even conclusive, according to the circumstances of each case and the result come to by judicial investigation of the case. 12 W.R. 156 (157). I
- (b) What a party himself admits to be true may reasonably be presumed to be so. *Slatterie v. Pooley*, 6 M. and W. 664 at 669; cited in 5 C.L.J. 175 (121) = 4 A.L.J. 102 = 29 A. 184. J

(2) Right of party to prove his admissions to be mistaken or untrue.

- (a) The express admissions of a party, to the suit, or admissions implied from his conduct, are evidence, and strong evidence, against him. But he is at liberty to prove that such admissions were mistaken or were untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition; in such a case, no party is estopped from disputing their truth with respect to that person and those claiming under him and that transaction; but as to third persons he is not so bound. *Heane v. Rogers*, 9 B. and C. 577; Tay. Ev., 10th Ed., S. 817, p. 577; Wigm. Ev., 1905 Ed., S. 1058, p. 1227 and 29 A. 184 (195). K
- (b) As a general rule, and particularly as to third parties, an admission contained in a deed is so conclusive, that the party whom it affects is not permitted by a Court of justice to controvert it, but he undoubtedly may plead and show by evidence, if he can, that the person relying upon it is himself estopped from setting up the admission; and the Court is bound to look into the truth of this plea, as this is not to deny the conclusive effect of the admission as to himself, but to incapacitate the other from taking advantage of it. To rule otherwise would be to cripple the action of the Court, and to make it the vehicle of enforcing fraudulent deeds. 1 W.R. 156 (158). L
- (c) In this country, it is in all cases open to third parties to show that the true nature of a transaction, where the assignment is not by deed, was sham. 15 B. 1 (6), referring to 4 B. 76, 77. M
- (d) In this case, there was a pretended sale, but the plaintiff had not parted with the title to the goods and nothing further was done in furtherance of the intended fraud. This case shows that, even in England, where the assignment is not by deed, the true nature of it, as a sham transaction, may be proved. *Bowes v. Foster*, 27 L.J. Ex. 262, cited in 27 C. 231; 15 B. 1. See, also, 1 A. 403 and 11 B. 708. N
- (e) Where a defendant seeks to make use of statements which have been put in evidence, and to treat them as admissions by the plaintiff who put them in, it is competent for the plaintiff to show the real nature of the transaction to which they relate, and to get rid of the effect of the apparent admissions. 18 W.R. 485. O
- (f) A party claiming under another, who has made admissions as to a transaction to which that other was a party, is at liberty to allege and prove that the admissions were made with a fraudulent purpose and were not true, and to show the real nature of the transaction. 20 W.R. 112. P

1.—“Admissions are not conclusive proof of the matters admitted.”

—(Continued).

(g) An admission contained in a deed of sale, or made before a Registrar, that the consideration has been received by the vendor is *prima facie* evidence against the person who makes it, but it affords only a rebuttable presumption, and the weight to be given to it varies according to the special circumstances of each case. 9 A.W.N. 142. **Q**

(h) An opponent whose admissions have been adduced in evidence against him may offer any evidence, which serves as an explanation of his former statement of what he now denies to be the fact. This may involve the showing of a mistake, or the evidencing of circumstances which suggest a different significance to the words. Wigm. Ev., 1905 Ed., S. 1058, p. 1228. **R**

(i) “Any statement of the opponent, made at the time of certain conduct of his which has been adduced as equivalent to an admission, may be offered in evidence so far as it presents the true complexion of his conduct and takes from it the quality of an admission.” Wigm. Ev., 1905 Ed., S. 1059, p. 1229. **S**

(j) A copy of a defendant’s deposition in a former suit having been put in by the plaintiff at a late stage of the case, when the defendant had no means of explaining away any supposed admission therein, held, that the first Court was wrong in accepting the same as an admission binding on the defendant, and that the lower appellate Court was right in sending for the defendant, and examining him on the subject. 16 W. R. 220. **T**

3) Mistakes both of legal liability and of fact may be proved.

(a) The doctrine that a person is always at liberty to prove that his admissions were founded upon *mistake*, except where the opposite party has been induced by them to change his condition, is equally applicable to mistakes in respect of legal liability, as to those in respect of matters of fact. Tay. Ev., 10th Ed., S. 817, p. 577, referring to *Newton v. Belcher*, 1 Q.B. 921, and *Newton v. Liddiard*, 18 I.J.Q.B. 53. **U**

(b) In a case, a mistake of law as to a certain liability was allowed to be proved. *Newton v. Belcher*, 12 Q.B. 921, 924; Wigm. Ev., 1905 Ed., S. 1058, p. 1227; see, also, *ex parte Morgan, in re Simpson*, L.R., 2 Ch. D. 72 (89) and *Trinidad Asphalt Company v. Coryat*, A.C., 587, referred to in 29 A. 184 (195) (P.C.). **V**

(c) The rule that admissions are not conclusive is applicable to mistakes in respect of legal liability as well as to those in respect of fact. *Newton v. Liddiard*, 12 Q.B. 925; Wigm. Ev., 1905 Ed., S. 1058, p. 1227. See, also, 29 A. 184 (195) (P.C.) = 11 C.W.N. 321. **W**

4) Defendant’s statement not amounting to admission—Effect

A plaintiff cannot take advantage of a statement made by a defendant, which, at most, amounts to a piece of evidence, and not to an admission, but which is found to be untrue, unless it be shown that the *status* of the plaintiff had been affected, or that he had been misled by such statement. 3 B.L.R.A.C. 337. **X**

1.—“Admissions are not conclusive proof of the matters admitted.”

—(Continued).

(5) Deposition in former suit an admission—S. 33, Evidence Act, does not apply.

S. 33 of the Evidence Act does not apply to the deposition of a witness in a former suit, when the witness is himself a defendant in the subsequent suit, and the deposition is sought to be used against him, not as evidence given between the parties one of whom called him as a witness, but as a statement made by him, which would be evidence against him, whether he made it as a witness or on any other occasion; it is admissible under the sections relating to admissions, although it might be shown that the facts were different from what they stated it to be in the former case. 14 B.L.R. Ap. 3=21 W.R. 414. **Y**

(5a) Admission when relevant on behalf of maker.

When the plaintiffs sought to establish their pedigree by proving, *inter alia*, that A and B were brothers, *held* that a statement to that effect made by one of the plaintiffs in a deposition, given long before the controversy in suit arose, was admissible in evidence. 12 C.W.N. 266. **Z**

(6) Admission on point of law, effect of

A plaintiff is not bound by an admission of a point of law, nor precluded, from asserting the contrary in order to obtain the relief to which, upon a true construction of the law, he may appear to be entitled. L.R. Sup. I.A. 47, cited in 21 A. 285 (287). **A**

(7) Admission not explained, though not conclusive, is strong evidence.

Where a defendant assigned no reason why a statement made by the defendant's vendor that the plaintiff was in possession of certain lands was falsely made in certain documents under consideration, it was held that, though that admission was not conclusive, in the absence of any explanation why this admission was made falsely in those documents, and remembering the occasion on which it was made, and also that it was made publicly and that on a subsequent occasion the attention of the defendant was distinctly drawn to it, it would be very good evidence upon which a Court of Justice should come to the conclusion that the plaintiff was in possession. 24 W.R. 431 (432). **B**

(8) Strong evidence necessary to show deliberate assertion of parties to be untrue.

Admissions made by parties, apparently and deliberately, are not to be set aside merely upon the suggestion or statement made by the same persons that the facts were different from what, on a former occasion, they stated them to be. It might have been shown to be false, if it were so; but, it would require strong evidence to prove that what the parties had deliberately asserted was altogether untrue, they alleging the facts to be different in order to keep the property they were in possession of. 14 B.L.R. Ap. 3=21 W.R. 414 (415). **C**

(9) Admission of a grave character—Onus of explaining it.

An admission, which appeared to be of a grave character, though it is not to be treated as an estoppel, at least casts upon those making it the burden of explaining it and of showing that what was then deliberately asserted was not the fact. 14 W.R. (P.C.), 28 (31)=5 B.L.R. 529. **D**

1.—“Admissions are not conclusive proof of the matters admitted.”

—(Continued).

(10) Deliberate oral admissions satisfactory evidence.

Where oral admissions are deliberately made and correctly identified, the evidence they afford is often of the most satisfactory character. *Rigg v. Curgenven*, 2 Wils. 395; Tay. Ev., 10th Ed., S. 861, p. 604; Wigm. Ev., 1905 Ed., S. 2086, p. 2811. **E**

(11) Judicial admission is conclusive.

A judicial or solemn admission is conclusive, in the sense that it formally waives all right to deny, for the purposes of the trial, that is, it removes the proposition in question from the field of disputed issues. Wigm. Ev., 1905 Ed., S. 1058, p. 1227. **F**

(12) Admissions held conclusive on grounds of public policy.

Admissions have also been held to be conclusive on grounds of public policy in some few cases connected with public justice and government. Tay. Ev., 10th Ed., S. 856, p. 600. **G**

(13) Examples.

(a) In an action for penalties for bribery at an election, a person who had given money to another for his vote will not be allowed to state that the latter was not entitled to vote. *Combe v. Pitt*, 3 Burr. 1586; Tay. Ev., 10th Ed., S. 856, p. 600. **H**

(b) Where the owners of a stage coach took up more passengers than were allowed, and an injury was alleged as having resulted from the overloading, their conduct was held to be conclusive evidence that the accident was occasioned by the cause alleged. *Israel v. Clark*, 4 Esp. 259; Tay. Ev., 10th Ed., S. 856, p. 600. **I**

(c) A shipowner, whose ship, after being forfeited for breach of the revenue laws, had been given up to him on his making an application, verified by an oath, that the forfeiture had been incurred by the master ignorantly and without fraud, was not afterwards allowed, in an action by the master against himself for wages on the same voyage, to contradict this statement, and to prove the misconduct of the master, though he proved that the fraud had come to his knowledge subsequently. *Freeman v. Walker*, 6 Greenl. 68 (Am.); Tay. Ev., 10th Ed., S. 856, p. 600; see, also, Wigm. Ev., 1905 Ed., S. 1058, p. 1228. **J**

(d) Where it was made illegal by statute to publish reports of the meetings of suppressed associations, a report alleging that a suppressed association had held a meeting and purporting to report the proceedings of that meeting, was held, even in a criminal case, to be an admission that such a meeting had in fact taken place. *Reg. v. Sullivan*, 20 L.R. Ir. 550; Tay. Ev., 10th Ed., S. 856, p. 600; Wigm. Ev., 1905 Ed., S. 2070, p. 2779; Phip. Ev., 4th Ed., p. 242. **K**

(14) Admission in first suit evidence in second suit.

A suit for rent having been dismissed by a Deputy Collector for want of jurisdiction, on the defendant's admission, that plaintiff was *etmamdār* and not *ijaradār*, the plaintiff sued in a Civil Court. Held that any allegation made by the defendant in the first suit, which was put in evidence by the plaintiff, was sufficient proof of the thing alleged. 17 W.R. 372. **L**

1.—“Admissions are not conclusive proof of the matters admitted.”

—(Continued).

(15) Relevancy and effect of admission.

The question of the relevancy and effect of an admission is, of course, quite apart from the question whether it was really made. U.B.R. (1897-1901), Civ., p. 377; see, also, 8 W.R. 468 (469), p. 260, *supra*. **M**

(16) Value of admissions.

Held that the value to be attached to an admission depends upon the circumstances of each particular case under which it was made. *R. v. Simmonsto*, 1 C. and K. 164, 166; A. A. and W. Ev., 4th Ed., p. 189; see, also, Ros. Ev., 13th Ed., p. 272; Wigm. Ev., 1905 Ed., S. 2086, p. 2812, and Phip. Ev., 4th Ed., p. 213; also Best Ev., 9th Ed., p. 443. **N**

(17) Evidence of admissions to be carefully tested.

The plaintiff-respondent sued to recover Rs. 350 alleged to have been lent to the defendant. There was no witness of the loan and no acknowledgment of it. The only evidence of the obligation was that of three witnesses, a man, his wife, and her sister, who said that the plaintiff demanded re-payment and that the defendant admitted that the money was due. *Held* that if the Judge believed that the admission was made, and, if that belief was justified, there was no legal objection to the decision on the admission and that a Court of revision should not interfere in such a case, although it pointed out that evidence of admissions of the kind produced in the case should be most carefully scrutinised and tested. U.B.R. (1897-1901), Civ., p. 377. **O**

(18) Admission to be taken as a whole.

(a) Where each party came into Court with his own statement, *held*, if used as evidence against him, it must be taken altogether, and not in part, and the plaintiff could not put in one part of it as an admission without putting in the whole. W.R. (1864, Act X), 27. **P**

(b) A written statement is not a pleading in confession and avoidance whereby a defendant is bound by the confession, and compelled to prove the avoidance; if used as evidence as against the defendant, the whole statement must be taken together. 9 W.R. 190. **Q**

(c) A written statement put in by a defendant is not a plea by way of confession and avoidance, and the whole statement must be taken together. 9 W.R. 190. **R**

(d) A plaintiff abandoning his own case, and falling back upon the defendant's admissions, must consent to take them in their entirety as they stand. 15 W.R. 451-(453). **S**

(e) When a defendant admits any one fact contained in the written statement of the plaintiff, and thereby excludes independent evidence thereof, he is not entitled to say that the plaintiff has relied on his statement as evidence, and that he (defendant) is, in consequence, in a position to claim that the whole of it may be read as evidence in his own favour. 16 W.R. 257. **T**

(f) The law rejects what a man has stated on his own behalf, and admits what he has stated against himself; but, where a document or statement is partly favourable and partly unfavourable to a party, the whole of it is admissible. *Randle v. Blackburn*, 5 Taunt. 245; Best. Ev., 9th Ed., p. 568; Wigm. Ev., 1905 Ed., S. 2117, p. 2866; Tay. Ev., 10th Ed., S. 726, p. 524; Phip. Ev., 4th Ed., p. 215. **U**

1.—“Admissions are not conclusive proof of the matters admitted.”

—(Continued).

(19) Reason of such rule.

For the reason of the rule requiring the whole of the admission to be considered together. See *Fletcher v. Froggatt*, 2 C. and P. 569; Tay. Ev., 10th Ed., S. 725, p. 523; see p. 203, (50), *supra*. Y

(20) Qualification of the rule.

(a) If a man makes a qualified statement, you cannot use that statement against him apart from the qualification. But it does not follow that, if a man makes a series of independent and unqualified statements, those statements may not be used against him. 10 W.R. 190, *explaining* 9 W.R. 190. W

(b) A defendant in his written statement made one clear and distinct allegation that the plaintiff's father had possession and that the defendant had no possession at the time. Then he made another distinct and unqualified allegation that the plaintiff's father having relinquished the lands, the defendant succeeded to the lands. There is no reason why two such separate statements could not be taken quite distinct from the other. (*Ibid.*) X

(21) Conduct construed as admission.

(a) Where delay is made in suing to enforce supposed rights, it may be regarded as an admission of the non-existence of those supposed rights. 14 M.I.A. 67. Y

(b) Delay in prosecuting alleged legal rights may amount to an admission that those rights do not exist. 14 B.L.R. 386. Z

(c) The fact that a party requested a witness to give false evidence is admissible in evidence against such party as being tantamount to an admission that he has a bad case. *Moriarty v. London, Chatham & Dover R. Co.*, L.R., 5 Q.B. 314; Best. Ev., 9th Ed., p. 569; Tay. Ev., 10th Ed., S. 804, p. 566; Phip. Ev., 4th Ed., p. 116; Wigm. Ev., 1905 Ed., S. 278, p. 356. A

(22) Conduct not held to be admission.

Where the plaintiff was an immediate reversioner, and contributed his share of profit and put his signature in the *patwari's* diary as lambardar, his conduct was held not to be an admission of the defendant's title as purchaser. 1 Agr. 223. B

(23) Unfair use of written statement.

An unfair use is not to be made of a man's written statement by trying to convert into an admission by him what he never intended to be an admission. 10 W.R. 190 (191). C

(24) Admission when evidence in party's own case.

(a) Unless a defendant has subjected himself to cross-examination, no statement which he may volunteer can be used as any evidence in his own case. 16 W.R. 257. D

(b) An admission by a jaghirdar in a suit brought by Government to assess certain lands, that the lands were comprised in a zamindari, is evidence of that fact in a suit by the zamindar to resume those lands. 5 B.L.R. 529. E

I.—“Admissions are not conclusive proof of the matters admitted.”

—(Continued),

(25) Admissions held not to be conclusive.

(a) A statement made by a party is not *ipso facto* conclusive against him, though it may be used against him, and may be evidence more or less weighty, possibly even conclusive, according to the circumstances of each case and the result come to by judicial investigation. 12 W.R. 156. **F**

(b) A party is not excluded by his own representations unless they have been acted upon by the opposite party. If treated merely as admissions not acted upon, it may be shown, by the party who made them, that they were not true. 20 W.R. 223. **G**

(c) A mere admission is not conclusive. It is so only in certain cases, *e.g.*, where it has been acted upon by the party to whom it was made. Thus, a statement made in a former suit, in which the Court, so far from acting upon it, passed a decree opposed to it, cannot be treated as conclusive. 18 W.R. 347. **H**

(d) An admission made by the defendants' ancestor may be evidence of some weight that may be used against them; but, it is only evidence upon which the Court which is trying the suit may act or not, according as it considers it ought to have effect given to it. 18 W.R. 347 (348). **I**

(e) An arrangement was entered into by the mother of the plaintiff during his minority to which he was alleged to have consented. The plaintiff was alleged to have, by his conduct, since he came of age, adopted the compromise made on his behalf, and certain receipts for rent signed by the plaintiff were adduced in evidence. Held that, in the absence of evidence to show that, after being fully aware of his legal position in relation to the defendant, he deliberately accepted that arrangement, his admissions, though evidence against him, were not evidence of a conclusive character. 10 B.H.C.R. 311 (318-9). **J**

(f) “Those admissions which have not been acted upon, either because they were originally made without any intention of being acted upon, or because for any other reason they, in fact, remain not acted upon, or have not altered the situation of the opposite party, are not conclusive, though they are receivable in evidence against the parties making them.” Tay. Ev., 10th Ed., S. 854, p. 598, referring to *Howard v. Hudson*, 22 L.J.Q.B. 341. **K**

(g) Where A contracts to sell goods to B, and gives him a delivery order, he may, on B's bankruptcy, provided B has neither paid for them nor sold them to a third party, show that the delivery order was invalid, and, therefore, did not amount to a constructive delivery of the goods. *Lackington v. Atherton*, 13 L.J.C.P. 140; Tay. Ev., 10th Ed., S. 854, p. 598. **L**

(h) A person who brought an action of trover for a dog, was held not to be precluded from proving his title to it, though he had previously authorised a third party (against whom the defendant had brought an action) to deliver it to the defendant, at the same time demanding it back on behalf of the plaintiff as being the latter's property. *Sandys v. Hodgson*. 9 L.J.Q.B. 31; Tay. Ev., 10th Ed., S. 854, p. 599. **M**

1.—“Admissions are not conclusive proof of the matters admitted.”

—(Continued).

- (i) “No wrong is done to the other party, by receiving any legal evidence to show that an admission was erroneous, and by leaving the whole evidence, including the admission, to be weighed by the jury.” Tay. Ev., 10th Ed., S. 854, p. 599. **N**
- (j) The Court will not treat the alteration of its locality after complaint, as conclusive evidence that a trade was a nuisance. *R. v. Neville*, Peake R. 91; Tay. Ev., 10th Ed., S. 854, p. 598; Ros. Cr. Ev., 13th Ed., p. 657; Wigm. Ev., 1905 Ed., S. 1056, p. 1226; Phip. Ev., 4th Ed., p. 212. **O**
- (k) The Court will not, in a petition for damages by reason of adultery, regard an admission by the defendant, that at some other and different time the “*tertium causa*” was the wife of the plaintiff, as conclusive evidence that she was the wife of the plaintiff at the time when the adultery was committed. *Morris v. Miller*, 4 Burr. 2057; Tay. Ev., 10th Ed., S. 854, p. 598; Wigm. Ev., 1905 Ed., S. 2084, p. 2804. **P**
- (l) If the defendants in a boundary suit, accepted, in a previous suit, a particular map as correct, their acceptance is legal, though not conclusive, evidence against them in the boundary suit, and is tantamount to an admission and stands upon a very different footing from the decree in the first suit. 8 W.R. 291. **Q**
- (m) An admission before a Registrar of the receipt of purchase-money attested by his endorsement, as required by cl. 3, S. 66, Act XX of 1866, though evidence of the strongest and most reliable description, ought not to be treated as conclusive. In the face of such an admission, however, the party seeking to get out of the effect of the admission should make out his case by very clear evidence. 15 W.R. 280 (281). **R**
- (n) Where it was admitted that an instrument of gift had been executed and evidence was offered to show that it was only a colourable transaction, and the question the Court had to decide was whether the person against whom an admission of the gift was used might show that it was really colourable, and that the property was not intended to pass, and really did not pass, the High Court held that he might show the real nature of the transaction. 18 W.R. 493 **S**
- (o) A misrepresentation as to his separate ownership made by a person, in a security bond given by him to the Collector, was not regarded in a subsequent suit as more than an admission inconsistent with the title asserted in the subsequent suit, the defendant not having purchased on the faith of such misrepresentation. 12 B.L.R. 317 = 19 W.R. 36 (P.C.) **T**
- (p) The circumstance of a defendant having, in a previous suit, admitted the execution of a deed of sale, was held not to preclude her from contesting its validity, and maintaining that it was colourable, not real. 19 W.R. 118. **U**
- (q) Where the admissions, which the defendant relied upon as proving the title of his judgment-debtor, were untrue, they were held to be no proof of title, unless they could be regarded as conclusive and as an estoppel. 20 W.R. 228 (224). **V**

1.—“Admissions are not conclusive proof of the matters admitted.”

—(Continued).

(r) The fact that certain defendants were allowed to join as co-plaintiffs in a previous redemption suit to which the plaintiff was not shown to be a party was held to be inadmissible in evidence as an admission adverse to the plaintiff's interest; and the admission of K, the plaintiff's brother, cannot merely on account of his being a *Lumbardar*, be admitted in evidence against the plaintiff, unless it was shown that K was a person who, either by official position or by some authority delegated to him was privileged to make admissions of such a nature binding on the plaintiff. 2 Agra A.C. 20 (21). **W**

(s) The mere admission of the vendor of property, subject to a claim of pre-emption, that an old debt due to him formed part of the consideration was held not to be conclusive evidence of the allegation. 2 Agra 348. **X**

(t) The Court held that even if a disputed fact was any evidence of an admission, under S. 31 of the Evidence Act, admissions were not conclusive proof. 14 B. 312 (315). **Y**

(u) There is no doubt but that the express admissions of a party to the suit are evidence and strong evidence against him; but we think that he is at liberty to prove that such admissions were mistaken or were *utruq*, and is not estopped or concluded by them, unless another party has been induced by them to alter his position. *Ileane v. Rogers*, 9 B. and C. 586; Tay. Ev., 10th Ed., S. 818, p. 577; Wigm. Ev., 1905 Ed., S. 1058, p. 1227. see, also, 1 W.R. 158 and 29 A. 184—4 A.L.J. 102 (P.C.). **Z**

(v) An admission, or a quasi-admission, as Prof. Wigmore calls it, being nothing but an item of evidence, is not in any sense final or conclusive. The opponent, whose utterance it is, may none the less proceed with his proof in denial of its correctness; it is merely an inconsistency that dis-credits, more or less, his present claim and his other evidence. Wigm. Ev., 1905 Ed., S. 1058, p. 1227. **A**

(26) Admissions not rendered conclusive by being made upon oath.

(a) Moreover, an admission is not made conclusive against a party merely by reason of the fact that it was made under an oath, though this circumstance greatly adds to its value and throws upon the party the burden of proving that it was made under a mistake which was both innocent and is perfectly clear. Tay. Ev., 10th Ed., S. 857, p. 601. **B**

(b) For example, in a prosecution under the game laws, proof of the oath of the defendant, under an Income Act then in force, that the annual value of his estate was less than £100, was held not to be quite conclusive against him, though it was held to be very strong evidence of the fact. *R. v. Clarke*, 8 T. R. 220; Tay. Ev., 10th Ed., S. 857, p. 601. **C**

(c) Where the fact sworn to is not a matter of judgment but is purely a matter of fact within the knowledge of the parties swearing, the same principle as the above applies. *Thornes v. White*, Tyr. & Gr. 110; Tay. Ev., 10th Ed., S. 857, p. 601. **D**

(d) Where a defendant has sworn to his belief of a fact in an old answer in Chancery, it is admissible in evidence against him, but is not conclusive. *Doe v. Steel*, 3 Camp. 115; Tay. Ev., 10th Ed., S. 857, p. 601. **E**

1.—“Admissions are not conclusive proof of the matters admitted.”

—(Continued).

(27) Oral admissions—Value.

“Evidence of oral admissions ought always to be received with great caution. Such evidence is necessarily subject to much imperfection and mistake; for either the party himself may have been misinformed, or he may not have clearly expressed his meaning, or the witness may have misunderstood him or may purposely misquote the expression used.”
Tay. Ev., 10th Ed., S. 861, p. 603. F

(28) Admissions in writing.

(a) Various other admissions, even though they may be in writing, are not conclusive, if they have never been acted upon by another to his prejudice, and do not fall within the reasons before mentioned for estopping a party from contradicting them. Such admissions are left to be weighed, with other evidence, by the jury. Tay. Ev., 10th Ed., S. 897, pp. 601 and 602. G

(b) “Receipts, mere acknowledgments, either for goods or money, and whether on separate papers—*Skaipe v. Jackson*, 3 B. and C. 421—or indorsed on deeds,—*Straton v. Rastall*, 2 T.R. 366—or on negotiable securities,—*Graves v. Key*, 3 B. and Ad. 313—are of this nature, as are also bankers’ pass-books—*Commercial Bank of Scotland v. Rhind*, 3 Macq. 643 (H.L.); an adjustment of a loss on a policy of insurance, which has been made without full knowledge of all the circumstances, or under a mistake of law or fact, or under any other invalidating circumstances—*Luckie v. Bushby*, 22 L.J.C.P. 220: and so, too, are accounts rendered, such as a solicitor’s bill—*Loveridge v. Botham*, 1 B. and P. 49—and the like.” *Bacon v. Chesney*, 1 Stark. R. 193). Tay. Ev., 10th Ed., S. 859, p. 602. H

(c) An old bill in Chancery is not admissible at all against the plaintiff in proof of the admissions it contains, since the facts stated therein are regarded as nothing more than the mere suggestions of counsel. *Boulev v. Rullin*, 2 Ex. 678; Tay. Ev., 10th Ed., S. 859, p. 602; Phip. Ev., 4th Ed., p. 231; Wigm. Ev., 1905 Ed., S. 1065, p. 1244. I

(29) Recitals in a deed, conclusiveness of.

(a) A recital in a deed or other instrument is no doubt in some cases conclusive, and in all cases evidence, as against the parties who make it, and it is of more or less weight, or more or less conclusive, against them according to circumstances. It is a statement deliberately made by the parties, which, like any other statement, is always evidence against the persons who make it. But it is no more evidence as against third persons than any other statement would be. 6 C. 268, referring to 3 M.I.A. 347. J

(b) Though the recitals in an instrument may be conclusive and are always evidence against the parties who make them, yet they are not evidence against third persons. 17 A. 428=15 A.W.N. 93. K

(30) Weight to be attached to recitals in a bond.

(a) The weight to be attributed to the recitals in a bond would depend entirely upon the other evidence of the *bona fides* of the bond. 6 C. 268 (278). L

1.—“ Admissions are not conclusive proof of the matters admitted.”

—(Continued).

- (b) A recital in a deed sent to be executed for the purpose of making a good title was received in evidence, but it was treated as having little weight, as it concerned a matter that happened 120 years before, of which the party could not have any personal knowledge. *Bulley v. Bulley*, L.R. 9 Ch. App. 739, 747 and 751; Wigm. Ev., 1905 Ed., S. 1053, p. 1223; Phip. Ev., 4th Ed., p. 212. **M**

(31) Reason for not giving effect to admissions of a defendant against a co-defendant.

One reason for not giving effect to such admissions against a co-defendant is that it deprives the defendant against whom such admissions are used of the opportunity of raising pleas which might be raised, if the defendants making the admissions appear in Court as plaintiffs suing for their rights. 7 A. 353 (359), per *Mahmood, J.*, referring to 6 A. 395. **N**

(32) Admission by co-defendant held not binding.

- (a) It is a fundamental proposition connected with our system of administering justice that a plaintiff cannot sue for more than his own right, and that no defendant can, by an admission or consent of this kind, convey the right, or delegate the authority, to one for more than his own share in property. 7 A. 353 (359) ; per *Mahmood, J.*, referring to 6 A. 395. **O**

- (b) Three Mahomedan brothers sued their three sisters for possession of immoveable property. Two of the sisters subsequently filed a written statement, where, after stating that they and their brothers were on good terms and that the suit had been instituted with their knowledge and permission, they prayed that the suit might be decreed, subject to the condition that they would, on some future occasion, settle with their own brothers as to their rights and costs. The third sister did not appear and defend the suit. It was held that the Courts below erred in treating this admission as sufficient to entitle the plaintiffs to a decree for possession, not only of their own share, but also of the shares of their three sisters. 7 A. 353 (359). **P**

- (c) The plaintiff sued L and M for possession of certain immoveable property left by R, deceased, whose paternal uncle's sons the plaintiff and M were. M was admitted by the plaintiff to be entitled to succeed R and was made a defendant by him, as he would not join in bringing the suit. M filed a statement to the effect that, though heir of R, he resigned all his rights in favour of the plaintiff, and that the plaintiff sued without his consent. *Held* that the plaintiff could not be allowed in the suit to obtain M's share as his representative, for that would be to decree him the share on a title he never set up and upon an admission of a co-defendant of the defendant which could not be used in the suit against the defendant, who would have no opportunity of answering it. 6 A. 395 (397 and 398), referring to 15 B.L.R. 10=23 W.R. 214. **Q**

- (d) An admission, or even a confession of judgment by one of several defendants in a suit, is no evidence against another defendant. 15 B.L.R. 10. **R**

I.—“*Admissions are not conclusive proof of the matters admitted.*”

—(Continued).

(33) **Pre-emptor whether concluded by disputing vendor's right to sell.**

A pre-emptor was held not to be precluded from claiming the suit property by right of pre-emption, by the circumstance that he had, in the Registrar's Office, disputed the vendor's right to sell it by reason of his not being or not having been in possession of it. 2 Agra 348. **S**

(34) **Admission of mortgagor's daughter—Bindingness.**

The admission of the daughter of a mortgagor, being that of a person having no title to the estate in question in the suit, was held not to be binding on the mortgagor. 2 N.W.P. 207. **T**

(35) **Admission by pleading—Conclusiveness.**

(a) In the English Common Law Courts, and, *a fortiori*, in the Courts of Law in India, where the pleadings are less technical, an admission of a fact on the pleadings by implication is not an admission for any other purpose than that of the particular issue, and is not tantamount to proof of the fact. 15 B.L.R. 10. **U**

(b) It scarcely needs to be remarked that the effect given, in our Common Law Courts, to admissions on the pleadings has always been greater than that given to admissions in the less technical pleadings in the Courts in India. 23 W.R. 214 (217). **Y**

(36) **Principle of pleading.**

The principle of pleading now is that the parties come into Court in person or by their agents, and make their statements. If the statement of one party is used as evidence against him by the other, the Judge is not necessarily bound to believe the whole statement. He may believe one part of it and disbelieve the other part. But he ought not to do so without some good reason. W.R. (1864, Act X), 27. **W**

(37) **Plaintiff, though misled by defendant's representations, cannot set up new case.**

Even if a plaintiff has been misled by various representations of the defendant into framing his suit in a particular way, still he can only recover according to his allegations and proofs, and cannot be allowed to set up an entirely new case, not set up or hinted at in the plaint. 19 W.R. 12. **X**

(38) **Allegations not traversed admitted.**

(a) Where the plaintiffs' claim on an alleged title and their allegation are not traversed by the defendant, their position requires no further proof. 12 W.R. 469. **Y**

(b) Where, in a suit tried under the Civil Procedure Code, issues have been settled, averments upon which no issue is framed should be taken to be admitted, as the Court before proceeding to frame and record the issue is directed to inquire and ascertain upon what question of law or fact the parties are at issue, and, if there is any mistake or omission, the Court may, at any time before the decision, amend the issues or frame additional issues. 18 W.R. 287. **Z**

1.--“Admissions are not conclusive proof of the matters admitted.”

—(Continued).

- (c) In a suit for an injunction, where the plaintiff's allegation of obstruction was not denied in the defendant's written statement or put in issue at the hearing, it was held to be fair to presume that the defendant did not deny the obstruction, as could be inferred from the character of the written statement and the fact that his pleader declined to give any undertaking against obstruction. 26 B. 735 (737-8), referring to 18 W.R. 287. A

(39) Averments not traversed necessarily not admitted.

- (a) The strict rule that averments not traversed must be taken to be admitted is not applicable to the Indian Courts. 2 W.R. (P.C.), 19. B
- (b) The system of procedure in this country is not such that, if a defendant fails to dispute or contest a point, he thereby admits it. On the contrary, if he allows judgment to go by default, the plaintiff is just as much bound to prove his case. 14 W.R. 55 (56). C
- (c) The mere fact of non-traverse of the plaintiff's allegation of heirship was held not to amount to an admission of title, especially (as in this case) where there was a general denial of the plaintiff's allegations, including that of the plaintiff's title, and where the real question at issue was as to the share to which the plaintiff was entitled. 17 W.R. 171. D
- (d) An allegation of fact not traversed by the opposite party was not held to be admitted by the latter. 6 A. 403. E
- (e) The doctrine of admission by non-traverse is not applicable to a written statement filed under Act X of 1859. 9 W.R. 83. F

(40) Statement under Act VIII of 1859, nature of.

A statement, under Act VIII of 1859, is not in the nature of a confession and avoidance as in English pleading, where the confession is considered as an admission of the party, and the avoidance has to be proved. W.R. (1864, Act X), 27. G

(41) Admission on pleadings whether such for other purposes.

- (a) An admission of a fact on the pleadings by implication is not an admission for any other purpose than that of the particular issue and is not tantamount to proof of the fact. 23 W.R. 214 (217), referring to *Edmunds v. Groves*, 2 M. and W. 642; *Smith v. Martin*, 9 M. and W. 301 and *Robins v. Maidstone*, 4 Q.B. 850. H
- (b) A sheriff's return, though conclusive, in the particular cause in which it is rendered, or for the purposes of an attachment, does not, in any other action or proceeding, operate as an estoppel either against the sheriff or against his bailiff. *Standish v. Ross*, 19 L.J. Ex. 185; *Tay. Ev.*, 10th Ed., S. 854, p. 598. I
- (c) The following proviso is appended to the provisions of S. 4 of Order XII, (styled 'Admissions') in the First Schedule of the New Civil Procedure Code, Act V of 1908:—"Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular suit, and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving the notice: Provided also that the Court may at any time allow any party to amend or withdraw any admission so made on such terms as may be just." J

1.—“Admissions are not conclusive proof of the matters admitted.”

—(Continued).

MAHOMEDAN LAW—DOCTRINE OF ACKNOWLEDGMENT—CONCLUSIVENESS.

(1) Whether acknowledgment of sonship conclusively establishes legitimacy.

(a) Though it would seem at first sight that an *ikrar* or acknowledgment stands in the Mahomedan Law much on the same footing as an ordinary admission, as defined in S. 17 of the Evidence Act, acknowledgments of parentage under the Mahomedan Law rest upon a footing higher than that of ordinary admissions as pure matters of evidence, and are subject matter of the substantive Mahomedan Law. 10 A. 289 (326), *per Mahmood J.* **K**

(b) Under the Mahomedan Law, the effect of an acknowledgment by a Mahomedan that a particular person, born of the acknowledger's wife before marriage, is his son, though the person who acknowledges may never have treated him as a legitimate son or intended to give him the *status* of legitimacy, is to confer on that person the *status* of a son capable of inheriting as legitimate son, except where circumstances exist rendering it impossible that such a person can have actually been the son of the acknowledger. 8 A. 234, *referring to* 11 M.I.A. 94; 8 C. 422=9 I.A. 8 and 10 C. 663=11 I.A. 31. **L**

(c) A person alleged that he was the son of a deceased Mahomedan and claimed, by right of inheritance, possession of a share of the deceased's property. He adduced evidence of certain letters, etc., wherein he was expressly referred to by the deceased as his son. *Held* that the effect of the acknowledgment by the deceased of the plaintiff as his son was in fact to confer on the plaintiff the *status* of a legitimate son capable of inheriting the estate of the deceased, despite evidence showing that the deceased never treated him as legitimate or intended to confer the *status* of legitimacy on him. 8 A. 234. *Per Petheram, C.J.*; (*Brodhurst, J., dissenting*). **M**

(d) Proved acknowledgments by a Mahomedan of another person as his son or daughter, if none of the conditions in bar subsist, confer on such person the *status* of a legitimate child with its legal consequences. 10 A. 289 (303). **N**

(e) The acknowledgment and recognition of children by a Mahomedan as his sons gives them the *status* of sons capable of inheriting as legitimate sons, unless certain conditions exist. 8 C. 422 (432) (P.C.)=9 I.A. 8, *referred to in* 8 A. 234 (251). **O**

(f) According to Mahomedan Law, the acknowledgment of a father renders a son or daughter a legitimate child and an heir, unless it is impossible for the son or daughter to be so. 5 W.R. 132. **P**

(g) The acknowledgment of a child as being the son of the acknowledger is valid, when the ages of the parties admit of the alleged relationship, and where the descent from another of the person acknowledged has not been already established. 12 W.R. 497. **Q**

(h) According to the Mahomedan Law, the acknowledgment of a father renders a son or daughter a legitimate child and an heir, unless it is impossible for the son or daughter to be so; and the acknowledgment need not be of such a character as to be evidence of marriage. 15 W.R. 403 (404). **R**

I. — "Admissions are not conclusive proof of the matters admitted."
—(Continued).

MAHOMEDAN LAW—DOCTRINE OF ACKNOWLEDGMENT—CONCLUSIVENESS.—(Continued).

- (v) Where, in a transaction with a third party, A describes B as his son, and B speaks of A as his father, the acknowledgment of sonship is complete and formal, and, under the Mahomedan Law, conclusive against all parties. 20 W.R. 164. S
- (vi) An acknowledgment by a Mahomedan that a certain person is his son is not merely *prima facie* evidence of that fact, which may be rebutted, but establishes the fact acknowledged. Such acknowledgment is valid when the ages of the parties admit of the relationship between them, and where the descent of the party acknowledged has not been already established from another. 4 B.L.R.A.C. 55. T
- (k) The treatment of the daughter as a member of the family affords a strong presumption in favour of the right of her mother to inherit from her; in the face of the acknowledgment, strong conclusive evidence is necessary to rebut the presumption raised by the treatment; and, in the absence of such evidence, the presumption must prevail. 8 Mad. Jur. 306, cited in 2 C. 184 (199). U
- (l) Continual cohabitation of the parents and acknowledgment of the child by the father is presumptive evidence of marriage between the parents and of the legitimacy of the offspring. 3 M.I.A. 295; cited in 10 A. 289 (331), per *Mahmood, J.* Y
- (m) The status of a person as the son of another Mahomedan was held to have been sufficiently established by recognition so as to enable him to claim as heir. 10 C. 663 (668) (P.C.), following 8 C. 422 (P.C.). W
- (n) According to the Mahomedan Law, the presumption of legitimacy from marriage, follows the bed, and whilst the marriage lasts, the child of the woman is taken to be the husband's child: but this presumption is not antedated by relation. An ante-nuptial child is illegitimate; a child born of wedlock is illegitimate; but, if acknowledged by the father, he acquires the status of legitimacy. Such acknowledgment may be express or implied, directly proved or presumed. 11 M.I.A. 91; cited in 8 A. 231 (248), per *Petheram, C.J.* X
- (o) According to the Mahomedan Law, the legitimacy or legitimation of a child of Mahomedan parents may properly be presumed or inferred from circumstances without proof, or at least without any direct proof, either of a marriage between the parents or of any formal act of legitimation. 8 M.I.A. 136 (159)=3 W.R. (P.C.), 37; cited in 10 A. 289 (331), per *Mahmood, J.* Y
- (p) Although, by the Mahomedan Law, the legitimacy of a child of Mahomedan parents may be presumed or inferred from circumstances, without any direct proof either of a marriage between the parents or of any formal act of legitimation, in the absence of evidence or circumstances sufficient to found such a presumption or inference, a claim by a party as a legitimate son to share in an intestate's estate should be dismissed. 8 M.I.A. 136, cited in 10 A. 289 (331), per *Mahmood, J.* Z

I.—“Admissions are not conclusive proof of the matters admitted.”
 —(Continued).

MAHOMEDAN LAW—DOCTRINE OF ACKNOWLEDGMENT—CONCLUSIVENESS.—(Continued).

- (q) According to the Mahomedan Law, the acknowledgment of the father renders the son a legitimate son and heir, whether the mother was or was not lawfully married to the father. 10 W.R. 45 (46). **A**
- (r) Where a man acknowledges a person to be his daughter, he must be taken to mean his legitimate daughter, unless the contrary appears. 10 W.R. 469. **B**
- (s) The Mahomedan Law is very scrupulous in bastardising the issue of any connection in which it can be shown by presumption that there has been co-habitation and acknowledgment of paternity. 5 W.R. 4. **C**
- (t) “The Mahomedan Law of acknowledgment of parentage with its legitimating effect has no reference whatever to cases in which the illegitimacy of the child is proved and established, either by reason of a lawful union between the parents of the child being impossible (as in the case of an incestuous intercourse or an adulterous connection), or by reason of the marriage necessary to render the child legitimate being disproved.” 10 A. 289 (334, 335), per *Mahmood, J.* **D**
- (u) The doctrine of acknowledgment relates only to cases where either the fact of the marriage itself or the exact time of its occurrence with reference to the legitimacy of the acknowledged child is not proved in the sense of the law as distinguished from disproved. 10 A. 289 (335), per *Mahmood, J.* **E**
- (v) In other words, the doctrine applies only to cases of uncertainty as to legitimacy, and in such cases acknowledgment has its effect, but that effect always proceeds upon the assumption of a lawful union between the parents of the acknowledged child. 10 A. 289 (335), per *Mahmood, J.* **F**
- (w) The rule is limited to cases of uncertainty of legitimate descent and proceeds entirely upon an assumption of legitimacy and the establishment of such legitimacy by the force of such acknowledgment. 10 A. 289 (337), per *Mahmood, J.* **G**
- (x) Where the illegitimacy is a proved and established fact, children born of *zina* cannot be made legitimate by any kind of acknowledgment. 10 A. 289 (334), per *Mahmood, J.* **H**
- (y) Notwithstanding the Mahomedan Law, a Court of Justice cannot pronounce a child to be the legitimate offspring of a particular individual, where such a conclusion would be contrary to the course of nature and impossible. 16 W.R. 260. **I**
- (z) An acknowledgment by a Mahomedan of another as his son or daughter, as the case may be, if there is no legal impediment to it, confers a *status* of legitimacy just as, by the analogy of the Roman law, manumission of a slave conferred on him the *status* of a free man. 10 A. 289 (307); but see *infra*. **J**

1.—“*Admissions are not conclusive proof of the matters admitted.*”

—(Continued).

MAHOMEDAN LAW—DOCTRINE OF ACKNOWLEDGMENT—CONCLUSIVENESS.—(Continued).

(aa) Under the Mahomedan Law, acknowledgment of parentage proceeds upon the theory of actual descent of the acknowledged child (whether male or female) from the father who acknowledges it, and such descent being the result of a legitimate intercourse between the parents, and when either of these two essentials is disproved, the one by proving that the acknowledged child is the offspring of another man, the other by proving either that marriage between the acknowledger and the mother of the child was impossible or did not exist at the time which would make the child legitimate, the acknowledgment itself would be ineffective. 10 A. 289 (340), per *Mahmood, J.* **K**

(bb) The Mahomedan Law relates only to cases of uncertainty and proceeds upon the assumption that the acknowledged child is not only the offspring of the acknowledger by blood, but also the issue of a lawful union between the acknowledger and the mother of the child. 10 A. 289 (341), per *Mahmood, J.* **L**

(2) **Proof of express acknowledgment.**

There need not be proof of an express acknowledgment, but an acknowledgment of children by a Mahomedan as his sons may be inferred from his having openly treated them as such. The question whether the acknowledgment should be presumed or not must of course depend upon the circumstances of each particular case in which it arises. 8 C. 422 (432) (P.C.) **M**

(3) **Acknowledgment of another as brother—Effect.**

The acknowledgment by one man of another as his brother is not, by Mahomedan Law, valid, so as to be obligatory on the other heirs, but is binding against the acknowledger. 13 B.L.R. 182. **N**

(4) **Whether acknowledgment conclusively establishes marriage.**

(a) Though there is no evidence of the celebration of any marriage ceremony, still the fact of a woman having constantly lived as a married woman with her husband, and the fact of her children having lived as legitimate children with their parents, make the case fall within the rule as to the presumption of marriage and legitimacy laid down by the Privy Council in 8 M.I.A. 136 and by the Calcutta High Court, in 1 Marsh 428. 1 W.R. 17. **O**

(b) The undoubted acknowledgment by the father and by the whole family of the legitimacy of N and the admission of E that N's mother was his wife, and not merely a servant, were held to raise some presumption of the marriage of his mother. 2 C. 184 (200) (P.C.) **P**

(c) Where a woman cohabited for years with a Mahomedan prince as his wife, and she had a child by him who had been openly acknowledged and treated by the Prince as his lawful son, the Privy Council held that, though there might be no cogent evidence of the actual fact of marriage, there arose, under the circumstances, an almost conclusive presumption of her marriage with the prince. 10 C.L.R. 293 (328). **Q**

1.—“Admissions are not conclusive proof of the matters admitted.”
—(Concluded).

MAHOMEDAN LAW—DOCTRINE OF ACKNOWLEDGMENT—CONCLUSIVENESS.—(Concluded).

- (d) An equivocal expression in a document, by a Mahomedan, which might be applicable to the ladies in respect to whom it is used, whether they were wives or not, cannot be considered to be such an express recognition of their being wives as to establish their claims, as such, to a share in the estate, on his decease. 10 C.L.R. 293. **R**
- (e) The mere fact of a man keeping a woman within the *purdah* and treating her, to outward semblance, as a wife, does not necessarily, in the absence of express declaration and acknowledgment, constitute the *factum* of marriage. 20 W.R. 352. **S**
- (f) According to the Mahomedan Law, a public acknowledgment of paternity will, of itself, raise a presumption of marriage between the person who makes it, and the mother of the child, without the father specifically connecting his paternity with any particular woman. To rebut this presumption, the *onus* of proving the impossibility of the marriage is on the other side. 3 W.R. 187 **T**
- (5) **Acknowledgment not merely *prima facie* evidence but establishes fact.**
According to the Mahomedan Law, where an acknowledgment is binding, it does not amount merely to *prima facie* evidence, but establishes the fact acknowledged. 12 W.R. 497. **U**
- (6) **Acknowledgment once made cannot be re-called.**
An acknowledgment once made cannot be re-called, either by the acknowledger himself or by any one claiming under him. 10 A. 299 (308). **Y**

2.—“But they may operate as estoppels under the provisions hereinafter contained.”

- (1) **Statements not estoppels or judicial admissions not conclusive.**
But statements which are not estoppels or judicial admissions have not the quality of removing the proposition, in question, from the field of disputed issues, and, on principle, cannot have. Wigm. Ev., 1905 Ed., S. 1058, p. 1227. **W**
- (2) **Difference between estoppel and admission.**
Where, in a mortgage deed executed by a widow who succeeded to her husband's property, her son P, for whom the loan was incurred, and who had attested the deed, was described as the son of one R, who was said to have adopted him, the District Judge assumed upon this fact that the mortgagee must have admitted the adoption and treated this as an estoppel; held that the District Judge failed to perceive the difference between an estoppel and a fact which may or may not be evidence of an admission. 14 B. 312 (315). **X**
- (3) **Admission does not estop.**
(a) An admission does not estop the party who makes it; he is still at liberty to disprove it by evidence so far as regards his own interest. *Ridgway v. Philip*, 1 C.M. & R. 415; Wigm. Ev., 1905 Ed., S. 1058, p. 1227. **Y**

2 -- "But they may operate as estoppels under the provisions hereinafter contained"—(Continued).

- (b) Where the defendant is not a party to the deeds, and there is, therefore, no estoppel, the party making the admission may give evidence to rebut this presumption, but unless and until that is satisfactorily done, the fact admitted must be taken to be established. 5 C.L.J. 115 (121)=4 A.L.J. 102 (P.C.). **Z**

(4) Estoppel is conclusive.

An estoppel, that is, a representation acted on by the other party, by creating a substantive right, does oblige the estopped party to make good his representation,—in other words, but inaccurately, it is conclusive. Wigm. Ev., 1905 Ed., S. 1058, p. 1227. **A**

(5) Whether conduct and words amount to estoppel.

A person's conduct and language have, generally speaking, not the effect of operating as an estoppel against him. *Smith v. Taylor*, 1 N.R. 210. Tay. Ev., 10th Ed., S. 802, p. 566. **B**

(6) Estoppel binds only parties and privies.

It is a well established rule of law that estoppel binds only parties and privies, not strangers. *Heave v. Rogers*, 9 B. & C. 577. Tay. Ev., 10th Ed., S. 817, p. 577; cited in 29 A. 184 (195)=11 C.W.N. 321=4 A.L.J. 102=5 C.L.J. 115=17 M.L.J. 103=2 M.L.T. 100=9 Bom. J.R. 267 (P.C.). **C**

(7) Admissions in deeds are estoppels.

Admissions in deeds in regard to parties and privies are generally regarded between them as estoppels, provided they are properly pleaded. *Fishmongers' Co. v. Robertson*, 5 M. & Cr. 193; Tay. Ev., 10th Ed., S. 858, p. 601. **D**

(8) Such admissions, even when not estoppels, deserve great weight.

Such admissions, though they may not amount to estoppels, are entitled to great weight from the solemnity of their nature. *Doe v. Stone*, 15 L.J.C.P. 234; Tay. Ev., 10th Ed., S. 858, p. 601. **E**

(9) But opponent may repel them when adduced in evidence by stranger.

But when they are adduced in evidence by a stranger, the opposite party may repel their effect, in the same manner as though they were only parol admissions. *R. v. Neville*, Peake, R. 91; Tay. Ev., 10th Ed., S. 858, p. 601. **F**

(10) Admission on point of law, effect of.

It has been held that an admission on a point of law is not an admission of a thing, so as to make the admission matter of estoppel, within the meaning of S. 115 of the Evidence Act. 21 A. 285 (287). See, also, under S. 115, *infra*. **G**

(11) Admission not amounting to estoppel.

- (a) The Judicial Committee of the Privy Council held that the defendants in a certain suit might plead that the statements which they had formerly made were false, and intended as a fraud on the third party, and that the admission in their answer would not amount to an estoppel as between them. 13 M.L.A. 551=15 W.R. (P.C.), 14, cited in 20 W.R. 112. **H**

2.—“But they may operate as estoppels under the provisions hereinafter contained.”—(Continued).

- (b) An admission made by a party in other cases may be taken as evidence against him, but cannot operate against him as an estoppel, in a case in which his opponents are persons to whom, or to any one else concerned, the admission was not made, and who are not proved to have ever heard of it, or to have been in any way misled by it, or to have acted in reliance upon it. 5 W.R. 209 (210). **I**

(12) Cases of no estoppel.

- (a) Where, in answer to a suit, two parties combine to make a statement to defeat a third party, it is competent to either of those parties, when they are opposed to each other in a suit, to say that the combined statement was false and intended as a fraud against the third party. The admission in the former suit is not to be regarded as an estoppel against either of the two parties in the present suit; but the Court is competent to enquire into the character of the transaction and to declare it void, if it is satisfied that the transaction is not a *bona fide* one. 1 W.R. 156. **J**

- (b) Though the mere receipt or payment of rent may raise a strong presumption of tenancy, it will not, yet, *ipso facto*, operate as an estoppel. *Doe v. Francis*, 2 M. and R. 57—but only to an admission which may be explained. Phip. Ev., 4th Ed., p. 634. **K**

- (c) Where the validity of an adoption was in question and the plaintiff who maintained its validity contended that the defendant was estopped by her previous admissions and conduct from disputing either the fact or the validity of the adoption, their Lordships observed that there was no estoppel in the case; as there was no misrepresentation on the defendant's part on any matter of fact; only the defendant had arrived at a conclusion that the adoption admitted in fact was valid in law—a conclusion which was erroneous, which created no estoppel whatever between the parties. 11 B.L.R. 391 (P.C.) = 19 W.R. 12, *referred to in* 21 A. 287. **L**

- (d) A pleading by two defendants against the suit of another plaintiff never can amount to an estoppel as between them. 13 M.I.A. 551 (559). **M**

- (e) Where, in a suit, two of the defendants in their written statement made an allegation regarding an alleged mortgage transaction with the object of defeating the plaintiff's claim, which was false, and where a foreclosure suit was subsequently brought by one of these defendants against the other on the basis of this alleged mortgage, it was held that the defendants could plead that the allegation in the joint statement in the former suit was false and meant as a fraud on a third party and that the admission in the statement did not amount to an estoppel as between the parties to the subsequent suit. 13 M.I.A. 551. **N**

- (f) In a suit to redeem a mortgage, a person to avoid an objection taken as to the parties to the suit, filed a petition disclaiming all interest in the estate. At that time, she had an expectant right only to the estate, and she subsequently became absolutely entitled; and it was held, in the first place, that the petition could not operate as a conveyance, and next, that the statement in the petition was no estoppel, and that she was at liberty to show the real truth of the transaction. 13 M.I.A. 555 = 15 W.R. (P.C.), 10; *cited in* 20 W.R. 112 (113). **O**

2.—“ But they may operate as estoppels under the provisions hereinafter contained.”—(Continued).

(g) M died leaving him surviving a son S, a widow P, and three daughters R, L (the plaintiffs) and A (a defendant). M had another son, K who was given in adoption to his maternal uncle N. S died soon after his father, leaving neither widow nor any child. The suit property thereon devolved on P. P mortgaged the property to the first defendant, and the mortgage bond was attested by K describing himself as N's adopted son. The first defendant obtained a mortgage decree against P and purchased it in execution. R and L as reversionary heirs of S sued to have the sale to the first defendant declared void after P's death. The District Judge relied on the mortgage deed, where K was described as N's adopted son and on the fact assumed that the mortgagee must have admitted the adoption and treated this as an estoppel. *Held* that the District Judge committed an error of law and that the fact treated by him as an estoppel had no such effect, unless it had caused or permitted the other person to believe a thing to be true and to act upon such belief. 14 B. 312 (315). **P**

(h) If a person makes a mis-statement, without any intention that another party should act upon it, and when he could not expect that another party would act upon it, in such a case he is not bound. *Freeman v. Cook*, 2 Ex. 660, per *Parker, B.* Cited in 1 W.R. 158. **Q**

(i) A creditor is not estopped from bringing an action against a sheriff for a false return, by accepting the amount levied on account and towards the satisfaction of the debt mentioned in the writ. *Holmes v. Clifton*, 10 A. and E. 673; *Tay Ev.*, 10th Ed., S. 854, p. 599. **R**

(j) Where a claim to the properties of a deceased Hindu by his son was resisted by the defendant on the allegation that the son had been adopted by another person, and, so, in law, had ceased to be his son for purposes of inheritance, *held* that the defendant not being a party to the deeds, the claimant was not estopped from disputing the truth of the admission made therein and it was open to him to adduce rebutting evidence to prove that the statements were untrue. But unless and until this was satisfactorily done, the adoption must be taken as established. 11 C.W.N. 321 = 4 A.L.J. 102 = 5 C.L.J. 115. **S**

(13) Admission, though not estoppel, may be good evidence to be rebutted.

In a suit for contribution brought by one brother against the widow of his deceased brother, on the allegation that when the family were joint in food and estate, a lease was taken by the father of the parties in the name of one of the sons or of the plaintiff, it was held that an admission by the widow's husband that the lease was the joint property of himself and the plaintiff, though not an estoppel, was good evidence to be rebutted by the widow. 6 W.R. 85. **T**

(14) Cases of estoppel.

(a) An executrix, who treats the goods of her testator as the property of her husband, will not be allowed to object to their being taken in execution for her husband's debt. *Quick v. Staines*, 1 Bos. and P. 203; *Tay. Ev.*, 10th Ed., S. 856, p. 620. **U**

(b) A person, who has officiously meddled with the goods of another, recently deceased, is, in favour of creditors, estopped from denying that he is executor. *Reade's Case*, 5 Co. Rep. 33; *Tay. Ev.*, 10th Ed., S. 856, p. 600. **V**

2.—“ But they may operate as estoppels under the provisions hereinafter contained.” (Concluded).

(15) Estoppel only a rule of evidence.

An estoppel is generally said to be only a rule of evidence, for an action cannot be founded upon it. *Joss v. Douverie*, 3 Ch. 82; Phip. Ev., 4th Ed., p. 630. **W**

(16) Estoppel has the force of substantive law as defence.

But, as a defence, it has in many cases been held to have the effect of a rule of substantive law. Phip. Ev., 4th Ed., p. 630. **X**

(17) Estoppels different from “conclusive presumptions of law.”

Estoppels can be distinguished from “conclusive presumptions of law,” for an estoppel may be waived by the party in whose favour it operates. *Scarf v. Jardine*, 7 App. Cas. 345; Phip. Ev., 4th Ed., p. 630. **Y**

(18) Estoppel different from “solemn admissions.”

An estoppel can be distinguished from a solemn admission and from conclusive presumptions, for it cannot generally be taken advantage of by strangers. Phip. Ev., 4th Ed., p. 630. **Z**

(19) Estoppel different from conclusive evidence.

An estoppel is distinguishable from “conclusive evidence,” because the conclusiveness of evidence is a thing that may result from simple logical cogency, whereas, when it results from some rule of law, it operates indifferently for or against all persons. Phip. Ev., 4th Ed., p. 630. **A**

(20) Estoppels cannot supersede the law of the land.

Where writing is required by statutes, no estoppel will cure the defect. *Hunt v. Wimbledon Local Board*, 4 C.P.D. 48; Phip. Ev., 4th Ed., p. 631. **B**

(21) Estoppels by conduct.

Where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things and induces him to act upon that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time. *Pirkard v. Sears*, 6 A. and E. 439; Phip. Ev., 4th Ed., p. 633. **C**

(22) Conditions essential to raise an estoppel.

(a) There must be a representation of fact, a mere statement of intention or a promise *in futuro* being insufficient. *Citizen's Bank v. Bank of New Orleans*, L.R. 6 H.L. 352 and *Whitechurch v. Cavanagh, A.C.*, p. 130. **D**

(b) it must be precise and unambiguous. *Lois v. Bouverie*, 3 Ch. 82; **E**

(c) there must have been an intention or conduct raising a reasonable presumption thereof, that the injured party was meant to act upon the representation as true. *Freeman v. Cooke*, 2 Ex. 654; **F**

(d) the mis-statement or negligence must have been the proximate cause of the detriment, (*Barendse v. Bennett*, 3 Q.B.D. 525), or perhaps, more strictly, of the error which caused the detriment.—*Swan v. North British Australasian Co.*, 2 H. and C. 175. See Phip. Ev., 4th Ed., 635. **G**

Statements by persons who cannot be called as witnesses.

32. Statements, written or verbal¹, of relevant facts, made by a person who is dead, or who cannot be found², or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases³ :—

(1) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question⁴.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question⁵.

(2) When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgment, written or signed by him, of the receipt of money, goods, securities, or property of any kind; or of a document used in commerce, written or signed by him; or of the date of a letter or other document usually dated, written, or signed by him⁶.

(3) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him, or would have exposed him, to a criminal prosecution or to a suit for damages⁷.

(4) When the statement gives the opinion of any such person, as to the existence of any public right or custom, or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom, or matter had arisen⁸.

(5) When the statement relates to the existence of any relationship by blood, marriage, or adoption between persons as to whose relationship by blood, marriage, or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised⁹.

(6) When the statement relates to the existence of any relationship by blood, marriage, or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family-pedigree, or upon any tombstone, family-portrait, or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.¹⁰

or is made in will or deed relating to family-affairs; (7) When the statement is contained in any deed, will, or other document which relates to any such transaction as is mentioned in section 13, clause (a):¹¹

or is made by several persons, and expresses feelings relevant to matter in question. (8) When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.¹²

Illustrations.

(a) The question is, whether A was murdered by B; or

A dies of injuries received in a transaction in the course of which she was ravished. The question is, whether she was ravished by B; or

The question is, whether A was killed by B under such circumstances that a suit would lie against B by A's widow.

Statements made by A as to the cause of his or her death, referring respectively to the murder, the rape, and the actionable wrong under consideration, are relevant facts.

(b) The question is, as to the date of A's birth.

An entry in the diary of a deceased surgeon, regularly kept in the course of business, stating that, on a given day, he attended A's mother, and delivered her of a son, is a relevant fact.

(c) The question is, whether A was in Calcutta on a given day.

A statement in the diary of a deceased solicitor, regularly kept in the course of business, that, on a given day, the solicitor attended A at a place mentioned, in Calcutta, for the purpose of conferring with him upon specified business, is a relevant fact.

(d) The question is, whether a ship sailed from Bombay harbour on a given day.

A letter written by a deceased member of a merchant's firm, by which she was chartered, to their correspondent in London, to whom the cargo was consigned, stating that the ship sailed on a given day from Bombay harbour, is a relevant fact.

(e) The question is, whether rent was paid to A for certain land.

A letter from A's deceased agent to A, saying that he had received the rent on A's account, and held it at A's orders, is a relevant fact.

(f) The question is, whether A and B were legally married.

The statement of a deceased clergyman that he married them under such circumstances that the celebration would be a crime, is relevant.

(g) The question is, whether A, a person who cannot be found, wrote a letter on a certain day.

The fact that a letter written by him is dated on that day is relevant.

(h) The question is, what was the cause of the wreck of a ship.

A protest made by the captain, whose attendance cannot be procured, is a relevant fact.

(i) The question is, whether a given road is a public way.

A statement by A, a deceased headman of the village, that the road was public, is a relevant fact.

(j) The question is, what was the price of grain on a certain day in a particular market. A statement of the price, made by a deceased banya in the ordinary course of his business, is a relevant fact.

(k) The question is, whether A, who is dead, was the father of B.

A statement by A that B was his son is a relevant fact.

(l) The question is, what was the date of the birth of A.

A letter from A's deceased father to a friend, announcing the birth of A on a given day, is a relevant fact.

(m) The question is, whether, and when, A and B were married.

An entry in a memorandum-book by C, the deceased father of B, of his daughter's marriage with A on a given date, is a relevant fact.

(n) A sues B for a libel expressed in a painted caricature exposed in a shop-window. The question is as to the similarity of the caricature and its libellous character. The remarks of a crowd of spectators on these points may be proved.

(Notes).

General.

(1) Ss. 32 and 33 contain exceptions to 'hearsay rule.'

Ss. 32 and 33 contain many important exceptions to the rule which excludes hearsay. Mark. Ev. p. 32. H

(2) Reason for excluding hearsay.

The exclusion of hearsay chiefly depends upon the desirability of getting the person, whose statement is relied upon, into Court, in order that he may be examined as a witness in the regular way. But this is practically impossible in many cases. Mark. Ev., p. 32. I

(3) Cases where hearsay rule is relaxed.

In the circumstances mentioned in the first part of S. 32, it is practically impossible to get into Court the person on whose statement reliance is placed, and, in such cases, consequently, the rule excluding hearsay is relaxed, only regarding statements mentioned in Ss. 32 and 33, and not as to all statements. Mark. Ev., p. 32. J

(4) English Law.

Under the English Law, in a case falling under cl. 1, hearsay is not admissible, and, in one falling under cl. 3, it is. U.B.R. 3rd Quarter, Ev. p. 3 (4). K

General.—(Continued).**(5) Principle underlying exceptions to the hearsay rule.**

(a) The purpose and reason of the hearsay rule is the key to the exceptions to it. The theory of the hearsay rule is that the many possible sources of inaccuracy and untrustworthiness beneath the bare untested assertion of a witness can be best brought to light and exposed, if they exist, by the test of cross-examination. But this test or guarantee may, in a particular case, be unnecessary; it may be sufficiently clear, rendering cross-examination superfluous. Besides, the test may be impossible of employment, *e.g.*, owing to the death of the declarant, so that, if his testimony is to be used at all, there is a necessity to take it in the untested condition. Thus, such statements have a *Circumstantial Guarantee of Trustworthiness* and there is a *Necessity* for their evidence. Wigm. Ev., 1905 Ed., S. 1420, p. 1791. **L**

(b) The general rule, that, however impressive the declaration of a man of character may be, yet, the law admits the word of no one in evidence without oath, is subject to relaxation in cases of necessity or extreme inconvenience. *Garwood v. Dennis*, 4 Binney. 323. Wigm. Ev., 1905 Ed., S. 1420, p. 1792. **M**

(c) The principle underlying all these exceptions is the same. First, the case must be one in which it is difficult to obtain other evidence; for, no doubt, the ground for admission of the exceptions was that very difficulty. Secondly, the declarant must be disinterested, *i.e.*, in the sense, that the declaration was not made in favour of his interest. Thirdly, the declaration must be made before dispute or litigation, to make it sure that it was made without bias, owing to the existence of a dispute or litigation the declarant might favour. And lastly, the declarant must have had peculiar means of knowledge, not possessed in ordinary cases. All these reasons exist in testifying both as to matters of public and general interest, for pedigree, and some, if not all, in the other cases referred to. *Snyder v. St. Leonards*, L.R. 1 P.D. 154. Wigm. Ev., 1905 Ed., S. 1420, p. 1792. **N**

(d) Exceptions to the general rule of evidence excluding all hearsay have been made from necessity and from the impracticability, in some instances, of other proof. *Westfield v. Warren*, 8 N.J.L. 251, Wigm. Ev., 1905 Ed., S. 1420, p. 1792. **O**

(e) Where the particular circumstances of the case are such as to afford a presumption that the hearsay evidence—which generally lacks the securities of oath and cross-examination—is true, it is then admissible. *Cornelius v. State*, 12 Ark. 804, Wigm. Ev., 1905 Ed., S. 1420, p. 1792. **P**

(f) The law does not dispense with the guarantee of an oath and the test afforded by cross-examination as a condition for the admission of verbal testimony, except where, from the nature of the case, some other guarantee or test, deemed equivalent for ascertaining the truth, exists. *Southwest School District v. Williams*, 48 Conn. 507, Wigm. Ev., 1905 Ed., S. 1420, p. 1793. **Q**

(6) Scope of the section.

Statements, made by persons who are dead or otherwise incapacitated from being called as witnesses, are admitted in the cases mentioned in Ss. 32 and 33. Steph. Introd. p. 140. **R**

General.--(Continued).**(7) Object of section.**

- (a) The section was passed to make it possible to make a dead person, who cannot be called as a witness but who knew the truth and had made a statement shortly before his death, a witness, notwithstanding his death, and to give in evidence the statements which he made. 7 A. 385 (396) (F.B.). Per *Petheram, C.J.* **S**
- (b) S. 32 was intended by the framers of the Act to provide for cases of dying declarations; that is to say, where a person, mortally injured, makes certain statements regarding the cause and other circumstances of the injury and then dies. These statements may be given in evidence under S. 32. 7 A. 385 (396) (F.B.). Per *Petheram, C.J.* **T**

(8) Intention of the Legislature.

The Legislature intended that such evidence (as is afforded by the signs made, by an accused person, in response to questions put to him) should be admitted only within the limits provided by that section, and that, if they cannot be brought under that section, the Courts ought not to search too carefully for other provisions under which to admit them. 7 A. 385 (396) (F.B.). Per *Petheram, C.J.* **U**

(9) Ground on which dying declarations admissible—Spiritual ground.

- (a) The ground, on which dying declarations are admissible, is, that, when they are made, the declarant is in a condition, in which, according to the experience of mankind, it is not less likely that what he says is true than if it had been said before a Magistrate, under the sanction of an oath and in the presence of the prisoner. 6 W.R. (Cr.), 75 (76). **Y**
- (b) The general principle, upon which evidence of this kind is admitted, is, that it is of declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone—when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth. 15 W.R. Cr. 11 (13), citing *Eyre, C.B.*'s observations in *Woodcock's case*, for which see *infra*. **W**
- (c) "The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is created by a positive oath administered in a Court of justice." *Woodcock's case*, Leach, Cr.L., 4th Ed., 500; Wigm. Ev., 1905 Ed., S. 1438, p. 1804; Tay. Ev., 10th Ed., S. 714, p. 506. **X**
- (d) "When a party comes to the conviction that he is about to die, he is in the same practical state as if called on in a Court of Justice under the sanction of an oath, and his declarations as to the cause of his death are considered equal to an oath. But they are nevertheless open to observation. For, though the sanction is the same, the opportunity of investigating the truth is very different, and, therefore, the accused is entitled to every allowance and benefit that he may have lost by the absence of the opportunity of more full investigation by the means of cross-examination." *Ashton's case*, 2 Lew. Cr. C. 147; Wigm. Ev., 1905 Ed., S. 1438, p. 1804. **Y**

General.—(Continued).

- (e) The deceased's statements after the assault, though apparently not made in consciousness of approaching death, were received, the Counsel premising that "the sayings of a dying man in such circumstances are remarkable." *Earl of Pembroke's trial*, 6 How. St. Tr. 1809, 1835; Wigm. Ev., 1905 Ed., S. 1480, p. 1798. Z

(10) Ground of admissibility based upon the interests of justice.

It often happens that no third person is present as an eye-witness to a murder; and as the party injured, who is the usual witness in other cases of felony, cannot himself be called, the murderer might often escape justice, if his dying declarations were not admitted in evidence. 1 East. P.O. 353; Tay. Ev., 10th Ed., S. 716, p. 508; but see Wigm. Ev., 1905 Ed., S. 1431, p. 1800 (where the professor calls this doctrine 'a heresy'). A

(11) Necessity of case is ground for receiving such evidence.

(a) It has been said that Courts have been driven to accept this evidence by the necessity of the case; the necessity arising from this, that the injured person, who might be the principal witness against the prisoner, is dead. 6 W.R. (Cr.), 75 (76). B

(b) The reason is that no better evidence could be had in the circumstances enumerated in the section. Steph. Introd. p. 140. C

(c) Evidence of dying declarations, which is peculiar to the case of homicide, has been considered to be relevant evidence from "the fullest necessity," for, it often happens that there is no third person present to be an eye-witness to the fact. Ros. Cr. Ev., 13th Ed., p. 29, citing 1 East. P.C. 353. D

(d) Since the witness had died there was a necessity for taking his only available trustworthy statements—his dying declarations—the necessity lying simply in the death of the witness. Wigm. Ev., 1905 Ed., S. 1431, p. 1799. But see 6 W.R. (Cr.), 75, *infra*. E

(12) Principle of necessity.

This principle is that, as we may lose the benefit of evidence completely unless we take it untested, there is thus a greater or less necessity for receiving it. Wigm. Ev., 1905 Ed., S. 1421, p. 1793. F

(13) Reason why otherwise the benefit of such evidence will be lost.

(a) The person whose assertion is tendered in evidence may now be dead, or out of the jurisdiction, or insane, or otherwise unavailable for the purpose of examination. It is found in the exception for dying declarations, statements against interest, declarations about family history, attestation of a subscribing witness, regular entries in the course of business, and sundry statements of deceased persons. Wigm. Ev., 1905 Ed., S. 1421, p. 1793. G

(b) The statement may be such that one cannot expect, again or at this time, to get evidence of the same value from the same or other sources. This appears more or less fully in the exception for spontaneous declarations, for reputation, and in part elsewhere. Here, there is no fear of the entire loss of a person's evidence, as in case (a), but, merely, of some valuable source of evidence. There is perhaps no necessity, or the necessity is not so great; only, an expediency or inconvenience is aimed at. Wigm. Ev., 1905 Ed., S. 1421, p. 1793. H

(General. (Concluded).)**(14) Necessity is no ground.**

Such *necessity*, as it is called, is not a ground for receiving evidence which ought, on other grounds, to be excluded, nor is it the reason why this evidence is admitted; but, even if it were so, that necessity is just as likely to exist where the deceased person has been robbed, or raped, or assaulted, as where he has been murdered. 6 W.R. (Cr.), 75 (76). **I**

(15) Circumstances specified in section guarantee truth of statements.

"It will be observed that most of the statements admitted have some guarantee of their truthfulness in the circumstances under which they were made." Mark. Ev. p. 33. **J**

(15a) Circumstantial Guarantee of Trustworthiness.

This principle is in the nature of a practical substitute for the general test of cross-examination. Under certain circumstances, the probability of the accuracy and trustworthiness of a statement is practically sufficient, if not equivalent to that of statements tested in the usual manner. This trustworthiness is found in different circumstances sanctioned by judicial practice. Common sense and experience have pointed them out as practically adequate substitutes for the ordinary test, at least in view of the necessity of the situation. Wign. Ev., 1905 Ed., S. 1421, p. 1793. **K**

(16) Relation between Ss. 21 and 32.

(a) "It is not easy to determine exactly in what relation the provisions of S. 32 stand to the provisions in S. 21. Under S. 32, certain statements may be admitted, if the maker of them is dead or ill; under S. 21, apparently the same statements are admissible, if the maker is alive and well. See illustrations (b) and (c) to S. 21." Mark. Ev. p. 34. **L**

(b) One of the exceptions to the general rule that an admission can be proved against the person who made it is, where the admission is of such a nature that, if the person making it were dead, it would be admissible as between third persons, under S. 32. If an admission, therefore, falls within S. 32, it may be proved independently of the general rule stated in S. 21. U.B.R. 1906, 3rd Quarter, Ev., p. 3. **M**

(17) Relation between Ss. 30 and 32.

S. 30 does not limit the operation of S. 32 and illn. (b) to S. 30 cannot be construed to have this effect. U.B.R. 1906, 3rd Quarter, Ev. p. 3. **N**

I.—"Statements, written or verbal."**(1) "Verbal," meaning of—Signs included in term.**

'Verbal' means by words; it is not necessary that the words should be spoken. If the term used in the section were "oral," it might be that the statement must be confined to words spoken by the mouth. But the meaning of "verbal" is something wider. The words of another person may be so adopted by a witness as to be properly treated as the words of the witness himself. 7 A. 385 (397), per *Petheram, C.J.* **O**

(2) Improper technical distinction.

It is not proper to draw such a purely technical distinction as to say that, while questions adopted or negated by a mere "yes," or "no" constitute a "verbal statement," within S. 32, they become inadmissible when assent or dissent is expressed by a nod or shake of the head. 7 A. 385 (398), per *Straight, J.* **P**

1. — "Statements, written or verbal." — (Concluded).

(3) Term "verbal" does not include signs.

"Verbal" cannot mean more than "by means of a word or words." Nodding the head or waving the hand is not a word. S. 32, cl. 1 can only apply to "statements, written or verbal." 7 A. 385 (398); per Mahmood, J. Q

(4) Questions responded to by certain signs are verbal statements.

(a) When a witness is called, who deposes to having put certain questions to a person, the cause of whose death is the subject-matter of the trial, which questions have been responded to by certain signs, such questions and signs, taken together, can be properly regarded as 'verbal statements,' under S. 32 of the Evidence Act. 7 A. 385 (397) (F.B.). Per Petheram, C.J. R

(b) If the significance of the signs made by a deceased person in response to questions put to her shortly before her death is established satisfactorily to the mind of the Court, then such questions, taken with her assent or dissent to them, clearly proved, constitute a verbal statement as to the cause of her death, within the meaning of S. 32 of the Evidence Act. 7 A. 385 (397). Per Straight, J. S

(5) Statement of witnesses as to their impressions of what signs meant inadmissible.

Statements by witnesses as to their impressions of what certain signs made by an accused person in response to questions put to her shortly before her death meant are inadmissible and they should be eliminated; but if the questions put to the deceased were responded to by her in such a manner as to leave no doubt in the mind of the Court as to her meaning, then it is not straining the construction to hold that the circumstances were covered by S. 32. 7 A. 385 (398). Per Straight, J. T

(6) Object of admitting signs made by deceased in response to questions.

The signs made by a deceased person in response to questions put to her may be given in evidence with the object of supplying material from which the inference may be properly drawn that she either adopted or negatived the matter of such questions. 7 A. 385 (397). Per Straight, J. U

(7) Procedure where dying declaration consists of signs made in response to questions put to deceased.

(a) Where a dying declaration is made by signs made in response to questions put, it is admissible in evidence. In such cases, however, the statement should be a true record of what, in point of fact, occurred and should bear on its face the questions put and the nature of the gesticulations made in response. Also, the officer who recorded the statement should be called as a witness. 2 P.R. 1886 (Cr.), referring to 26 P.R. 1885 (Cr.). Y

(b) When such a declaration is not a continuous statement made by the dying person, but is elicited in answer to one or more questions, the document, to be really of use, should clearly set out the exact questions put and the answers made to them. 6 C.W.N. 72. Z

2.—“Of relevant facts made by a person who is dead, or who cannot be found.”

1.—RELEVANT FACTS.

Requisition of section for admissibility of statements.

S. 32 says that the statement, whether written or verbal, must be a statement as to relevant facts. 7 A. 385 (386) (F.B.); per *Petheram, C.J.* X

2.—PERSON.

(1) “Person” does not mean “persons.”

A contention, based entirely upon that provision of the General Clauses Act, which says that “person” shall include “persons,” that the term “person,” in S. 32, must be read as “persons” was held not to be entitled to succeed. 26 C. 236 (237) = 3 C.W.N. 88. Y

(2) Example.

A statement by way of recital as to pedigree and supporting the plaintiff's case, made in a patta executed by three sisters, two of whom were dead, and one of whom was living, was held to be as much the statement of each sister, who was dead, as that of the sister, who was then living; it might be matter for legitimate comment in arguing the case that those statements of the deceased persons must be received with caution, as the plaintiffs had not called the surviving sister to depose to their accuracy; but the matter could not be placed higher than that. 26 C. 236 (237). Z

3.—“Or who has become incapable of giving evidence, or whose attendance..cases.”

(1) Signs made by deaf mute how far admissible.

In a case of murder, the question was whether the gesticulations of a deaf mute, a witness for the prosecution, at the place where the body of the deceased was found, during the police inquiry, and subsequently in Court, were evidence against the accused, and, if so, what was their value. *Held* that the mute was not, during the police inquiry, capable of understanding the questions put to him, that he, hence, did not *become*, (but was all along), *incapable of giving evidence*, within the meaning of S. 32, and that his signs, if regarded as statements, were inadmissible under S. 32. 5 O.C. 246 (249). A

(2) Distinction between case of deaf mute and 7 A. 385 (F.B.).

Signs made by a dying woman, as to the circumstances under which injuries had been inflicted upon her, were admitted as statements, within the meaning of S. 32 (1), Evidence Act, as the woman was able to understand the questions put to her and as she had “*become incapable of giving evidence.*” 7 A. 385 (F.B.); explained in 5 O.C. 249. B

4.—“(1) When the statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction... question.”

- (1) **Dying declaration held inadmissible, where transaction was not proved to have resulted in declarant's death.**

Held that, in the absence of evidence to prove that the death of F, who was wounded by the accused in committing a dacoity, and who made a declaration on the 13th August and died on the 20th August, 1899, was caused or accelerated by the wounds received at the dacoity, or that it was the transaction which resulted in his death, his declaration ought not to have been admitted in evidence. 2 Bom. L.R. 331 (333). **C**

- (2) **Statements made by deceased as to cause of death held admissible.**

An accused person was charged with culpable homicide not amounting to murder. The question was whether the deceased had died from the effect of a beating. *Held* that a statement by the deceased, that he had been beaten by the accused, was admissible in evidence, under S. 32 of the Evidence Act, without proof that, at the time when the statement was made, the deceased was conscious of any fatal effect of such beating. 6 C.L.R. 278. **D**

- (3) **Statement held inadmissible where cause of death of person making it was not in question.**

An accused person was charged with having abetted the false personation of one K before a Sub-Registrar, with having intentionally made a false statement before that officer in that he identified some unknown person as the said K, and also with having abetted the offence of cheating. The Magistrate allowed, in the trial, the statement of a deceased person, whose servant had been cheated, to go in as evidence, although objected to. This statement was deposed to by the servant of the deceased. *Held* that there was no question that this statement was not relevant. 10 C. 1047 (1050). **E**

- (4) **Admissibility of dying declarations, where another person's death is in question.**

Only where the death of the deceased is the subject-matter of the charge and the circumstances of the death are the subject of the dying declaration is it admissible in evidence. And the statement of a deceased person, who did not himself charge the accused with having wounded him, to the effect that another person, also deceased, was stabbed by the accused, is not admissible in evidence, under S. 32 (1) of the Evidence Act. 17 P.R. 1901 (Cr.), following *R. v. Mead*, 2 B. & C 605 and *R. v. Hind*, 8 Cox. 300. **F**

- (5) **Admissibility of dying declaration of person, other than the accused, charging himself.**

A is charged with the murder of B. C's dying declaration that he, and not A, had murdered B was held to be inadmissible. *R. v. Gray*, Ir. Cir. Rep. 76; Phip. Ev., 4th Ed., p. 294; Steph. Dig. 7th Ed., Art. 26, p. 35. **G**

4.—“(1) When the statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction... question.”—(Continued).

(6) Dying declarations are a species of evidence.

— which, on the whole, are likely to be useful in leading Juries and Courts of Law to a right conclusion on the facts before them, and the principle on which they are admissible in cases of murder is applicable to their admissibility in other cases—for instance in a charge of rape. 6 W.R. (Cr.), 75 (76). **H**

(7) Dying declaration put on a level with a deposition.

It is, therefore, put on a level with a deposition, technically so called, which is admissible in case of the deponent's death or absence from illness. But this has nothing to do with the nature of the crime to which the evidence relates; it is just as applicable to one crime as to another. 6 W.R. (Cr.), 75 (76). **I**

(8) Proof of dying declarations.

(a) The only way of proving a dying declaration is by the evidence of some witness, who heard it made, the witness being at liberty to refresh his memory by referring to the note made by him or read over by him at or about the time the statement was made. 6 C.W.N. 72. **J**

(b) Witnesses should not be allowed to prove a dying declaration, as if it is a substantial piece of evidence in the case. The relevant fact to be proved is the statement made by a deceased person, admissible under S. 32 of the Evidence Act, and that statement is not the document made by the Magistrate, but the verbal statement made by the deceased person. 6 C.W.N. 72. **K**

(c) A statement made by a dying person as to the cause of his death and recorded by a Magistrate cannot be treated as a deposition, unless made in the presence of the accused, before the Magistrate exercising judicial jurisdiction, but must be proved in the ordinary way by a person who heard it made. 10 C.L.R. 11 = 8 C. 211. **L**

(d) A document purporting to be the dying declaration of a deceased person cannot be admitted in evidence without proof or solemn affirmation that the deceased actually made such a declaration, and the law does not provide that the mere signature of a Magistrate, who, however, was not the Committing Magistrate, shall be a sufficient authentication of such a document. It is obviously desirable that the person, who took the statement, should be subject to cross-examination as to the dying man's state of mind when he made it, and as to other circumstances. 11 B.H.C.R. 247 (249). **M**

(e) Although the dying declaration of a deceased person is recorded by a Magistrate, it must be proved in the usual manner by calling the Magistrate who took it down and also the clerk or interpreter, where the statement was understood by the Magistrate through the medium of interpretation. L.B.R. (1872-1892), p. 157. **N**

(f) There is no authority for the admission as evidence of what purports to be the dying declaration of a deceased person, when such declaration has not been taken by the committing Magistrate, without proof or solemn affirmation that the deceased actually made such a declaration. S.C. 29 (Oudh). **O**

4.—“(1) When the statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction... question.”—(Continued).

(9) Admissibility is a question for Judge.

The Judge must determine upon the condition of the dying declarant, that is, whether he had the consciousness of impending death, which is legally essential for the admissibility of the declaration. Wigm. Ev., 1905 Ed., S. 1451, p. 1818 and S. 2550, p. 3590. **P**

(10) Weight of declaration—Question for jury.

After a dying declaration, or any other evidence, has been admitted, the *weight* to be given it is a matter exclusively within the province of the jury. Wigm. Ev., 1905 Ed., S. 1451, p. 1818. **Q**

(11) Considerations in deciding upon the admissibility of dying declaration.

In determining whether a declaration alleged to have been made by a deceased person is admissible as a dying declaration under S. 137, Cr. P.C., 1861, a Sessions Judge ought to direct his attention to the point whether the declarant believed himself to be in danger of approaching death. The evidence of persons who cannot speak of their personal knowledge to such a declaration should not be admitted; and, in deciding whether the accused is guilty of the charge of murdering the deceased declarant, the Court should confine itself to inquiring into the facts which occurred on the day of the murder. 10 W.R. 11 (Cr.). **R**

(12) Invalid objections to admissibility of dying declarations.

(a) It is no objection to the admissibility of dying declarations that they were made in answer to leading questions. *R. v. Smith*, 10 Cox. C. C. 82. Tay. Ev., 10th Ed., S. 720, p. 512; Phip. Ev., 4th Ed., p. 294. **S**

(b) It has been held more than once in England that it is no objection to the admissibility of a dying declaration that it was made in answer to leading questions or obtained by earnest and pressing solicitations. 7 A. 385 (398); per *Straight, J.*, citing Russell on Crime, Vol. III, p. 269. **T**

(c) It is no objection to the admissibility of dying declarations that they were obtained by earnest solicitations. *R. v. Fagent*, 7 C. and P. 238; *R. v. Reason*, 1 Str. 499 and *R. v. Whitworth*, 1 F. and F. 382; Tay. Ev., 10th Ed., S. 720, p. 512. **U**

(13) Weight to be attached to dying declaration.

A Court should receive a dying declaration with caution. The details of the violence referred to by the deceased might have occurred under circumstances of confusion and surprise tending to prevent their being correctly observed. The deceased might have stated his inferences from events regarding which he might have arrived at a wrong conclusion. Before the dying declaration is received in evidence, any enmity between the accused and the deceased should also be taken into consideration. 117 P.R. 1866 (Cr.). See, also, 8 P.R. 1868 (Cr.). **Y**

(14) Form of dying declarations.

Dying declarations are not necessarily either written or spoken. Any method of communication between mind and mind may be adopted that will develop the thought, as the pressure of the hand, a nod of the head, or a glance of the eye. *Mokabee v. Com.*, 78 Ky. 382; and, also, *Com. v. Casey*, 11 Cush 420, (where pointing with a finger so as to convey a meaning clearly was held to be sufficient.) See Wigm. Ev., 1905 Ed., S. 1445, p. 1819. **W**

4.—“(1) *When the statement, is made by a person as to the cause of his death or as to any of the circumstances of the transaction... question.*”—(Continued).

(15) **Declarations must be complete.**

(a) The declarations should be complete, conveying the whole of what the declarant intended to say; an incomplete statement, or one which the declarant intended to qualify, but was prevented from doing so, is inadmissible. *Phip. Ev.*, 4th Ed., p. 294; *Wigm. Ev.*, 1905 Ed., S. 1448, p. 1815. **X**

(b) It is not that the declarant must state everything that constituted the *res gestas* of the subject of his statement, but that his statement of any given fact should be a full expression of all that he intended to say as conveying his meaning as to such fact. *State v. Patterson*, 45 Vt. 308, 313; *Wigm. Ev.*, 1905 Ed., S. 1448, p. 1815. **Y**

(16) **Dying declaration must be by person who can be a competent witness.**

(a) The declaration should be made by a person, who, if he were alive, would have been a competent witness, imbecility or tender age excluding the declaration. *R. v. Drummond*, 1 Leach, C. C. 338; *R. v. Pike*, 3 C. and P. 598 and *R. v. Perkins*, 9 C. and P. 395; *Phip. Ev.*, 4th Ed., p. 293. **Z**

(b) In a case of murder of a girl of 4 years of age, the Court refused to admit evidence of her declarations, remarking that, though she might be very precocious, it was impossible to believe that she could have that idea of a future state, which is necessary to make such a declaration admissible in evidence. *R. v. Pike*, 3 C. and P. 598; *Wigm. Ev.*, 1905 Ed., S. 1443, p. 1810; *Phip. Ev.*, 4th Ed., p. 293, *Ros. Cr. Ev.*, 13th Ed., p. 79. See, also, *R. v. Perkins*, 9 C. and P. 395 (where the child was 11 years old), *infra*. **A**

(c) A boy between 10 and 11 years of age was seriously wounded by a gun loaded with shot and died the next morning. On the evening of the day on which he was wounded, two surgeons told him there was no hope of his recovery. From question put to him, he appeared to be fully aware that he would be punished in a future world, if he spoke falsehood. He then made a statement to the medical men, and it was held to have been made under the apprehension and expectation of immediate death. *R. v. Perkins*, 9 C. and P. 395; *Ros. Cr. Ev.*, 13th Ed., p. 81; *Wigm. Ev.*, 1905 Ed., S. 1443, p. 1810. **B**

(17) **The doctrine of compentence does not apply to the present section.**

(a) The English ruling in *R. v. Pike*, 3 C. and P. 598, according to which the dying declaration of a child, of such tender years that she could not understand the doctrine of a future state, was rejected, is not applicable under the present section. *Cun. Ev.*, 10th Ed., p. 161. **C**

(b) The question of the competence of the person to bear testimony is not one which affects the admissibility of the statement under any of the clauses of the section. *U.B.R.* 1906, 3rd Quarter, *Ev.* p. 3 (5), *citing Cunningham*, 10th Ed., p. 162. **D**

(c) If it complies with the requirements of this section, it is relevant, though possibly, of small importance. *Cun. Ev.*, 10th Ed., p. 162. **E**

4.—“(1) *When the statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction.. question.*”—(Continued).

(18) Declarant's testimonial capacity may be impeached.

(a) Dying declarations being, in effect, testimonial statements made out of Court, it is open to impeach and discredit the declarant in the same way as other witnesses, as far as feasible. Wigm. Ev., 1905 Ed., S. 1446, p. 1813. **F**

(b) Thus, impeachment by bad testimonial character, or by conduct showing a revengeful or irreverent state of mind at the time, or by conviction of crime, or by prior or subsequent inconsistent statements may be made. Wigm. Ev., 1905 Ed., S. 1446, pp. 1830 and 1814 and cases cited therein. **G**

(19) Declarant may be corroborated.

The declarant may be corroborated by evidence of similar consistent statements made previously, though the latter were not admissible themselves as dying declarations. *State v. Blackburn*, 80 N.C. 474, 478; Wigm. Ev., 1905 Ed., S. 1446, p. 1814. **H**

(20) Deceased's statement should form part of Sessions record.

(a) The deposition of a person murdered, taken before a Magistrate, and the medical evidence, should be annexed to the Sessions record. 11 W.R. (Cr.), 2. **I**

(b) The dying declaration of a deceased person should form part of the Sessions record. 9 W.R. (Cr.), 2. **J**

(21) Dying declaration—Procedure.

(a) Where a Sessions Judge sees from the Magistrate's record that there is evidence which could prove that the declaration was a dying declaration, he should call for that evidence. A Magistrate should, in all cases in which dying declarations are made, examine the complainant on the point, and record the question as well as the answer to it, upon the record of the examination. 15 W.R. 11 (Cr.). **K**

(b) The dying declaration of a deceased person taken down in writing by a head constable is admissible in evidence under S. 162, Crim. Pro. Code. The proper course is to put in the document itself and have it formally proved by that officer and not to allow him to give evidence orally as to its purport. 7 C.P.L.R., 14 (Cr.). **L**

(c) A dying declaration is admissible in evidence in all criminal cases, provided all the conditions attaching to its admission have been fulfilled, and is not confined to cases in which the death of the injured party is the sole object of the inquiry. There must be some evidence of the state of the deceased person at the time of making the declaration. The Magistrate recording a dying declaration should put on record the answer of the declarant to a question touching his knowledge or belief in his approaching death. 3 N.W.P. 212. **M**

(22) Substance of questions and answers insufficient—Actual words of, and questions eliciting, dying declarations to be given.

A statement which gives the *substance* of questions and answers is inadmissible; the *actual* words of the deceased must be given and also the questions put, if any; for answers, even if taken word for word, are useless

4.—“(1) What the statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction.. question.”—(Continued).

without the questions, and, when a person is in such a condition, the danger arising from leading questions is enhanced. *R. v. Mitchell*, 17 Cox. C.C. 503; Wigm. Ev., 1905 Ed., S. 1445, p. 1812; Ros. Cr. Ev., 13th Ed., p. 33; Phip. Ev., 4th Ed., p. 294; Tay. Ev., 10th Ed., S. 720, p. 513; see, also, 6 Bom. L.R. p. 182 N

(23) Examination of deceased need not be similar to interrogating witness.

But, though dying declarations must be confined to what is relevant to the issue, it is not essential that the examination of the deceased should have been conducted after the manner of interrogation of a witness in the cause, though any departure from this method may affect the weight of the declarations. *Tay. Ev.*, 10th Ed., S. 720, p. 512. O

(24) Dying declarations admissible for accused and prosecutor.

Dying declarations by B, where A is charged with the murder of B, that, “I don’t think A would have struck me, if I had not provoked him,” are admissible in favour of an accused as well as of the prosecutor. *R. v. Scalfie*, 1 Moo. and Rob. 551; Phip. Ev., 4th Ed., p. 296; *Tay. Ev.*, 10 Ed., S. 720, p. 513. P

(25) Practice of Privy Council with regard to decisions of lower Courts on credibility of witnesses.

Where the Courts below had rejected the evidence of certain witnesses on the ground that it was hearsay only and had not conformed with S. 32 of the Evidence Act, and, on the face of the evidence, it was sometimes uncertain whether the witnesses were speaking from their own personal knowledge or from information derived from others, but the Courts had considered it from both points of view and held it inadmissible, the Judicial Committee saw no reason to differ from the estimate which the Courts had formed as to the credibility of the witnesses in the former case, nor, in the latter case, to question the manner in which the Courts had applied the provisions of S. 32. 26 A. 581=31 I.A. 217=7 O.C. 290. Q

(26) Admissibility of statements in police report or made to another person in police inquiry.

(a) Statements embodied in first reports to the police or statements made by a witness to another person in the course of a police inquiry are not ordinarily admissible in proof of the facts stated, though they may be admissible to rebut the suggestion of recent fabrication of a case, or they may be admissible under S. 32 of the Evidence Act. 5 O.C. 246. R

(b) Where the police recorded certain statements relating to the cause of death, made during the investigation of a criminal case, held, they were admissible in evidence against the accused. 17 P.R. 1886 (Cr.). S

(27) Dying declaration taken in absence of accused or of Judicial Officer—Effect on its admissibility.

(a) Though a dying declaration may be made in the absence of the accused or of a Judicial Officer, it is yet relevant. But, whenever it is possible, the declaration should be taken by a Judicial Officer as a guarantee of its authenticity. 3 P.R. 1870 (Cr.). T

4.—“(1) When the statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction.. question.”—(Concluded).

- (b) Where the written record of a dying declaration was made, when the accused was absent, *held* that such writing was admissible under S. 32 (1) of the Evidence Act, but that it must be proved in the ordinary way. 13 P.R. 1886 (Cr.). **U**
- (c) The dying statement of a deceased person must be taken in the presence of the accused; if not so taken, the writing cannot be admitted to prove the statements made. The statement may be proved in the ordinary way by a person who heard it, and the writing may be used for the purpose of refreshing the witness's memory. 8 C. 211.. 10 C.L.R. 11. **Y**
- (d) A declaration made by a person in expectation of death, recorded, in the absence of the accused and in a language different from the one in which it is made, by an officer who is not examined in the case, cannot properly be used in evidence against the accused, and, at any rate, such a declaration should not be relied upon in convicting the accused. 6 C.W.N. 72. **W**
- (e) A dying declaration was taken down by a Magistrate other than the Committing Magistrate. This Magistrate had not recorded in his attestation that the statement was taken in the presence of the accused. Where such a statement was used against the accused, *held*, it was necessary to summon the Magistrate to attest in Court the deposition recorded by him. The Chief Court returned the case to the Sessions Judge, so that the Magistrate might be summoned and his attestation upheld, and he might be examined in the accused's presence as to the circumstances under which the statement was recorded. 29 P.R. 1887 (Cr.), *followed* in *Hastan v. Empress*, Criminal Appeal, No. 114 of 1897. **X**
- (f) A dying declaration was taken down by a Magistrate other than the Committing Magistrate. It was not taken in the presence of the accused. The Court below admitted it in evidence, under S. 80 of the Evidence Act. *Held*, S. 80 did not apply to the question of the admissibility of the statement, and that the document itself was not relevant to prove the truth of the facts stated in it. 9 P.R. 1900 (Cr.). **Y**

5.—“Such statements are relevant whether the person..question.”

1.—SUCH STATEMENTS ARE RELEVANT WHETHER THE PERSON WHO MADE THEM WAS OR WAS NOT, AT THE TIME WHEN THEY WERE MADE, UNDER EXPECTATION OF DEATH.

(1) Indian Law.

Dying declaration relevant whether deceased was or was not under expectation of death.

- (a) In India, a dying declaration is admissible, whether the person who made it was or was not, at the time when it was made, under expectation of death. Whitley Stokes, Vol. II, p. 828. **Z**
- (b) The statement of a deceased person, under S. 32, cl. 1, is relevant, whether the person who made the statement was or was not, at the time when it was made, under expectation of death. 19 W.R. (Cr.), 44. **A**

5.—“Such statements are relevant whether the person...question.”—(Contd).

1.—SUCH STATEMENTS ARE RELEVANT WHETHER THE PERSON WHO MADE THEM WAS OR WAS NOT, AT THE TIME WHEN THEY WERE MADE, UNDER EXPECTATION OF DEATH.—(Continued).

(2) English Law

(1) Conditions essential to the admissibility of dying declarations.

- (a) In England, to render a dying declaration admissible, the declarant must have been in actual danger of death, he must have been fully aware of his danger, and death must have ensued. Whitley Stokes, Vol. II, p. 828. B
- (b) Before dying declarations can be received as evidence, the undermentioned facts must be proved to the satisfaction of the Judge :—
 - (1) the declarant should have been in actual danger of death, at the time when they were made ;
 - (2) he should have had a full apprehension of his danger ; *R. v. Cleary*, 2 F. and F. 850 ; C
 - (3) death should have ensued. *Tay. Ev.*, 10th Ed., S. 718, p. 509, and 15 W.R. (Cr.), 11 (14). D
- (c) The expectation of death essential to render a dying declaration admissible must be expectation of *immediate death* ; “if he thinks if he will die to-morrow, that will not do.” *R. v. Osman*, 15 Cox. 1 : adopted in *R. v. Gloster*, 16 Cox. 471 ; *Tay. Ev.*, 10th Ed., S. 718, p. 511 ; *Phip. Ev.*, 4th Ed., p. 293 ; *Wigm. Ev.*, 1905 Ed., S. 1441, p. 1807. E
- (d) Before a dying declaration is received in evidence, it should be proved that the person making it believed himself to be in danger of approaching death. It appears that it is only on the supposition that, in this awful state, while at the confines of a future world, he is not likely to speak a falsehood, that such statements of a deceased are received in evidence ; and, therefore, the law very properly requires that it shall be proved that the deceased did really believe that he was in this state before his statement shall be received in evidence. 15 W.R. (Cr.), 11 (13). F
- (e) The declaration of persons *in articulo mortis* is allowed to be given in evidence, if it appear that the person making such declaration was then under the deep impression that he was soon to render an account to his Maker. *R. v. Pike*, 5 C. and P. 598 ; *Wigm. Ev.*, 1905 Ed., S. 1439, p. 1805. G
- (f) With regard to declarations made by persons *in extremis*, supposing all necessary matters concurred, such as actual danger, death following it, and a full apprehension, at the time of the danger, and of death, such declarations can be received in evidence ; but *all these things must concur* to render such declarations admissible. Such evidence, however, ought to be received with caution, because it is subject to no cross-examination, *Sussex Peerage Case*, 11 Cl. and F. 108, 112 (H.L.) ; *Tay. Ev.*, 10th Ed., S. 718, p. 509. H
- (g) It is the impression of impending death that renders the declaration admissible (*R. v. Forester*, 4 F. and F. 857), and not the fact that death actually ensued very soon after the declaration was made. *Tay. Ev.*, 10th Ed., S. 718, p. 510. I

5.—“Such statements are relevant whether the person..question.”—(Contd).

1.—SUCH STATEMENTS ARE RELEVANT WHETHER THE PERSON WHO MADE THEM WAS OR WAS NOT, AT THE TIME WHEN THEY WERE MADE, UNDER EXPECTATION OF DEATH.—(Continued).

(2) English Law—(Continued).

(2) In England, the author of the statement must be dead to make it admissible.

In each of these articles (26—31), the word “declaration” means such a statement as is herein mentioned, and the word ‘declarant’ means a dead person by whom such a statement was made in his lifetime. Steph. Dig., 7th Ed., Art. 25, p. 34. J

(3) Belief must be, not merely of possibility or probability of death, but of its certainty.

(a) These dying declarations would not be evidence, unless she was under a clear impression that she was in a dying state. *R. v. Mooney*, 5 Cox. Cr. 318; Wigm. Ev., 1905 Ed., S. 1440, p. 1806. K

(b) There must be a settled, hopeless, expectation of death in the declarant. *R. v. Peel*, 2 F. and F. 22; Wigm. Ev., 1905 Ed., S. 1410, p. 1806. L

(c) There must be an unqualified belief in the nearness of death, a belief without hope that the declarant is about to die. There must be no hope whatever. *R. v. Jenkins*, L.R. 1 Cr. C.R. 192; Wigm. Ev., 1905 Ed., S. 1440, p. 1806. M

(4) Hope of recovery will exclude declaration.

Any expectation or hope of recovery, however slight, will render the declaration inadmissible. *R. v. Welborn*, 1 East P.C. 358; Tay. Ev., 10th Ed., S. 718, p. 511. N

(5) Speediness of death must also be expected.

(a) A man may receive an injury from which he may think that he shall ultimately ‘never recover;’ but, still, that would not be sufficient to dispense with an oath. *R. v. VanButchell*, 3 O. and P. 631; Wigm. Ev., 1905 Ed., S. 1441, p. 1807. O

(b) In order to make a dying declaration admissible, there must be an expectation of impending, and almost immediate, death. *R. v. Jenkins*, L.R. 1 Cr. C.R. 193; Wigm. Ev., 1905 Ed., S. 1441, p. 1807. P

(6) Actual period of survival after declaration immaterial.

The question does not really depend upon the length of the interval between the death and the declaration, but on the state of the man’s mind at the time of making the declaration and his belief that he is in a dying state. *R. v. Reaney*, 7 Cox. Cr. 209, 212; Wigm. Ev., 1905 Ed., S. 1441, p. 1807. Q

(7) Consciousness of approaching death, how determined.

(a) If a dying person either declares that he knows his danger, or it is reasonably to be inferred, from the wound or state of illness, that he was sensible of his danger, the declarations are good evidence. *R. v. John*, 1 East’s Cr. L., p. 358; Wigm. Ev., 1905 Ed., S. 1442, p. 1808. R

5.—“Such statements are relevant whether the person..question.”—(Contd.).

1.—SUCH STATEMENTS ARE RELEVANT WHETHER THE PERSON WHO MADE THEM WAS OR WAS NOT, AT THE TIME WHEN THEY WERE MADE, UNDER EXPECTATION OF DEATH.—(Concluded).

(2) English Law—(Concluded).

(b) In cases where the deceased by his conduct made it evident that he believed himself at the brink of eternity, such as settling his affairs, taking leave of his relatives, providing for his death, and the like, it may be held that the statement of that person is admissible as a dying declaration, because the deceased was under the belief that death was approaching. 15 W.R. (Cr.), 11 (13). **S**

(3) Survival, subsequent to declaration, for some time—Effect.

Where the deceased is shown to have been, at the time he made the declaration, in actual danger of death, and to have abandoned all hope of recovery, the declaration will be admissible, although he lingered for some time afterward s. *R. v. Bernadotti*, 11 Cox. 316, and *R. v. Craven*, 1 Lew. 77; Phip. Ev., 4th Ed., p. 293. **T**

(3) Entertaining hope of recovery subsequent to declaration—Effect.

A dying declaration will be admissible, if, at the time the deceased made the declaration, he was proved to have been in actual danger of death and to have abandoned all hope of recovery, though he might have subsequently entertained hope. *R. v. Hubbard*, 14 Cox. 565; Phip. Ev., 4th Ed., p. 293. **U**

2.—AND WHATEVER MAY BE THE NATURE OF THE PROCEEDING IN WHICH THE CAUSE OF HIS DEATH COMES INTO QUESTION.

(1) English Law.

(a) In England, dying declarations are admissible only in criminal cases, “where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the declaration.” Whitley Stokes, Vol. II, p. 828. **Y**

(b) The admissibility of dying declarations is, in the English Law, confined to cases of *homicide*, where the death of the party making the declaration is the subject of the enquiry. 6 W.R. (Cr.), 75 (76). **W**

(c) In criminal cases, such evidence is admissible in the single case of *homicide*, where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declaration. *R. v. Mead*, 2 B. and C. 608; Tay. Ev., 10th Ed., S. 174, p. 507; Wigm. Ev., 1906 Ed., S. 1432, p. 1801. **X**

(d) Dying declarations are only admissible where the death of the declarant is the subject of enquiry. *R. v. Hutchinson*, 2 W.R. (Eng.), 608; but not acted upon in *R. v. Baker*, 2 N. and R., p. 53; *R. v. Hind*, 29 L.J.M.C. 149, acting upon *R. v. Mead*. See 6 W.R. (Cr.), 75 (76). **Y**

5.—“Such statements are relevant whether the person...question.”—(Contd.).

2.—AND WHATEVER MAY BE THE NATURE OF THE PROCEEDING IN WHICH THE CAUSE OF HIS DEATH COMES INTO QUESTION.—(Continued).

(2) Dying declaration inadmissible in charge of abortion.

Where the question was whether a person administered drugs to a woman with intent to procure her abortion, and the woman made a statement, that would have been admissible had that person been on his trial for murder, her statement was deemed to be irrelevant. *R. v. Hind*, Bell 259; Steph. Dig., 7th Ed., Art. 26, p. 35 and Phip. Ev., 4th Ed., p. 295. Z

(3) Reason for restricting such evidence to homicide cases.

(a) The danger of perjury in fabricating declarations, whose truth or falsehood it is impossible to find out ;

(b) the danger of letting in incomplete statements, which, though true so far as they go, are not the whole truth ;

(c) implicit reliance cannot, in all cases, be placed on a dying man's declarations, as his body may have survived his mental powers, or his memory, where his senses are not impaired, may not be perfect, or, for the sake of ease and to be free from the importunity of those around him, he may say whatever they suggest. *Jackson v. Knuffen*, 2 Johns. 31 (Am.). Tay. Ev., 10th Ed., S. 716, p. 508 ; 6 Bom. L.R. p. 182. A

(4) Dying declaration not admissible in civil cases.

(a) Evidence of this description, of dying declarations, cannot be offered in civil cases. *Stobart v. Dryden*, 1 M. and W. 615 ; Tay. Ev., 10th Ed., S. 714, p. 507 ; Wigm. Ev., 1905 Ed., S. 1432, p. 1800. See, also, *R. v. Abernethy*, 2 East 63. B

(b) The law in England on this subject has been much narrowed of late years. there are instances in the older books in which dying declarations have been admitted in civil cases. 6 W.R. (Cr.), 75 (76). See the cases of *Wright v. Little*, 1 W. Bl. 349 ; *R. v. Bury St. Edmunds*, Cald. 486 and *Appotens v. Dunsuwell*, 2 Bott. 80 ; Tay. Ev., 10th Ed., S. 711, pp. 506-7. C

(5) Reason for not adopting English Law.

(a) So narrow a rule as that of the English Law does not exist in this country, not because of any difference between Europeans and Orientals, but because the English rule does not rest on any sound principles. 6 W.R. (Cr.), 75 (76). D

(b) S. 29, Act II of 1855.

Where dying declarations are evidence, they shall be received if it be proved that the deceased was at the time of making the declaration, and then thought himself to be in danger of impending death, though he entertained, at the time of making it, hope of recovery. This provision modified the English law on this point in an important particular. 6 W.R. (Cr.), 75 (76). E

(c) It cannot, therefore, be said that the authority of English decisions is very strong in support of the exclusion. 6 W.R. (Cr.), 75 (76). F

5.—“Such statements are relevant whether the person..question.” (Contd.)

2.—AND WHATEVER MAY BE THE NATURE OF THE PROCEEDING IN WHICH THE CAUSE OF HIS DEATH COMES INTO QUESTION.—(Concluded).

(d) With regard to the English treatises, Best, Phillips and Taylor, all recognise the exclusion of the evidence in such cases; they all treat the admissibility of dying declarations as itself exceptional, and place this limitation on the exception, that the declaration must relate to the death of the person making the declaration, and is only evidence when that is the subject of enquiry; but there is little force in their reasoning. 6 W.R. (Cr.), 75 (76). **G**

(5a) English authorities must be cautiously referred to

The English Law contains similar, but not identical, provisions, and, hence, the English authorities must be cautiously referred to. Mark. Ev., p. 39. **H**

(6) Indian Law.

(a) In India, [S. 32, illu. (a)], dying declarations are admissible in civil suits as well as in criminal prosecutions for rape or any other offence. Whitley Stokes, Vol. II, p. 828. See, also, illustration (a) to the section. **I**

(b) No possible reason can be given for the admissibility of the dying declaration of a deceased person in a case where the death of the party making the statement is the subject of the enquiry, which does not apply with equal force to its admissibility in a case where the death of the party making it is not in question, 6 W.R. (Cr.), 75 (76). **J**

(c) The dying declarations of a deceased person are relevant on a charge of rape. 6 W.R. (Cr.), 75 (76). **K**

(7) Subject-matter of declarations.

Dying declarations are only admissible to show the cause of, and the circumstances of the transaction ending in, death and not previous or subsequent transactions, though relevant to the question at issue. *R. v. Mead*, 2 B. and C. 605; *R. v. Hind*, 8 Cox. 300, and *R. v. Murton*, 3 F. and F. 492; *Philp. Ev.*, 4th Ed., p. 294; *Ros. Cr. Ev.*, 18th Ed., p. 30. See also *Wigm. Ev.*, 1305 Ed., S. 1432, p. 1801; see, also, 6 Bom. L.R. p. 179. **L**

3.—DYING DECLARATIONS HELD ADMISSIBLE AND INADMISSIBLE.

(1) Questions put to deceased and signs made by her held to be admissible verbal statements.

An accused person was tried for the murder of one D. The deceased was questioned by a police officer, a Magistrate and a medical man. Being unable to speak, D made certain signs in response; it was held that evidence to prove the questions put to D and the signs made by D in response was admissible, as the questions and the signs taken together might properly be regarded as “verbal statements” made by a person as to the cause of her death, within S. 32. 7 A. 385 (F.B.); *Mahmood, J., dissenting.* **M**

5.—“Such statements are relevant whether the person . . . question.”—(Contd.)

3.—DYING DECLARATIONS HELD ADMISSIBLE AND INADMISSIBLE.—(Continued).

(2) Statement made by deceased in presence of his neighbours.

In a case of murder, the statement made by the deceased which he did, not only before his neighbours, but also before a head constable, was admitted as relevant evidence, under S. 32, cl. 1 of the Evidence Act. 19 W.R. (Cr.) 44. N

(3) Declaration implicating third persons admissible.

Where third persons are implicated in the dying declarations, they do not therefore become irrelevant. *R. v. Bottomley*, 118 L.T. Jo. 88; Phip. Ev., 4th Ed., p. 295. O

(4) Admissibility of declarations taken as deposition.

In a case of murder, the deceased made a statement on oath before a Magistrate and affixed her mark to it, but not in the accused's presence, so that her statement was not a deposition within the statute then in force. But the deceased was, when making the statement, in a dying state and had no hope of recovery. The statement was held to be admissible. *R. v. Woodcock*, 1 East P.C. 356; Steph. Dig., 7th Ed., Art. 26, p. 35; Phip. Ev., 4th Ed., p. 294.

(5) Survival after declaration—Statement held admissible.

A deceased person, in a murder case, made a declaration that another had murdered him, when he had no hope of recovery, though his doctor had such hopes. The deceased lived for 10 days after making the declaration. The declaration was held to be admissible. *R. v. Mosley*, 1 Moo. C.C. 97; Steph. Dig., 7th Ed., Art. 26, p. 35; Phip. Ev., 4th Ed., p. 294. Q

(6) Deposition before Magistrate by witness dying subsequently to deposition.

Where, in proceedings before a Magistrate on a charge of causing grievous hurt, two witnesses, among several, one of whom was the person assaulted, were examined for the prosecution and the accused were committed for trial, and subsequently the person, who was assaulted, owing to the injuries inflicted upon him, died, and, in the trial before the Court of Sessions, charges of murder and culpable homicide not amounting to murder were added to the charge of the grievous hurt, the deposition of the witness deceased was adduced in evidence. Held that the deposition was admissible in evidence, under cl. 1, S. 32 and S. 33 of the Act, despite the additional charges. 7 C. 42. R

(7) Dying declaration—Complainant remaining alive—Inadmissible.

Where a complainant making a dying declaration chances to live, his statement is inadmissible as a dying declaration under S. 32 of the Evidence Act, but it might be relied on, under the provisions of S. 157 of the Act, to corroborate the testimony of the complainant, when examined in the case. 4 Bom. L.R. 494 (485). S

5. "*Such statements are relevant whether the person...question.*"—(Contd.)

3.—DYING DECLARATIONS HELD ADMISSIBLE AND INADMISSIBLE.—(Continued).

(8) **Statement of deceased person—Admissibility of statement in writing by person who could have been called as a witness, but was not.**

A person was alive at the time the plaintiff closed his case. But he was not called as a witness. The Privy Council held that statements in writing by such person, filed before his death in support of the plaintiff's case, were inadmissible in evidence, as the statements of a deceased person. 25 A. 143 (153) (P.C.). T

(9) **Statements of dying person recorded and attested not admissible.**

Upon the information received from a chowkidar of an offence which was duly recorded in the station diary, the Sub-Inspector went to the hospital to see the wounded man, and there recorded the statement made by him. Held that the writing, containing the statement so recorded by the Sub-Inspector and attested by witnesses, could not be regarded as evidence, and to make it such, the course indicated in 8 C. 211 should have been followed. Those who heard the statement should say before the Court what they heard from the mouth of the wounded man, who was dead before the trial and unable then to speak for himself, as to the cause of his death, and evidence must be taken in regard to the actual statement said to have been made by the deceased in the hospital. 6 C.W.N. 921 (922). U

(10) **Dying declaration inadmissible owing to want of proof.**

A document purporting to be the dying declaration of a deceased person was held to be inadmissible in evidence, although it was signed by a Magistrate, as there was no legal proof that the deceased actually made such a declaration and as the person who took the statement was not subjected to cross-examination as to the dying man's state of mind when he made it. 11 B.11.C.R. 247 (248). V

(11) **Declaration held inadmissible, where declarant hoped to recover some time after.**

A deceased person, when making a statement, which is written down, says something which is thus taken down: "I make the above statement with the fear of death before me and with no hope *at present* of my recovery." He died some hours afterwards. The statement was held to be inadmissible. *R. v. Jenkins*, 1 C.C.R. 187; Steph. Dig., 7th Ed., Art. 26, p. 35; Phip. Ev., 4th Ed., p. 296. W

(12) **Declaration not taken down from deceased's own lips held inadmissible.**

The deceased made a statement, when not in a dying condition, which her father wrote down and took to a Magistrate asking him to swear the deceased. The Magistrate, thereupon, went to the deceased, and, upon questioning her as to its truth, bit by bit, swore her to it. The statement was held to be inadmissible in evidence. *R. v. Fitzgerald*, 1r. Cir. rep. 168; per *Crompton, J.*, who remarked that the statements should have been taken down from the deceased's own lips to avoid the danger of an assent to what she did not intend. Phip. Ev., 4th Ed., p. 297; Tay. Ev., 10th Ed., S. 720, p. 512. X

5.—“ Such statements are relevant whether the person..question.”—(Conclud.)

3.—DYING DECLARATIONS HELD ADMISSIBLE AND INADMISSIBLE.--(Concluded).

(13) Declaration as to circumstances held inadmissible.

Where a person was indicted for robbing another, a dying declaration by the latter as to the circumstances of the robbery was held to be inadmissible. *R. v. Lloyd*, 4 C. and P. 233, Philp. Ev., 4th Ed., p. 295. **Y**

(14) Declaration upon matters of opinion inadmissible.

The statement of a deceased person must be such that it would be admissible, should he be alive and could be examined as a witness; hence, a declaration upon matters of opinion, apart from matters of fact, will not be admissible. *R. v. Sellers*, Carr. Cr. L., 233; Ros. Cr., Ev., 13th Ed., p. 29; Philp. Ev., 4th Ed., p. 294; Tay. Ev., 10th Ed., S. 720, p. 512. **Z**

(15) Only opinion admissible—Medical evidence.

In a capital sentence case referred to the High Court, the only opinion of a Surgeon as to the cause of death of the deceased which can be judicially considered is the opinion expressed by him under examination as a witness. 10 C.L.R. 11=8 C. 211. **A**

(16) Accomplice's declaration admissible.

If the declarant be an accomplice, his dying declaration is admissible against one indicted for causing the death of such accomplice by an illegal operation. *R. v. Pinckler*, 1 East, P.C. 354; Tay. Ev., 10th Ed., S. 717, p. 509 and 6 Bom.L.R. 184. See 6 Bom.L.R. Jol., p. 177 for an article on “Dying Declaration” by Mr. S. N. Roy, M.L. (Gold Medallist). **B**

(17) Hearsay—Statement of deceased.

A statement of a witness as to what he heard from the deceased, when it does not relate to the cause of his death or the circumstances of the transaction which resulted in his death, is hearsay, and is not admissible; they must be proved in the ordinary way, *viz.*, by evidence of a primary character, and not by hearsay testimony. 5 C.W.N. 574=28 C. 397. **C**

(19) Expectation of death unnecessary.

(a) According to S. 32 (1) of the Evidence Act, a statement made by a person, who has died since the statement was made, if otherwise relevant, is not irrelevant, simply because the person who made it was not, at the time, under expectation of death. 67 P.L.R. 1905=2 Cr. L.J. 237. **D**

(b) Where two persons were killed by the violent assault committed on them by several accused persons, held that the statements made by the deceased, before their deaths, relating to the circumstances of the assault, which resulted in their deaths, were relevant against all the accused persons. 67 P.L.R. 1905=2 Cr. L.J. 237, *distinguishing* 17 P.R. 1901 (Cr.). **E**

6.—“(2) When the statement was made by such person in the ordinary course of his business, and in particular when it consists of any entry...written or signed by him.”

1.—GENERAL.

(1) Statements by persons who cannot be found or called as witnesses—Relation between Ss. 11 and 32.

As a general rule, S. 11 of the Evidence Act is controlled by S. 32 of the Act, where the evidence consists of statements of persons who are dead or who cannot be found; but this rule is subject to certain exceptions.
9 Bom. L.R. 1047. F

(2) Relation between S. 32 (2) and S. 34.

It is a mistake to suppose that the requirements of S. 31 apply to the accounts tendered by a plaintiff in support of her claim for a sum of money, though they were relevant under S. 32 (2). 6 Bom. L.R. 50. G

(3) Statements by persons who cannot be found or called as witnesses—Scope and object of section

(a) S. 32 imposes restrictions upon the admissibility of statements made by persons who cannot be brought before the Court to give their own evidence. The whole scope and object of the section centres upon securing the highest degree of truth, possible in the circumstances, for the statement. It follows that where the person tendering such a statement is indifferent as to the truth or falsehood, there is nothing to bring that section into play. 9 Bom. L.R. 1047. H

(b) Cl. 2, S. 32, provides that a written statement of a relevant fact made by a person who is dead, is itself a relevant fact, when the statement was made by such person in the ordinary course of business. 23 B. 63 (65). I

(4) Object and reason of restrictions.

(a) The basic principle of legal evidence being that the Court must always have the best, it follows that, where persons can be, they must be brought before the Court to tell what they knew at first hand. Their veracity can then be best tested by the art of cross-examination. 9 Bom. L.R. 1047 (1048). *Per Beaman, J.* J

(b) Where, however, witnesses cannot be brought before the Court, their previous statements are, at best, indirect evidence of a kind that a Court would not, except under necessity, receive at all. The conditions, which, when compelled by necessity to take this evidence or none, are imposed upon its admissibility, plainly aim at affording some guarantee of its truth. As there is to be no chance of testing the man by cross-examination, his statement will not be admitted, unless it has been made under conditions which, looking to the ordinary course of human affairs, raise pretty strong presumptions that it was a true statement. 9 Bom. L.R. 1047 (1048). *Per Beaman, J.* K

(5) Statements by persons who cannot be found or called as witnesses—When they fall out of the section.

The test whether the statement of a person, who is dead or who cannot be found, is relevant under S. 11 and admissible under that section (presuming that it is in other respects within the intention of the section), although

6.—“(2) When the statement was made by such person in the ordinary course of his business, and in particular when it consists of any entry...written or signed by him.”—(Continued).

1.—GENERAL—(Continued).

it would not be admissible under S. 32, is this. It is admissible under S. 11 when it is altogether immaterial whether what the dead man said was true or false, but highly material whether the dead man did say it. In these circumstances, no amount of cross-examination could alter the fact, if it be a fact, that he did say the thing, and, if nothing more is needed to bring the thing said in under S. 11, then the case is outside S. 32. 9 Bom. L.R. 1047. **L**

(6) Grounds on which declarations in course of duty are admissible.

(a) “On the principle of necessity,” (for which see *supra*), “this exception sanctions the use of statements by persons whose testimony, though not necessarily the sole evidence available on the subject, is yet the only testimony now available from that person. Hence, the usual rule applies that the person *must be unavailable as a witness*.” Wigm. Ev., 1905 Ed., S. 1521, p. 1887. **M**

(b) “On proof that the declarant was dead, such entry has been read; by reason of the difficulty of making of proof in cases of this kind, the Court has gone so far.” *Lefebvre v. Worden*, 2 Ves. Sr. 54. Wigm. Ev., 1905 Ed., S. 1521, p. 1887. **N**

(c) “The question was thought to fall within the general rule, which requires the best evidence the nature of the case admits of. It is analogous to the exceptions to other general rules of evidence.” *Wells v. Barrett*, 15 Mass. 380, Wigm. Ev., 1905 Ed., S. 1521, p. 1887. **O**

(d) “It is the best evidence the nature of the case admits of. If the party is dead, we cannot have his personal examination upon oath, and the question then arises, whether there shall be a total failure of justice, or secondary evidence shall be admitted to prove the facts, where ordinary prudence cannot guard us against the effects of human mortality.” *Nicholls v. Webb*, 8 Wheat. 323; Wigm. Ev., 1905 Ed., S. 1521, p. 1887. **P**

(e) The grounds of reception of declarations in the course of duty are —(1) death and (2) the presumption of truth which arises from the mechanical and generally disinterested nature of the entries which are made in the ordinary course of duty and from their constant liability, if they should be false, to be exposed by the declarant's superiors. Phip. Ev., 4th Ed., p. 264. **Q**

(f) The habit and system of making such a record with regularity calls for accuracy through the interest and purpose of the person who makes the entries, and the force of habit may be relied upon, by very inertia, to prevent casual inaccuracies and to counteract the casual temptation to mis-statements. Wigm. Ev., 1905 Ed., S. 1522, p. 1889. **R**

(g) Since the entries record a regular course of business transactions, an error or mis-statement is almost certain to be detected and the result disputed by those dealing with the entrant; mis-statements cannot safely be made, if at all, except by a systematic and comprehensive plan of falsification. As a rule, this fact (if no motive of honesty obtained)

6. —“(2) When the statement was made by such person in the ordinary course of his business, and in particular when it consists of any entry..written or signed by him.”—(Continued).

1.—GENERAL—(Concluded).

would deter all but the most daring and unscrupulous from attempting the task; the ordinary man may be assumed to decline to undertake it. In the long run, it operates with fair effect to secure accuracy. *Wigm. Ev.*, 1905 Ed., S. 1522, p. 1889. **S**

(ii) If, in addition to this, the entrant makes the record under a duty to an employer or other superior, there is the additional risk of censure and disgrace from the superior in case of inaccuracies, a motive, on the whole, the most powerful and most palpable of the three. *Wigm. Ev.* 1905 Ed., S. 1522, p. 1889. **T**

(i) It is easier to state what is true than what is false; the process of invention implies trouble, in such a case unnecessarily incurred. *Pool v. Dicus*, 1 Bing. N.C. 649, per *Tindal, C.J.*; *Wigm. Ev.*, 1905 Ed., S. 1522, p. 1889. **U**

(j) The clerk had no interest to make a false entry; if he had any interest, it was rather to make a true entry; a false entry would be likely to bring him into disgrace with his employer. Again, the book in which the entry was made was open to all the clerks in the office, so that an entry, if false, would be exposed to speedy discovery. *Pool v. Dicus*, 1 Bing. N.C. 649. *Wigm. Ev.*, 1905 Ed., S. 1522, p. 1890. **Y**

(7) Particulars wherein declarations in course of duty and against interest have same rules.

With regard to entries made by deceased persons in the regular course of business and the declarations against interest, the rules which regulate their admissibility in evidence are in some respects the same. —

- the death —*Cooper v. Marsden*, 1 Esp. 1—the handwriting, the official character—*Doe v. Wilcombe*, 6 Ex. 601—and absence of motive to misstate of the entrant must be proved. *Tay. Ev.*, 10th Ed., S. 709, p. 498. **W**

(8) Difference between declarations in course of duty and those against interest.

The difference between declarations made in the course of duty and the declarations against interest consist in that the former require contemporaneity, personal knowledge, absence of motive to misrepresent and the exclusion of collateral matters. *Phil. Ev.*, 4th Ed., p. 265. **X**

2.—CONDITIONS UNDER WHICH DECLARATIONS MADE IN COURSE OF DUTY WILL BE ADMISSIBLE.

(1) Entry must be made in the course of business.

The first general condition of the admissibility of entries is, that the entry must have been made in the regular course of business. The judicial phraseology of this requirement is various:—(1) “in the ordinary course of business,” *Doe v. Turford*, 3 B. and Ad. 893; (2) “usual course and routine of business,” *Pool v. Dicus*, 1 Bing. N.C. 649;

6.—“(2) *When the statement was made by such person in the ordinary course of his business, and in particular when it consists of any entry written or signed by him.*”—(Continued).

2.—CONDITIONS UNDER WHICH DECLARATIONS MADE IN COURSE OF DUTY WILL BE ADMISSIBLE.—(Contd.).

(3) “in the exercise of his business and duty and in the regular course of his business” *Rawlins v. Rickards*, 28 Beav. 373; (4) “an employment in which he was usually engaged . . . memorandums in the ordinary discharge of their duties and employment, etc.,” *Nicholls v. Webb*, 8 Wheat 326; Wigm. Ev., 1905 Ed., S. 1523, p. 1890 and the other cases therein cited. Y

(2) Entry must be made in discharge of duty to another.

(a) The declarations must have been made in the discharge of a duty to a third person; a mere personal habit, not involving any accountability is not enough. *R. v. Worth*, 4 Q.B. 132; Phip. Ev., 4th Ed., p. 264. See also *Marsay v. Allen*, 13 Ch. D. 558. Z

(b) An entry made by a deceased employer in a book in which he had ever been, in the course of his business, in the habit of entering the time and terms of hiring farm servants, when doing so, was not admitted in evidence on the principle that, though it might be the practice, it was not the *duty*, of the person, who actually did so, in general, to make such entries. *R. v. Worth*, 4 Q.B. 132; Phip. Ev., 4th Ed., p. 265; Tay. Ev., 10th Ed., S. 701, p. 497; Wigm. Ev., 1905 Ed., S. 1524, p. 1891. A

(3) Duty must be to do the very thing.

There must have been a *duty to do the very thing* recorded. *Polson v. Gray*, L.R. 12 Ch. D. 431; *Lyell v. Kennedy*, 35 W.R. 725. Wigm. Ev., 1905 Ed., S. 1524, p. 1891. B

(4) Duty must be specific and two-fold.

(a) The duty, in the discharge of which the declarations must have been made, should not be a *general one*, involving a variety of acts that may change from time to time, but *specific and two-fold*, i.e., to do a particular act and to record or report it when done. *Sturla v. Freccia*, 5 App. Cas. 437; and *Mercer v. Denne*, 2 Ch. 534, 559; Phip. Ev., 4th Ed., p. 265, (marking that a rigid application of this dictum would conflict with several of the cases where the evidence has been admitted). C

(b) There must have been a *duty to record or otherwise report the very thing*. *Chambers v. Bernagioni*, 1 C.M. and R. 347; *Trotter v. McLean*, 13 Ch. D. 579; Wigm. Ev., 1905 Ed., S. 1524, p. 1891. D

(c) The duty must be to do the very thing to which the entry relates, and then to make a report or record of it. *Smith v. Blakey*, L.R. 2 Q.B. 332, per *Blackburn, J.* Wigm. Ev., 1905 Ed., S. 1524, p. 1891; Phip. Ev., 4th Ed., p. 265; Tay. Ev., 10th Ed., S. 700, p. 496. E

(5) Act must have been done by the declarant.

The acts must have been done by the declarant, and not by third persons. *Smith v. Blakey*, 2 Q.B. 326 and *Riggs v. Ring*, 25 L.R. Ir. 184; Phip. Ev., 4th Ed., p. 265. F

6.—“(2) *When the statement was made by such person in the ordinary course of his business, and in particular when it consists of any entry..written or signed by him.*”—(Continued).

2.—CONDITIONS UNDER WHICH DECLARATIONS MADE IN COURSE OF DUTY WILL BE ADMISSIBLE.—(Contd.)

(6) Entry must relate to something done by or to declarant.

The entry must relate, not to something said, learned, or ascertained by the declarant, but to something done *by*, or *to*, him. *Polini v. Gray*, 12 Ch. D. 411; Phip. Ev., 4th Ed., p. 265. G

(7) Declarations regarding acts to be done.

Whether declarations as to an *act to be done* are admissible is doubtful, but they were admitted in *R. v. Buckley*, 13 Cox. 293; they were, however, rejected in *Rowlands v. De Vecchi*, 1 C. and E. 10; Phip. Ev., 4th Ed., p. 265. H

(8) Entry must have been made at the time of doing the act.

(a) The duty must have been to record or otherwise report it *at the time*. *Smith v. Blakey*, 2 Q.B. 392; Wig. Ev., 1905 Ed., S. 1524, p. 1891. I

(b) Declarations in the regular course of business must have been made contemporaneously with the acts to which they relate. *Deb v. Turford*, 3 B. and Ad. 898 and *Short v. Lee*, 2 J. and W. 475; Best. Ev., 9th Ed., S. 501, p. 417. J

(c) The declarations should be made simultaneously with the facts recorded. *Mercer v. Davis*, 2 Ch. 534, and *Ryan v. Ring*, 25 L.R. Ir. 184; Phip. Ev., 4th Ed., p. 265. K

(d) The entry should be made at or near the time of the act; a record in the evening of an act done in the same morning was received in evidence. *Price v. Torrington*, 1 Salk. 285. Phip. Ev., 4th Ed., p. 265. L

(9) Delay will exclude.

An entry of the circumstances of a collision at sea made by a deceased mate in the ship's log book on the following Monday, the collision having occurred on Saturday, was held to be inadmissible, partly because of the delay. *The Henry Coxon*, 3 P.D. 156; Wig. Ev., 1905 Ed., S. 1611, p. 2003; Phip. Ev., 4th Ed., p. 265 and 267; Tay. Ev., 10th Ed., S. 704, p. 499. M

(10) Proof of contemporaneity.

Contemporaneity should be proved independently, unless it can be inferred from the circumstances of the case. Phip. Ev., 4th Ed., p. 266, referring to *East Union Ry. v. Symonds*, 5 Ex. 297; *Esch v. Nelson*, 1 T.L.R. 610. N

(11) Declarations as to collateral facts.

(a) The declarations are only evidence of the exact facts, which it was the duty of the entrant to record, and of which he had personal knowledge; and not of other matters which, though they may be contained in the same entry, are merely collateral thereto. *Brain v. Preece*, 11 M. and W. 773; *Sturla v. Freccia*, 5 App. Cas. 593; *The Henry Coxon*, 3 P.D. 156, and *Ryan v. Ring*, 25 L.R. Ir. 184; Phip. Ev., 4th Ed., p. 265. O

6.—“(2) *When the statement was made by such person in the ordinary course of his business, and in particular when it consists of any entry..written or signed by him.*”—(Continued).

2.—CONDITIONS UNDER WHICH DECLARATIONS MADE IN COURSE OF DUTY WILL BE ADMISSIBLE.—(Conclud.).

(b) Whatever effect may be due to an entry in the course of office, reporting facts necessary to the performance of a duty, the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances. *Chambers v. Bernasconi*, 3 L.J. Ex. 373; Tay. Ev., 10th Ed., S. 705, p. 499. **P**

(c) Declarations in the regular course of business, office, or employment, by deceased persons, to be admissible, must be confined strictly to the particular thing which it was the duty of the person to do, and should not, unlike statements against interest, extend to collateral matters, though they may be closely connected with that thing. *Smith v. Blakey*, 2 Q.B. 326, 332; Best Ev., 9th Ed., S. 501, p. 417. **Q**

(12) Motive to misrepresent—Effect.

Where it is proved that there was a motive to misrepresent, declarations in the course of duty will not be received in evidence. *Chambers v. Bernasconi*, 1 C. M. and R. 347; *Poole v. Ducas*, 1 Bing. N.C. 649, and *The Henry Cowan*, 3 P.D. 156; Phip. Ev., 4th Ed., p. 265. **R**

(13) Contradiction or explanation of entries.

It is not permissible to contradict or explain the entries by subsequent declarations. *Stapylton v. Clough*, 2 E. and E. 933; Phip. Ev., 4th Ed., p. 265. **S**

(14) Extrinsic proof.

—must be given of the declarant's death, handwriting, official character, (though where the office is public, proof of acting therein is sufficient: *Bright v. Leyerton*, 2 De. G.F. and J. 606), and duty* (*Lyell v. Kennedy*, 56 L.T. 647; *Miller v. Wheatley*, 28 L.R. Ir. 144); Phip. Ev., 4th Ed., pp. 265-6. **T**

(15) Handwriting of entry to be proved by person conversant with it.

The handwriting of a deceased curate to a marriage certificate 85 years old was allowed to be proved by the opinion of the parish clerk, who only knew the curate's handwriting from various old signatures of the curate, in the parish register. *Doe v. Davies*, 10 Q.B. 314; Phip. Ev., 4th Ed., p. 371. **U**

(16) Declarations in the course of business may be written or oral.

(a) Declarations in the regular course of business, though the evidence commonly appears in a written form, may also be oral, and verbal declarations answering all other requisite conditions are admissible. *Sussex Peerage Case*, 11 Cl. and F. 113; *Stapylton v. Clough*, 2 E. and B. 261, and *Edie v. Kingsford*, 14 C.B. 759, 763; Best Ev., 9th Ed., S. 501, p. 417. **a**

(b) The declaration may consist of an oral statement and as such words admissible. *R. v. Buckley*, 13 Cox. Cr. 293 (where the oral statement of a constable was admitted); Wig. Ev., 1905 Ed., S. 1528, p. 16. **L**

6. —“(2) *When the statement was made by such person in the ordinary course of his business, and in particular when it consists of any entry..written or signed by him.*”- (Continued).

3.—COURSE OF BUSINESS.

(1) Applicability of cl. 2.

The applicability of this clause entirely depends on the exact meaning of the words ‘course of business.’ 23 B. 63 (65). X

(2) Particulars set out in S. 32, cl. (2), indicate nature of statements made in the ordinary course of business.

The particulars set out in cl. (2) of S. 32, though not exhaustive, may fairly be taken as indicating the nature of the statements “made in the course of business.” 23 B. 63 (67). Y

(3) The expression “course of business” found in many sections of Act.

(a) The expression “course of business” occurs in more than one place in the Evidence Act. 23 B. 63 (65). Z

(b) Thus, in S. 16, when there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact. Illustration (a) to that section is evidently the case of *Hetherington v. Kemp*, 4 Camp. 193. The course of business there put forward was a certain usage in the plaintiff’s counting house. It was not a usage in a private house, which, however methodical, cannot carry the same weight as the ordinary routine of an office. 23 B. 63 (66). A

(c) So, too, by S. 114 the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case. 23 B. 63 (66). B

(4) “Course of business,” meaning of.

(a) What is meant by “the common course of public and private business?”

Illustration (f) to S. 114, with its explanation, refers to the public business of the post office. Private business would apparently apply to such a case as that alluded to above (*Hetherington v. Kemp*). If the expression was meant to include the dealings of a private individual, apart from his avocation or business, different language would have been used. 23 B. 63 (66). C

(b) The explanation to illustration (c) of the same section (114) speaks of a man of business, which, in its well-known popular sense, must mean a man habitually engaged in mercantile transactions or trade. 23 B. 63 (66). D

(11)

(c) Again, in the explanation to S. 47, it is said that a person is said to be acquainted with the handwriting of another person, when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him. Here, too, the expression must mean in the ordinary course of a professional avocation. The illustration is that of a broker, to whom letters are shown for the purpose of advice. 23 B. 63 (66). E

- 6.—“(2) *When the statement was made by such person in the ordinary course of his business, and in particular when it consists of any entry...written or signed by him.*”—(Continued).

3.—COURSE OF BUSINESS—(Continued).

(d) Again, by S. 34, entries in books of accounts, regularly kept in the course of business, are relevant. 23 B. 63 (66). **F**

(e) In 4 B. 576 (583), *West, J.*, referred to a private account book tendered in evidence, which had been entered up casually once a week or fortnight, with none of the claims to confidence that attach to books entered up from day to day, or (as in banks) from hour to hour as transactions take place. “These only” (he said) “are, I think, regularly kept in the course of business.”, 23 B. 63 (66). **G**

Note.—(The decision in 4 B. 576 was not approved of by the Privy Council in 27 C. 180 = 4 C.W.N. 147).

(f) The expression “in the ordinary course of business,” in S. 32 (2), must mean in the ordinary course of a professional avocation. 23 B. 63 (67). **H**

(g) The Legislature, in using the phrase “in the ordinary course of business,” probably intended to admit in evidence statements similar to those admitted in England, as coming under the same description. The subject is dealt with in Chap. XII of Mr. Pitt Taylor's treatise on the Law of Evidence and the cases which he has collected show that this exception to the general rule against hearsay extends only to statements made during the course, not of any particular transaction of an exceptional kind, such as the execution of a deed of mortgage, but of business or professional employment in which the declarant was ordinarily or habitually engaged. 23 B. 63 (70); per *Fulton, J.* **I**

(h) The phrase was apparently used to indicate the current routine of business which was usually followed by the person whose declaration it is sought to introduce. 23 B. 63 (70); per *Fulton, J.* **J**

(5) “Course of business.” meaning of, in S. 32 (2).

Having regard, then, to the above considerations, there can be no doubt that the expression “in the ordinary course of business,” in S. 32 (2), must be read in the same sense. It may, in one sense, be true that it is in the ordinary course of business for a mortgage deed to contain recitals of the boundaries of the land mortgaged. But that would not make the recitals evidence. 23 B. 63 (66, 67). **K**

(b) Mortgage deed, whether a statement made in course of business.

(a) The question is, whether the mortgage-deed itself is a statement made in the ordinary course of business. Looking at the particulars set out in cl. (2) of S. 32, which, though not exhaustive, may fairly be taken as indicating the nature of the statements “made in the course of business” and looking at the sense in which the expression is apparently used in the other sections of the Evidence Act, it cannot be said that a mortgage-deed executed by an agriculturist falls within that term. It is not the “profession, trade or business” (to borrow the words used in S. 27 of the Contract Act) of an agriculturist to execute mortgage-deeds. 23 B. 63 (67). **L**

- 6.—“(2) *When the statement was made by such person in the ordinary course of his business, and in particular when it consists of any entry..written or signed by him.*”—(Continued).

3.—COURSE OF BUSINESS—(Concluded).

(b) It can hardly be said that the execution of a mortgage deed is an act done in the ordinary course of business. 23 B. 63 (70); per *Fulton, J.* M

(7) Relevancy of declarations made in the ordinary course of business—English Law.

A declaration is relevant when it was made by the declarant in the ordinary course of business, or in the discharge of professional duty, at or near the time when the matter stated occurred, and of his own knowledge. *Brain v. Proere*, 11 M. and W. 773; 1 B. 610 (616). N

4.—ACCOUNT BOOKS, DAKHILAHS AND DOCUMENTS *RES INTER ALIOS ACTA.*

(1) Corroboration whether necessary for accounts.

Entries in accounts, relevant only under S. 34 of the Evidence Act, are not alone sufficient to charge any person with liability; corroboration is required; but, where accounts are relevant also under S. 32 (2), “they are in law sufficient evidence in themselves, and the law does not, as in the case of accounts admissible only under S. 34, require corroboration. Entries in accounts may, in the same suit, be relevant under both sections, and, where that is so, it is clear that, inasmuch as they are relevant under S. 32 (2), the necessity of corroboration prescribed by S. 31 does not apply. 6 Bom. L.R. 50—28 B. 294. O

(2) Account books of partnership—Discretion of Court.

(a) Where account books are admitted in evidence before the Commissioner, under S. 32 of the Evidence Act, as having been kept in the ordinary course of business by persons deceased, it is in the discretion of the Court to hold that they are sufficient evidence of the transaction to which the entries in the book relate, without further proof. 10 Bom. L. R. 811. P

(b) Though accounts, which are relevant under S. 32 (2), do not as a matter of law require corroboration, the Judge is not bound to believe them without corroboration; that is a matter on which he must exercise his own judicial discretion, as a Judge of fact. 6 Bom. L.R. 50 (51). Q

(3) Partnership books not conclusive evidence.

And they are not conclusive evidence, if the person complaining of them can, by clear evidence, show that there is an error in the books. 10 Bom. L.R. 811. R

(4) Indian rule of evidence regarding account books.

The Indian rule of evidence (S. 32 (2) and S. 34) simply requires that entries in accounts should, in order to be relevant, be regularly kept in the course of business; and, although it may be no doubt important to show that the person making or dictating the entries had, or had not, a personal knowledge of the facts stated, this is a question which, according to the Indian rule of evidence, affects the value, not the admissibility, of the entries. 1 B. 610 (616). S

6.--“(2) When the statement was made by such person in the ordinary course of his business, and in particular when it consists of any entry written or signed by him.”—(Continued).

4.—ACCOUNT BOOKS, DAKHILAHS AND DOCUMENTS *RES INTER ALIOS ACTA*—(Continued).

(5) Proof of receipts of rent and dakhilahs.

- (a) Receipts of rent, purporting to have been given by the former owners of a *jote*, are not admissible in evidence, without proof as to the handwriting of the parties who gave them, or some satisfactory account of the custody from which they came. 7 W.R. 15. T
- (b) A ryot, who puts in dakhilahs as evidence to support his case, is bound to prove them. Their admission as genuine is not to be legally presumed, merely because they are not formally disputed by the landlord. 7 W.R. 526. U
- (c) It cannot be expected that a ryot should, in every case, summon all the agents of his landlord who gave him the receipts; if a tenant produces dakhilahs, and swears that they were genuine documents which were delivered to him by the land-owner or his *goma-tah*, or gives other *prima facie* evidence to show that they are genuine, whether for the purpose of proving that rent has been paid at a fixed rate for a certain number of years, or for the purpose of bairing a landlord's claim to enhance, such dakhilahs are strong evidence, if the landlord or his agent do not come forward to deny them. 7 W.R. 526 (528). Y
- (d) Dakhilahs relied upon by a defendant in a suit for arrears of rent at enhanced rates, to obtain the benefit of the presumption arising under S. 4, Act X of 1859, must be proved, even if not positively denied. If a variation in the dakhilahs is found to exist, there must be a distinct finding as to whether the short payments of one year were made up the next year, the variation being *prima facie* evidence that the rent was not uniform. 8 W.R. 498. W
- (e) Copies of pottahs and *jumma-wassul-bahce* papers ought not to be accepted on the mere fact of their being attested or authenticated copies, but should be proved by the best and most distinct evidence available. 8 W.R. 488. X
- (f) In a suit for enhancement of rent, where defendant filed receipts, with a written statement duly verified, as proving uniform payment of jumma, but was not examined as to the genuineness of the receipts filed, it was held that the receipts were not proved. (But see per *Glover, J.*, who held that there was legal evidence of uniform payment, and as the lower Court believed that evidence, however weak, its decision could not be interfered with in special appeal). 10 W.R. 490. Y
- (g) Where persons who subscribed to certain dakhilahs were not produced as witnesses, and the absence of the dakhilahs was not satisfactorily accounted for, the lower appellate Court was held to have been right in law in refusing to attach credit to the evidence of other witnesses who swore to the dakhilahs. 11 W.R. 105. Z
- (h) Where a party filing dakhilahs deposed that the amounts of rent he had paid were according to the sums entered in the dakhilahs, such statement was held not to prove the dakhilahs, being merely a deposition to the fact of a certain payment of rent, and not to the authenticity of the documents filed. 11 W.R. 170. A

- 6.---“(2) *When the statement was made by such person in the ordinary course of his business, and in particular when it consists of any entry..written or signed by him.*”---(Continued).

4.--ACCOUNT BOOKS, DAKHILAHS AND DOCUMENTS

RES INTER ALIOS ACTA---(Concluded).

- (i) A Civil Court has every right to accept dakhilahs tendered by a party, as undisputed documents, where the opposite party says that he is not prepared to deny their genuineness. 12 W.R. 350. **B**
- (j) In a suit for rent at an enhanced rate, where the defendant availing himself of the provisions of S. 4, Act X of 1859, pleads uniform payment of rent for 20 years, it is necessary for him to give some evidence of the genuineness of the receipts which he produces. 13 W.R. 462. **C**
- (k) The party producing dakhilahs is bound to give some evidence of their having been signed by the person by whom they purport to have been granted, although the opposite party does not deny the signature. 14 W.R. 211. **D**
- (l) The evidence of a tenant deposing to the genuineness of dakhilahs produced by him, if not rebutted, is legally sufficient to prove them. 20 W.R. 261. **E**
- (m) It is not necessary for a party who desires to prove a document to call the writer of it, if alive, as a witness, so long as he can give other satisfactory proof of its execution. 12 W.R. 30. **F**
- (n) A party is perfectly competent to prove the payment of a debt or rent by the production of the receipt and proof that it is the document which he received on paying the money; he is not bound to summon the parties, who signed the receipts, to prove their signatures, nor is his own evidence secondary evidence. 12 W.R. 34. **G**

(6) *Dakhilahs must be attested.*

- (a) No dakhilah or document, unless of very old date, or for some other special reason, is admissible in evidence, unless it is attested in some way. 9 W.R. 147. **H**
- (b) Unattested dakhilahs, without corroborative evidence, are not in law sufficient evidence of payment of rent. 9 W.R. 241. **I**
- (c) Dakhilahs unattested, or attested only by the evidence of a manager and mookhtear, were held to be no legal evidence of uniform payment of rent. 12 W.R. 267. **J**

(7) *Receipts not conclusive evidence.*

Receipts signed by the landlord's agent, if shown to be authentic, are *prima facie* evidence of payment of rent, but not conclusive evidence. 22 W.R. 489. **K**

(8) *Evidence of documents res inter alios acta.*

Documents *res inter alios acta* will be admissible against parties, even though they did not fall within any of the classes of evidence enumerated in S. 32 of the Evidence Act, if they would be admissible against persons through whom such parties claimed. 31 C. 871 (P.C.). **L**

6.—“(2) When the statement was made by such person in the ordinary course of his business, and in particular when it consists of any entry..written or signed by him.”—(Continued).

5.—INSTANCES OF DECLARATIONS IN COURSE OF BUSINESS OR DUTY HELD ADMISSIBLE OR INADMISSIBLE.

(1) Declarations made in course of business or duty held admissible.

- (a) Where goods are consigned to be disposed of in a foreign market, it is an implied term of the agreement by the consignor that the account-sales furnished by the correspondents abroad shall be taken as *prima facie* evidence of what the goods realized, and this is so, even though the consignor objected to the correctness of the account-sales when furnished to him. 6 B.H.C.R. (O.C.), 39 (41). Per *Couch, C.J.* **M**
- (b) Account books which contain entries not made by, and not at the dictation of, a person who has a personal knowledge of the truth of the facts therein stated, when regularly kept in the course of business, are admissible in evidence under S. 34 of the Act, and *semble* under S. 32, cl. 2. 1 B. 610. **N**
- (c) Account books, which, though they are not proved to have been regularly kept in the course of business, are yet shown to have been kept on behalf of a firm of contractors by its servant or agent appointed for that purpose, are receivable against the firm as admissions. 1 B. 610. **O**
- (d) Suit to recover possession of certain lands. A deed of conveyance, purporting to bear the mark of the defendant and duly attested by a number of witnesses, all of whom were dead, was adduced in evidence by the plaintiff. The defendant denied the execution of the deed and said that the mark put to it was not hers. The deed was proved to be all in the handwriting of a dead attesting witness, who wrote the deed, including the words descriptive of the markswoman. The statement of the deed-writer that the mark was the defendant's was held to be admissible under S. 32 (2). 11 B. 690 (691), following *Whitelocke v. Musgrove*, 2 Cr. and M. 511. **P**
- (e) A plaintiff sued to recover a sum of money and produced certain accounts in support of the claim. The accounts were held to be relevant both under S. 34 and S. 32 (2). 6 Bom. L.R. 50 = 23 B. 291. **Q**
- (f) The partnership books, being accessible to all the partners and being kept more or less under the surveillance of all of them, are *prima facie* evidence against each of them; and, also, for any of them against the others. 10 Bom. L.R. 811. **R**
- (g) Suit by a Mahomedan lady for her deferred dower. A register of marriages kept by the Kazi, in which the marriage in question was recorded and in which the amount of the dower was entered, was held to be admissible and relevant evidence, within the meaning of S. 32, cl. 2, of the Evidence Act, as having been made by the Mujtahid in the discharge of his professional duty. 19 C. 689 (693) (P.C.) = 19 I.A. 157. **S**
- (h) In a suit to recover the loss sustained by the plaintiffs on a sale of goods, consigned to them by the defendants for sale by the plaintiffs' London firm, it was held that the account sales were *prima facie* evidence of

6.—“(2) When the statement was made by such person in the ordinary course of his business, and in particular when it consists of any entry..written or signed by him.”—(Continued).

5.—INSTANCES OF DECLARATIONS IN COURSE OF BUSINESS OR DUTY HELD ADMISSIBLE OR INADMISSIBLE.—(Continued).

the amount realized in the foreign market by the sale of the goods, unless and until they were rebutted by substantive evidence by the defendants, as otherwise it would be impossible to carry on mercantile transactions with merchants in distant parts. 38 C. 209 (210). T

(i) An endorsement made by a deceased solicitor alleging that he himself had served a notice is relevant, the solicitor being under a duty to his client, and the presumption being that the rules of the office would be observed by the principal as well as the clerks. *Doe v. Tuford*, 3 B. and Ad. 890; Phip. Ev., 4th Ed., p. 269. U

(j) Entries made in old Irish Chapel books by a deceased Roman Catholic priest, who had performed the ceremonies were held to be admissible to prove the baptism and marriage of a certain person. *Malone v. Lestrange*, 2 Ir. Eq. R. 16; Phip. Ev., 4th Ed., pp. 267-8. Y

(k) Field-book entries, made by a deceased surveyor for the purpose of a survey on which he was professionally employed, were held to be entries made in the discharge of professional duty. *Mellor v. Walmsley*, 2 Ch. 164, 167-8, (1905), overruling *Eady, J.*, who held them not to be such; 2 Ch. 525, 527, 528 (1904); Phip. Ev., 4th Ed., pp. 266-7, and Tay. Ev., 10th Ed., S. 700, pp. 496. W

(l) Books kept by deceased servants in the usual routine of business were admitted as evidence for their masters. *Pitman v. Maddox*, 1 Ld. Ray. 732 and *Price v. Torrington*, 2 Ld. Ray. 873; Phip. Ev., 4th Ed., p. 264. X

(m) The question was whether A delivered certain beer to B; an entry to that effect made in A's books at night by his deceased drayman, whose duty it was to deliver the beer during the day and afterwards to make the entry, was held to be admissible to prove the delivery. *Price v. Torrington*, 1 Salk. 285; Phip. Ev., 4th Ed., p. 267. Y

(n) Where the question was as to the contents of a letter not produced after notice, a copy entered, immediately after the letter was written, in a book kept for the purpose, by a deceased clerk, was held to be relevant. *Pritt v. Fairclough*, 3 Camp. 305. Steph. Dig., 7th Ed., Art. 27, p. 36. Z

(o) Where the question was whether the accused murdered a policeman at a particular time and place, an oral report made by the policeman, in the course of duty, to his inspector, that he was about to go that place at that time in order to watch the movements of the accused was held to be admissible. *R. v. Buckley*, 13 Cox, 293; Phip. Ev., 4th Ed., p. 269; Tay. Ev., 10th Ed., S. 699, p. 496. A

Note.—(The framers of the Indian Evidence Act apparently took the case of *Higham v. Ridgway*, 2 Sm. L.C. 318, as an illustration of a statement made in the ordinary course of business [S. 32 (2)], and not of a statement against interest [S. 32 (3)] on which ground it was decided. 23 B. 63 (69). See illustration (b) to S. 32. B

6.—“(2) *When the statement was made by such person in the ordinary course of his business, and in particular when it consists of any entry..written or signed by him.*”—(Continued).

5.—INSTANCES OF DECLARATIONS IN COURSE OF BUSINESS OR DUTY HELD ADMISSIBLE OR INADMISSIBLE.—(Continued).

(p) An entry by a deceased solicitor in his diary of his having attended a client on a certain day on her executing a deed of appointment, at a certain time and place, was held to be admissible. *Rawlins v. Richards*, 28 Beav: 370. **B**ut see *Hope v. Hope*, W.N.20, where the Court of Appeal doubted whether the solicitor was under any duty to make the entry. *Tay. Ev.*, 10th Ed., S. 699, p. 496, and *Phip. Ev.*, 4th Ed., p. 266. **C**

(q) To prove service of a notice to quit on A's tenant, an indorsement of the fact and time of service made on a duplicate notice by a deceased clerk of A's solicitor, whose duty it was to serve the notice, is admissible. *Stapilton v. Clough*, 2 E. and B. 933, *Phip. Ev.*, 4th Ed., p. 269. **D**

(r) Where the contents of a lost will were in question, a copy of the will, made by a clerk of the solicitor to the executor of the will, all three being dead, and superscribed “will of Mary Sly,”—the same clerk's name appearing in the copy as one of the attesting witnesses, and the other's not being found—was held to be admissible in evidence, being presumably made by the clerk in the course of his duty. *Sly v. Sly*, 2 P. D. 91. (So, with drafts of lost deeds, made by a deceased solicitor's clerk; *Waldy v. Gray*, L.R. 20 Eq. 238.) *Phip. Ev.*, 4th Ed., p. 269. **E**

(s) Where the question was whether A was arrested at the place P or S, a certificate annexed to the writ by a deceased officer of the sheriff and returned by him to the sheriff, was held to be relevant, so far as it related to the *factum* of the arrest, but irrelevant as to the place where the arrest was effected. *Chambers v. Bernasconi*, 1 C.M. and R. 347 and *Smith v. Blakey*, 2 Q.B. 326; *Steph. Dig.*, 7th Ed., Art. 27, p. 36. **F**

(t) Where the question was about the age of a certain person, a statement made by the incumbent in a register of baptisms, that he was baptised on a particular day, was held to be relevant. A statement in the same register that he was born on a particular day is irrelevant, it not being the duty of the incumbent to make it. *R. v. Clapham*, 4 C. and P. 29; *Steph. Dig.*, 7th Ed., Art. 27, p. 37; but see *Phip. Ev.*, 4th Ed., p. 268, where Mr. Phipson says that the entry “seems to have been admitted as a public document, and not as a declaration by a deceased clergyman in the course of duty.” **G**

(2) *Declarations made in course of business or duty held inadmissible.*

(a) A plaintiff sued for a partition of the family estate. The answer was that the estate, being a *vatan* attached to the ancient offices of *nadgavda* and *nadharni* of the pargana of Kundgol, was, according to the family custom, impartible. Certain estimates, whether correct or not, made in the middle of the last century, of the produce of the estate, from which it appeared that, out of 24 *mars* of land at Kundgol, eleven *mars* were set aside as maintenance for the family of the ancient *patels* of that place, were adduced in evidence; held, they were not in

6.—“(2) *When the statement was made by such person in the ordinary course of his business, and in particular when it consists of any entry..written or signed by him.*”—(Continued).

5.—INSTANCES OF DECLARATIONS IN COURSE OF BUSINESS OR DUTY HELD ADMISSIBLE OR INADMISSIBLE—(Continued).

strictness admissible, as they were not deeds produced by the possessor of an estate, which, relating to transactions affecting it, might be taken as part of those transactions, or *res gestae*, nor were they shown to be accounts whereby some person charged himself (see *Doe v. Kinglake v. Bress*, 18 L.J.C P.128), or entries made by some person in the books kept in the ordinary course of business, or in the discharge of a professional duty [S. 32 (2)] ; they were merely estimates drawn up by some unknown person, and the fabrication of them, however genuine they may really be, would involve no appreciable responsibility. *Timangavda v. Raungavda*, Regular Appeal No. 24 of 1877, Printed Judgments, Bom.H.C. 1878, p. 240, cited in 11 B. 94 (97). **H**

(b) In 1893, a suit to recover possession of certain land was instituted by the plaintiff, who, to prove his ownership, produced a registered mortgage-deed, executed in 1877 by N to C, in which the suit land was described, as a boundary and as the plaintiff's. In 1877, there was no litigation between the plaintiff and the defendants. N had no motive to make such a statement in the deed on behalf of the plaintiff. N was also dead at the date of this suit. *Held* that the mortgage deed executed by an agriculturist was not a statement made in the ordinary course of business, within cl. 2, S. 32, but that the document was admissible, under cl. 3 of S. 32, as a statement against the pecuniary or proprietary interest of the person making it. 23 B. 63 (67). **I**

(b1) Where a marriage solemnised in Ireland in 1842, before the Irish Marriage Act, in the private house of a Protestant clergyman, was in question, an entry made by him in a register, which he maintained, of such private marriages, was held to be inadmissible in evidence, *Stuckbridge v. Quicke*, 3 C. and K. 305; but doubted by *O'Brien, J.*, in *Miller v. Wheatley*, 28 L.R. Ir. 144; *Philp. Ev.*, 4th Ed., p. 268. **J**

(c) The prisoner was charged with forging a railway receipt for the purpose of obtaining from the East Indian Railway Company certain goods entrusted to them for transit. The delivery of the goods was sought to be proved by the letter of advice sent by the consignor to the consignee; *held* that under no circumstances was a letter of advice relevant under S. 32 (2), as it was beyond the instances specified in the section, and that, therefore, it was not admissible in evidence. 9 B.L.R. Ap. 42. **K**

(d) Statements made by deceased tenants in Road Cess returns filed by them, regarding the assets of the tenancy cannot, looking at the language and scope of S. 32, be regarded as statements made by those persons, within the meaning of S. 32, so as to be admissible against others. 26 C. 832 (837). **L**

(e) In a coal-pit, the course of business was for the workman, who delivered the coal, to give an account, at the end of the day, of all coal delivered during the day to a foreman—deceased—who, being illiterate, had the

6.—“(2) *When the statement was made by such person in the ordinary course of his business, and in particular when it consists of any entry..written or signed by him.*”—(Continued).

5.—INSTANCES OF DECLARATIONS IN COURSE OF BUSINESS OR DUTY HELD ADMISSIBLE OR INADMISSIBLE.—(Continued).

entries made by a clerk. An entry so made was held to be inadmissible to prove the delivery of the coal, as the foreman had no personal knowledge of the deliveries, though they were made by his direction. *Bram v. Procco*, 11 M. and W. 773; Phip. Ev., 4th Ed., p. 270; Steph. Dig., 7th Ed., Art. 27, p. 36; Tay. Ev., 10th Ed., S. 700, p. 496. M

(f) Where the question was as to the age of a Jew, a custom was proved of performing circumcision 8 days after birth. An entry made, in course of duty, by a deceased Chief Rabbi in the books of the synagogue that he had circumcised the Jew eight days after his birth, was held to be inadmissible. *Davis v. Lloyd*, 1 G. and K. 275; Phip. Ev., 4th Ed., p. 268. N

(g) In an action by a wife for divorce from her husband, the former, to prove that her husband had infected her with a certain disease tendered an oral statement made to her by a deceased doctor as to the nature of her disease at a professional consultation. The statement was held to be irrelevant, as no sufficient duty was proved. *Dawson v. D.*, 22 T.L.R. 52; Phip. Ev., 4th Ed., p. 267. O

(h) Where the marriage of a fellow of a college was in question, unsigned entries relating to the marriage, and made in the college books by a deceased registrar, whose duty it was to make and sign the entries, were held to be inadmissible, although the entries in question were in the same hand-writing as those signed. *Fox v. Bearblock*, 17 Ch. D. 429; Phip. Ev., 4th Ed., pp. 268 and 269; Steph. Dig., 7th Ed., Art. 27, p. 37. P

(i) Where a deceased solicitor made a copy of a deed at the time of sending the deed away, as a precaution in case of its loss, and made an endorsement that it was a true copy executed and attested by persons whose hand-writing he knew, it was held to be inadmissible, as “any one may make a copy of a deed; it is not like a letter copied into a regularly kept book.” *Kerin v. Davoren*, 12 Ir. Ch. R. 352; Phip. Ev., 4th Ed., p. 269. Q

(j) Where the baptism and marriage of a person were in question, entries in old Irish chapel-books by a deceased Roman Catholic priest, were held to be inadmissible. *Malone v. O'Connor*, Drury 632; Phip. Ev., 4th Ed., pp. 267 and 268. R

(k) Where the question was whether the purchase of shares for a client was made, an entry by a deceased stock-broker in his day book, that he had purchased the shares for his client, was held to be inadmissible, as there was no duty to make the entries. *Massey v. Allen*, 13 Ch. D. 558; Phip. Ev., 4th Ed., p. 266. S

6.—“(2) *When the statement was made by such person in the ordinary course of his business, and in particular when it consists of any entry..written or signed by him.*”—(Continued).

5.—INSTANCES OF DECLARATIONS IN COURSE OF BUSINESS OR DUTY HELD ADMISSIBLE OR INADMISSIBLE.—(Continued).

- (i) Where the question was whether certain lands in Walmer Castle had, in 1616, been covered by the sea, statements to that effect contained in an ancient survey made in that year by a surveyor under the direction of the then Lord Warden of the Cinque Ports,¹ regarding the repairs which were necessary to be done at the castle, and an estimate made by a royal engineer, were held to be inadmissible, as there was no proof that they were made contemporaneously with the doing of some act, which the deceased official was bound to record, as there was no proof of what their instructions were and of the source of their knowledge, whereon the contents of the documents were based. *Mercer v. Deme*, 2 Ch. 538 (C.A.); Phip. Ev., 4th Ed., p. 266. T
- (iii) The appointments of parish surveyors was required to be made by a Magistrate's warrant under seal, but it had for some years been irregularly made without any written evidence, except an entry thereof in the minute book of the Magistrate's deceased clerk. The entries were held to be inadmissible, without proof of search for the original warrants, whose existence might perhaps be presumed, and of a practice to make such entries. *R. v. Pembroke*, Car and M. 157; Phip. Ev., 4th Ed., p. 269. U
- (n) Where the question was whether A and B were married, an entry in a baptismal register made by a deceased Roman Catholic parish priest, recording the baptism of C as “born of A and B, *his wife*,” was held not to be admissible, the entry not being contemporaneous with the marriage, which was a collateral fact, and one whereof the writer had no personal knowledge. *Ryan v. Ring*, 25 L.R. Ir. 184; Phip. Ev., 4th Ed., p. 270. Y
- (o) Where the question was whether a certain letter was posted, an entry regarding the letter made by a deceased clerk in a book in which it was his duty to enter all letters to be posted, was held to be inadmissible. *Rowlands v. De Vecchi*, 1 C. and E. 10; *aliter* if the duty had been to enter the letters *after* posting. Phip. Ev., 4th Ed., p. 270. W
- (2) The duty of a Government Committee was to report about the fitness of a person for the post of consul. A statement, of the date and place of that person's birth and other details of his personal history, was held to be inadmissible, as the statement of these facts was not necessary to the performance of the duty, and as the report was not a public document. *Sturla v. Freccia*, 5 Ap. Cas. 623; Phip. Ev., 4th Ed., p. 270. X
- (q) The diary of a deceased colliery manager, stated by a witness to have been kept in the regular course of business for the purpose of making a report to the owner, was held to be inadmissible, the Court observing that proof must be given, not only of its being made in the regular course of business, but also that the manager was under a duty to make the whole of it. *Trotter v. Maclean*, 13 Ch. D. 574; Phip. Ev., 4th Ed., p. 267. Y

6.—“(2) *When the statement was made by such person in the ordinary course of his business, and in particular when it consists of any entry..written or signed by him.*”—(Concluded).

5.—INSTANCES OF DECLARATIONS IN COURSE OF BUSINESS OR DUTY HELD ADMISSIBLE OR INADMISSIBLE.—(Concluded).

(r) The certificate of a deceased solicitor, whose duty it was to audit the accounts, but only by checking the calculation, without testing its accuracy with the vouchers, was held to be inadmissible to prove the items of an account. *Vivian v. Muat*, 44 L.T. 210; Phip Ev., 4th Ed., p. 267. **Z**

(s) Where the contents of a lost deed, executed in 1570, had to be proved, an entry, giving the subject-matter of the deed and made in 1610, in the books of a deceased steward of the property to which the deed related, was held to be inadmissible, as it was not contemporaneous, and as it did not appear to be a part of the steward's duty to make the entry. *Doe v. Witlecomb*, 6 Ex. 601; Phip. Ev., 4th Ed., p. 269. **A**

(3) **Entry made in performance of religious duty.**

An entry made in the performance of a religious duty is certainly of no less value than one made by a clerk, messenger, or notary, an attorney or solicitor, or a physician, in the course of his secular occupation. *Kennedy v. Doyle*, 10 All. 161; Wigm. Ev., 1905 Ed., S. 1523, p. 1891. **B**

7.—“(3) *When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it..damages.*”

1.—GENERAL.

(1) **Reason of admissibility of declarations against interest—Necessity.**

This exception to the hearsay rule implies, like most of the others, first, a necessity for resorting to hearsay, i.e., the death of the declarant, or some other condition rendering him unavailable for testimony in Court. Wigm. Ev., 1905 Ed., S. 1455, p. 1820. **C**

(2) **Implication of “the necessity principle.”**

The necessity principle connotes the impossibility of obtaining other evidence from the same source, the declarant being unavailable in person for examination. Whenever the witness is actually not available, his statements ought to be received in evidence. Death is universally conceded to be sufficient. Wigm. Ev., 1905 Ed., S. 1456, p. 1821. **D**

(3) **Death is ground.**

The cases where such evidence is admitted seem to proceed generally upon the principle that, by the decease of the person, no better evidence could be had. *Fitch v. Chapman*, 10 Conn. 11; Wigm. Ev., 1905 Ed., S. 1456, p. 1821. **E**

7.—“(3) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it..damages.”

—(Continued).

1.—GENERAL.—(Continued).

(4) Reason—Circumstantial guarantee of trustworthiness.

Secondly, the exception pre-supposes a circumstantial guarantee of trustworthiness, in this case, the circumstance that the fact stated, being against the interest of the declarant, is not likely to have been stated untruthfully. Wigm. Ev., 1905 Ed., S. 1455, p. 1820. **F**

(5) Cases elucidating principle.

- (a) When the entries are against the pecuniary interest of the person making them, and never could be made available for the person himself, there is such a probability of their truth that such statements have been admitted after the death of the person making them. *Smith v. Blakey*, L.R. 2 Q.B. 326; Wigm. Ev., 1905 Ed., S. 1457, p. 1822. **G**
- (b) The interest, against which the statement appears to be made, is required in order to supply that sanction which, after the death of the party, is accepted as a substitute for an oath. *Lalor v. Lalor*, 4 L.R. Ir. 681; Wigm. Ev., 1905 Ed., S. 1457, p. 1822. **H**
- (c) The principle is founded on a knowledge of human nature. Self-interest induces men to be cautious in saying anything against themselves, but free to speak in their own favour. We can safely trust a man when he speaks against his own interest. *Gibblehouse v. Stony*, 3 Rawl. 437; Wigm. Ev., 1905 Ed., S. 1457, p. 1822. **I**
- (d) It rests on the principle which allows entries or memorandums, which were prejudicial to the interest of the writer, to be evidence, thus substituting for the sanction of a judicial oath the more powerful sanction of a sacrifice of self-interest. *Addams v. Seitzinger*, 1 W. and S. 437; Wigm. Ev., 1905 Ed., S. 1457, p. 1822. **J**
- (e) Experience has taught us that, when one makes a declaration in disparagement of his own rights or interests, it is generally true, and, because it is so, the law has deemed it safe to admit evidence of such declaration. *Mercer's Adm'r v. Mackin*, 14 Bush. 441; Wigm. Ev., 1905 Ed., S. 1457, p. 1822. **K**
- (f) It is a general principle of evidence that declarations or statements of deceased persons are admissible when they appear to have been made against their interest. Where a person has peculiar means of knowing a fact, and makes a declaration or written entry of that fact, which is against his interest at that time, it is evidence of that fact as between third persons after his death. *Middleton v. Melton*, 10 B. and C. 322; Wigm. Ev., 1905 Ed., S. 1476, p. 1836. **L**

(6) Distinction between statements against interest, admissions and confessions.

- (a) A statement of a fact against interest is admissible on the ground that such a statement is one which would not be made unless truth compelled it, and that it is, therefore, as trustworthy as if made in the box under cross-examination. Wigm. Ev., 1905 Ed., S. 1475, p. 1833. **M**

7.—“(3) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it damages.”

—(Continued).

1.—GENERAL.—(Continued).

(b) Under modern law, a party-opponent in a civil case may be summoned as a witness. If the hearsay exception be invoked, the opponent's extra-judicial statements are inadmissible, unless he is shown to be deceased or otherwise unavailable,—as every other declarant must be, so that his statements against his interest may be admitted in evidence. But this is never required as a condition to the admissibility of an opponent's admissions. Hence, admissions are receivable independently of the hearsay exception as to statements against interest. Wigm. Ev., 1905 Ed., S. 1475, p. 1823. **N**

(c) An opponent's admission is admissible, even though the fact as stated by him was then not against his interest, *i.e.*, even though he was then making a claim in his favour. This principle shows clearly that opponent's admissions, though they are usually of facts then against their interest, need not be so. Wigm. Ev., 1905 Ed., S. 1475, p. 1833. **O**

(d) The direct confessions of an accused person are relevant, not only as covered by the general principle of admissions, but also as covered by the doctrine of the exception to the hearsay rule, regarding declarations against interest. The declarant is not available as a witness for the prosecution,—because he cannot be cross-examined,—and the fact of the crime as confessed is directly against his interest. But his statements are admissible, even though they are not against his interest, for exculpatory statements of facts, not at the time against his interest, are, nevertheless, admissible. Wigm. Ev., 1905 Ed., S. 1475, p. 1834. **P**

(7) Distinction between declarations against proprietary interest in disparagement of occupier's title and those abridging or encumbering property.

“In applying the rule that declarations against proprietary interest are admissible, care must be taken to distinguish between statements made by an occupier of land in disparagement of his own title, and such declarations as merely go to abridge or encumber the property itself. The former are receivable, but the latter will be rejected.” Tay. Ev., 10th Ed., S. 687, p. 486. **Q**

(8) Ground of distinction.

“The grounds for this distinction are that, it is scarcely possible to imagine any inducement which will lead a person possessed of premises in fee to admit that he is only a tenant. But many reasons might induce a tenant to acknowledge the existence of an easement or a highway,—especially where it was either not inconvenient, or even absolutely beneficial to him.” Tay. Ev., 10th Ed., S. 687, p. 487, referring to *R. v. Bliss*, 7 L.J.Q.B. 4; *Daniel v. North*, 11 East, 375, and *Papendick v. Bridgwater*, 24 L.J.Q.B. 289. **R**

7.—“(3) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it damages.”

— (Continued).

1.—GENERAL.—(Concluded).

(9) English and Indian Law.

“The provision rendering relevant any statement, which would have exposed a man to a criminal prosecution, is a departure from the English law. The admissibility of such statement was discussed by Lord Lyndhurst and it was ruled that they were inadmissible in the *Sussex Peerage Case*, 11 Cl. and F. 85.” *Cun. Ev.*, 10th Ed., p. 165. **S**

(10) Distinction between effects of entries in course of business, and statements against interest—English and Indian law.

The distinction, made in the English Courts, as to the effects of entries in the course of business, and statements against interest, whereby the latter are admitted as proof of independent matters, which, though forming part of the entry, are, in themselves, not against the interest of the declarant, and the former are not admitted as proof of such independent and collateral facts, would appear not to be retained in the present section; anything contained in a statement, which could be shown to have been made in the ordinary course of business, would be admissible in the same way as anything contained in a statement against interest. *Cun. Ev.*, 10th Ed., p. 165. **T**

(11) Construction of section.

The clause, “when, if true, it would expose him,” means “would have exposed him at the time the statement was made.” See *Whitley Stokes*, Vol. II, p. 874 and *A. & W. Ev.*, 4th Ed., p. 211, where it is stated that this construction was approved by the Calcutta High Court in the case of *Nicholas v. Asphar*, 24 C. 216; (the decision upon this point was, however, not reported, as the decision was given during the course of the examination of the witnesses.) **U**

2.—CONDITION OF ADMISSIBILITY OF DECLARATIONS AGAINST INTEREST—TEST OF ADMISSIBILITY—PROOF—LIMITATION.

(1) Declarations against interest when relevant.

(a) A declaration is relevant if the declarant had peculiar means of knowing the matter stated, if he had no interest to misrepresent it, and if it was opposed to his pecuniary or proprietary interest. *Steph. Dig.*, 7th Ed., Art. 28, p. 37, referring to *Gladwin v. Atkin*, 1 Crompt. and M. 423. **Y**

(b) To render declarations against interest admissible, the interest must be pecuniary or proprietary. No other kind of interest, even though it be of a penal kind, will suffice. *Sussex Peerage Case*, 11 Cl. & F. 108; *Philp. Ev.*, 4th Ed., p. 255; *Wigm. Ev.*, 1905 Ed., S. 1476, p. 1896. But under cl. 3, S. 32, it would be sufficient. **W**

7.—“(3) *When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it damages.*”

—(Continued).

2.—CONDITION OF ADMISSIBILITY OF DECLARATIONS AGAINST INTEREST—TEST OF ADMISSIBILITY— PROOF—LIMITATION—(Continued).

(2) *Statements predicated a limited interest in property.*

(a) A statement predicated of oneself a limited interest, instead of a complete title to property, asserts a fact decidedly against one's interest, and has always been so regarded. In particular, assertions that one's estate is a leasehold, not a freehold, or that one's possession is not as owner, but merely as agent or as trustee for another, are admissible. *Wigm. Ev.*, 1905 Ed., S. 1458, p. 1823. **X**

(b) The probability that a man will speak the truth, which is the reason for admitting the evidence, is equally great whether the tendency of the declaration is to establish liability for money, or to deprive a man of a real estate. Therefore, a statement, cutting down an interest in realty, is admissible to the same extent, and for the same purposes, as where the effect is to charge the person with the receipt of money. *R. v. Birmingham*, 1 B. and S. 763; *Wigm. Ev.*, 1905 Ed., S. 1458, p. 1823. **Y**

(c) Declarations against proprietary interest—which include statements by persons while in possession of land, explanatory of the nature of their possession—if made in disparagement of the title of the declarant—are admissible in evidence as original admissions against himself and all those who claim through him—*Trimblestown v. Kenmis*, 9 C. & F. 763 (H.L.)—and also as evidence for or against strangers.—*Carne v. Nicoll*, 1 Bing. N.C. 430; *Peacable v. Watson*, 4 Taunt. 16, and *Gery v. Redman*, 1 Q.B.D. 161; *Tay. Ev.*, 10th Ed., S. 684, p. 484. **Z**

(d) Where a person admits that the land, of which he is the owner, is in the possession of a tenant, his statement is a statement against his proprietary interest and is admissible, under cl. 3 of S. 32 of the Evidence Act, if the other requirements of that section are fulfilled. *Burha Mandari v. Mejh Nath Singh*, 2 C.L.J. 4n (5n). **A**

(e) Where a landlord, who was since dead, had made a statement that her land had been let to a tenant, it was held that it was a statement contrary to her proprietary interests and rights, as she admitted thereby that she had parted with some, at least, of her entire proprietary rights in the land, viz., the right to possession, and, though it did not affect her proprietary interests whether the particular tenant or some one else was a tenant, still, the statement must be taken as a whole being in derogation of the proprietary interest; and that any part of the statement was admissible under cl. 3 of S. 32. 31 C. 965 (959), following 22 W.R. 291. **B**

(f) A declaration by a person in possession that he is a tenant in tail, or for life, or for years, or by sufferance, making against his own interest, may be received in evidence, on account of its probable truth. *Chambers v.*

7. —“(3) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it damages.”

—(Continued).

2.—CONDITION OF ADMISSIBILITY OF DECLARATIONS AGAINST INTEREST—TEST OF ADMISSIBILITY—PROOF—LIMITATION—(Continued).

Bernascom, 3 L.J. Ex. 373; *Peaceable v. Watson*, 4 Taunt, 16; *Créase v. Bartlett*, 4 L.J. Ex. 297 and *Doe v. Langfield*, 16 M. and W. 497. *Tay. Ev.*, 10th Ed., S. 635, p. 495. (Possession is *prima facie* evidence of seisin in fee simple. *Doe v. Coulthred*, 7 A. and E. 235; *Tay. Ev.*, 10th Ed., S. 123, p. 129). **C**

(3) Test whether statement is against interest.

(a) It is strictly correct to say that a statement, though indifferent in itself, becomes against the proprietary interest of the declarant, when made as a material part of a deed, the object of which is to limit his proprietary interest. It cannot be said to affect his interest, because assuming it to be material, the deed, if it were struck out, would be less effective than it would otherwise be. If, on the other hand, the statements were unconnected with the purpose of the deed, and were not in themselves adverse to the declarant's interest, they would doubtless have to be rejected. Vide *Knight v. Marquess of Waterford*, 4 Y. and C. Ex. 293 and *Doe v. Berist*, 18 L.J.Q.P. 123, 23 B. 63 (72). **D**

(b) In a suit to recover possession of certain lands, the plaintiff tendered in evidence a mortgage-deed executed by the owner of a neighbouring piece of land in which the plaintiff's land was recited as a boundary. The question was whether the recital of boundaries was a statement against interest. *Fulton, J.*, observed that the real question was, was it material in the mortgage-deed, or in other words, was it used for the purpose of advancing the intention of the deed? If it was so used, then it was a statement against interest. The words themselves may be innocent and free from any taint of prejudice to the interest of the declarant; but the context may show that they were only employed for the purpose of more completely describing the property mortgaged and of rendering it impossible for the mortgagor, if dishonestly inclined to raise any dispute as to its identity. 23 B. 63 (71). **E**

(c) The question is, whether, taking the document as a whole, it is against the interest of the proprietary right of the person making it. In estimating the value of any particular part of it, that may be looked at; but the principle upon which the admissibility of it is determined is, whether it has been made under such circumstances as makes it reasonable to suppose that it was done *bona fide*, and that the statements are true. 22 W.R. 231 (233). **F**

(4) Statements held to be against interest.

(a) In a mortgage deed, the mortgagor not only acknowledges his liability to repay money, but also charges his land with the debt, and, therefore, it seems that the deed, as a whole, is a statement against the pecuniary and proprietary interest of the person making it. The declarant would be in a better position if the deed were cancelled than he is whilst it remains in force. 23 B. 63 (70). **G**

7.—“(3) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it..damages.”

—(Continued).

2.—CONDITION OF ADMISSIBILITY OF DECLARATIONS AGAINST INTEREST—TEST OF ADMISSIBILITY—PROOF—LIMITATION—(Continued).

(b) The question before the Court was whether the rent payable to the Zemindar by the Ghatwal during a certain period was Rs. 75 or Rs. 175. The Zemindar relied upon a statement, prepared by the then Zemindar many years previously, of the Ghatwali villages in the mahal, in which there was a recital, against the name of the property in question, that the original rent was so much and the increased rent so much, *Markby, J.*, held this statement was inadmissible. But, in appeal, *Couch, C.J.*, and *Ainslie, J.*, held that it was admissible as a statement against interest, 22 W.R. 231 (233); followed in 23 B. 63 (67). **H**

(5) Amount of pecuniary interest immaterial.

With regard to the admissibility of declarations against interest, the amount of the pecuniary interest is immaterial. *Orret v. Corser*, 21 Beav. 52; *Philp, Ev.*, 4th Ed., p. 255. **I**

(6) Prosecution, fear of, not enough, to render declarations admissible.

(a) The declarations of a clergyman that he had performed a marriage, which would subject him to a prosecution were held to be inadmissible, as not being against the pecuniary or proprietary interest of that person. *Sussex Peerage Case*, 11 C. & F. 103-114; *Philp, Ev.*, 4th Ed., p. 253; *Wigm. Ev.*, 1905 Ed., S. 1476, p. 1836. (But see cl. 3 of S. 32, under which they would be admissible). **J**

(b) A is indicted for murder; B, who is dead, made, while living, a declaration that he was present at the murder; that declaration is against his own interest, and would, had he lived, have subjected him to a prosecution. It is in principle the very case supposed in the argument, and it is not possible to say that such a declaration would have been receivable in evidence. *Per Lord Chancellor Lyndhurst in Sussex Peerage Case*, 11 C. and F. 109; *Wigm. Ev.*, 1905 Ed., S. 1476, p. 1836. (But see cl. 3 of S. 32, under which such a statement would be admissible). **K**

(7) Interest not to be too remote.

The interest must not be too remote. *Smith v. Blakey*, L.R. 2 Q.B. 326; *Steph. Dig.*, 7th Ed., Art. 23, p. 37. **L**

(8) Liability involved must not be conditional or contingent.

A certain entry ran thus:—“April 4th, 1824, W. Worsell came as farm-hand; and to have for the half-year 40 s.” Lord Denman, C.J., observed: “The book here does not show any entry operating against the interest of the party. The memorandum could only fix upon him a liability on proof that the services had been performed.” *R. v. Worth*, 4 Q.B. 184; *Wigm. Ev.*, 1905 Ed., S. 1461, p. 1826; but see the learned professor's remarks also in the section. **M**

7.—“(3) *When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it damages.*”

— *Continued*).

2.—CONDITION OF ADMISSIBILITY OF DECLARATIONS AGAINST INTEREST—TEST OF ADMISSIBILITY— PROOF—LIMITATION—(*Continued*).

(9) **Declarations need not be contemporaneous with facts stated.**

(a) Declarations against pecuniary interest are relevant, although they were not made contemporaneously with the facts therein stated. *Doe v. Turford*, 3 B. and Ad. 890; Phip. Ev., 4th Ed., p. 257. **N**

(b) It was held that a receipt, given in substitution for a lost receipt of 28 years before, was admissible in evidence. *Whaley v. Masserene*, 8 Ir. Jur. N.S. 281; Phip. Ev., 4th Ed., p. 257. **O**

(10) **But declarations must be against interest at the time they were made.**

(a) It must be proved that the endorsements were on the bond, at or recently after the times when they bore date, before one is entitled to read them. Although it may at first sight seem against the interest of the obligee to admit part-payment, he may thereby in many cases set up the bond for the residue of the sum secured. They cannot be properly admitted, unless they are proved to have been written at a time when their effect was clearly in contradiction to the interest of the writer. *Rose v. Bryant*, 2 Camp. 322; Wigm. Ev., 1905 Ed., S. 1466, pp. 1829–1830. **P**

(b) Declarations against interest should, to be admissible, have been against interest *at the time they were made*, and it is no answer that they might possibly turn out to be so subsequently. *Ex-parte Edwards*, re *Tollenache*, 14 Q.B.D. 415; *Smith v. Blaney*, 2 Q.B. 326, and *Massej v. Allen*, 13 Ch. D. 558; Phip. Ev., 4th Ed., pp. 255-6. **Q**

(11) **Personal knowledge not necessary.**

Declarations against pecuniary interest are relevant, though the declarant had no personal knowledge of the facts therein mentioned, but received them merely on hearsay. *Crease v. Barrett*, 1 C.M. & R. 719; *Percival v. Nanson*, 7 Ex. 1; Phip. Ev., 4th Ed., p. 257. **R**

(12) **Competency of declarant to testify immaterial.**

Declarations against pecuniary interest are relevant, although the declarant himself would have been incompetent as a witness to testify. *Gleadow v. Atkin*, 1 C. & M. 410; Phip. Ev., 4th Ed., p. 257. **S**

(13) **Facts stated in declarations against interest need not be proved by living witnesses.**

With reference to the admissibility of declarations against interest, it is not essential that the facts therein mentioned should be provable by living witnesses, who might have been called. *Middleton v. Melton*, 10 B. & C. 322; Tay. Ev., 10th Ed., S. 681, p. 483; Phip. Ev., 4th Ed., p. 258. **T**

7.—“(3) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it damages.”

—(Continued).

2.—CONDITION OF ADMISSIBILITY OF DECLARATIONS AGAINST INTEREST—TEST OF ADMISSIBILITY—PROOF—LIMITATION—(Concluded).

(14) Absence of interest to misstate not necessary.

Declarations against pecuniary interest are relevant, although the declarant had an interest or motive to misstate the facts, which renders the declarations of no value. *Taylor v. Witham*, 3 Ch.D. 605, per *Jessel, M.L.*, *Phil. Ev.*, 4th Ed., p. 257 (observing that these circumstances affect the weight, and not the admissibility, of the evidence). **U**

(15) Declarations containing statements against and for declarant's interest—Disserving interest must preponderate.

Where entries by one of a college of vicars, who was also proctor or collector of dues for the college, were objected to, Sir T. Plumer, M.R., observed, “Though the proctors were members of the body of vicars, that does not affect the ground on which such entries are admitted; there being evidently a balance of interests, and the interest in making the entry smallest. If we look to this set-off of the opposite interests, the preponderance, being against making false charges, reduces him to the situation of any other proctor or collector.” *Short v. Lee*, 2 J. & W. 477, 483; *Wigm. Ev.*, 1905 Ed., S. 1464, p. 1827. **Y**

(16) Counter interest need not preponderate—It affects only weight of evidence.

It must be *prima facie* against his interest; that is to say the natural meaning of the entry standing alone must be against the interest of the man who made it. Of course, if you can prove *alimule* that the man had a particular reason for making it, and that it was for his interest, you may destroy the value of the evidence altogether; but the question of admissibility is not a question of value. The entry may be utterly worthless when you get it, if you show any reason to believe that he had a motive for making it and that, though apparently against his interest, yet really it was for it; but that is a matter for subsequent consideration, when you estimate the value of the testimony. *Taylor v. Witham*, L.R. 3 Ch.D. 605. Per *Jessel, M.L.*, *Wigm. Ev.*, 1905 Ed., S. 1464, p. 1827; *Phil. Ev.*, 4th Ed., p. 256; *Tay. Ev.*, 10th Ed., S. 676, p. 479. **W**

(17) Original entry complete—Other entries made subsequently on separate occasion—Effect.

Where the account-roll of a bailiff was tendered in evidence, the entries charging himself were admitted in evidence, but the entries discharging himself by payments were rejected; the Court observing that it may be that a person in charging himself makes a declaration which is not intelligible without looking at the other side of the account; and in that case recourse must necessarily be had to both sides. But the items of discharge in the accounts in question which were not referred to in, or

7.—“(3) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it...damages.”

—(Continued).

2.—CONDITION OF ADMISSIBILITY OF DECLARATIONS AGAINST INTEREST—TEST OF ADMISSIBILITY—PROOF—LIMITATION—(Continued).

necessary to explain, the items of charge which were admitted and read were properly rejected. The presumption that these entries are false is at least as strong as the presumption that the others are true. *Doe v. Bevis*, 7 C.B. 504; Wigm. Ev., 1905 Ed., S. 1455, p. 1829 & 23 B. 63. X

(18) Declarations against interest of third persons who are alive.

It is clear that the declarations of third persons alive, in the absence of any community of interest, are not to be received to affect the title or interests of other persons, *merely* because they are against the interests of those who make them. *Phillips v. Cole*, 10 A. & E. 106; Tay. Ev., 10th Ed., S. 684, p. 485. Y

(19) Declaration admissible for all facts contained in it—Collateral facts.

(a) The principle being that the statement which is against interest is made under circumstances fairly guaranteeing the sincerity and accuracy of the declarant, it is obvious that the circumstances guarantee the correctness of whatever he may say while he is under that influence. The statement, therefore, may be accepted not merely as to the particular fact which is against interest, but also as to every fact contained in the same statement. The leading case on this point is *Higham v. Ridgway*, 10 East, 109; Wigm. Ev., 1905 Ed., S. 1465, p. 1828. Z

(b) Entries in books may be admitted to prove collateral and independent matters, which, though forming part of a declaration against interest, are not, in themselves, against the interest of the person who makes the declaration. Tay. Ev., 10th Ed., S. 677, p. 479, referring to *Higham v. Ridgway*, 10 East, 109. A

(c) Statements and entries against interest may be received as evidence of independent and collateral matters which, though forming part of the declaration, were not in themselves against the interest of the declarant. 23 B. 63 (71), referring to 22 W.R. 231 and *Higham v. Ridgway*, 2 Sm. L.C. 318. B

(d) The statement of a registered occupant of a survey number in the Bombay Presidency that he is indebted in a certain sum of money, which is a charge on his land, must be held to be both against his pecuniary and proprietary interest and the whole statement is admissible in evidence, not only to prove so much contained in it as was adverse to the interest of the person making it, but to prove any collateral fact contained in the statement, which fact was not foreign to the part actually against interest, and formed a substantial part of it. 23 B. 63 (68). Per *Candry, J.* C

(e) The question was, on what day a child was born. An entry in the book of the accoucheur, who had attended the mother, was produced, in which his charge for such attendance on a particular day was noted as *paid*. This entry was held to be relevant evidence of the date of the child's

7.—“(3) *When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it damages.*”

—(Continued).

2.—CONDITION OF ADMISSIBILITY OF DECLARATIONS AGAINST INTEREST—TEST OF ADMISSIBILITY— PROOF—LIMITATION—(Continued).

birth; the Court observing, “It is idle to say that the word *paid* only shall be admitted in evidence without the context, which explains to what it refers: we must, therefore, look to the rest of the entry, to see what the demand was which he thereby admitted to be discharged.” *Higham v. Ridgway*, 10 East, 109; Tay. Ev., 10th Ed., S. 677, pp. 479-80, and Phip. Ev., 4th Ed., p. 258. **D**

(f) The principle, upon which the admissibility of a written statement is determined, is, whether it has been made under such circumstances as make it reasonable to suppose that it was done *bona fide*, and that the allegations it contains are true. And, if, as a whole, it is against the interest or the proprietary right of its author, such parts as are in his favour cannot be rejected. 22 W.R. 231. **E**

(g) A statement of a zemindar that there was a certain ghatwali occupant in a portion of his *mehal* was held to be a statement against the interest of the zemindar and against his proprietary right. The effect of it was to cut down the proprietary right, to subject it to the tenure or incumbrance which was mentioned. Though in one part of it there may be what is not against his interest, but in his favour, *viz.*, the amount of the original rent and increased rent payable to him, yet, when a document of this kind is tendered in evidence, it is not to be divided into parts, and the part which is in favour of the person making it rejected, and that which is against his interest accepted. 22 W.R. 231 (233). **F**

(h) The declarations are admissible not only to prove the particular facts against interest, but of all connected facts, though not against interest, which are necessary to explain, or are expressly referred to by the declaration and whether contained in the same or other document. *Connor v. Fitzgerald*, 11 L.R. Ir. 106; Phip. Ev., 4th Ed., p. 267. **G**

(i) If the entry is admitted as being against the interest of the party making it, it carries with it the whole statement. *Percival v. Nanson*, 7 Exch. 1; Wigm. Ev., 1905 Ed., S. 1465, p. 1828. **H**

(j) It is admissible as evidence not merely of the precise fact which is against interest, but of all matters involved in, or knit up with, the statement. *Smith v. Blakey*, L.R. 4 Q.B. 344; Wigm. Ev., 1905 Ed., S. 1465, p. 1828. **I**

(k) The principle that a declaration against interest was evidence as to all that formed an essential part of it was long since settled; here the entry “Paid Brook balance of a quarter’s rent due on 24th June last, £3” was against proprietary interest, and was admitted to show the payment. *R. v. Exeter*, L.R. 4 Q.B. 944; Wigm. Ev., 1905 Ed., S. 1465, p. 1828. **J**

7.—“(3) *When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it damages.*”

—(Continued).

2.—CONDITION OF ADMISSIBILITY OF DECLARATIONS AGAINST INTEREST—TEST OF ADMISSIBILITY— PROOF—LIMITATION—(Continued).

(l) Where a steward rendered an account showing a balance due to his employer at the foot of which was a further and subsequent entry of the payment of the balance by him, held that the former part could not bring in the last one, which was the evidential one desired. *Per Tindal, C. J. Doe v. Tyler*, 4 Moo. and P. 881; Wigm. Ev., 1905 Ed., S. 1465, p. 1829. **K**

(m) Where a steward made a debit entry of rent received and afterwards on the opposite page a credit entry of a sum paid to the tenants as poor rates, the latter entry was held to be inadmissible in evidence. *Knight v. Waterford*, 4 Y. and C. 294; Wigm. Ev., 1905 Ed., S. 1465, p. 1829 and 23 B. 63 (72). **L**

(n) Where it was contended against a toll-keeper's book that, where, in the same document in which a person charges himself, a discharge also appears, which squares the accounts, or it may be, leaves a balance in his favour, then taking the whole together—both sides of the account, the charge and the discharge—the reason fails, because it no longer is a declaration of a party *against* his own interest, though it may be a declaration *for* his own interest; the argument was disapproved; the Court observing that a man is not likely to charge himself for the purpose of getting a discharge, and that almost all the accounts that are produced being accounts on both sides, that objection would go to the very root of that sort of evidence. *Rowe v. Brenton*, 3 M. and Ry. 266; Wigm. Ev., 1905 Ed., S. 1464, p. 1828. **M**

(20) **Declarations controlled by rules regarding parol evidence affecting documents.**

(a) Declarations against interest cannot be received in evidence to derogate from the declarant's own grant. *Lalor v. Lalor*, 4 L.R.I. 678; Phip. Ev., 4th Ed., p. 257. **N**

(b) Declarations against interest are not admissible in evidence to qualify the estate of a co-devisee. *Turner v. A.G.*, L.R. 10 Eq. 386, 392; Phip. Ev., 4th Ed., p. 257. **O**

(21) **Declaration made pendente lite.**

Declarations against pecuniary interest are relevant, although the declarant made the declaration *pendente lite* as evidence, or *post litem motam*. *Whaley v. Massereene*, 8 Ir. Jur. N.S. 281; Phip. Ev., 4th Ed., p. 257. **P**

(22) **Recital in old deed made ante litem motam.**

Amid the conflict of the oral statements of interested witnesses, a recital in an old deed made *ante litem motam* may often be a most trustworthy guide to indicate on which side lies the truth. The total rejection,

7.—“(3) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it..damages.”

—(Continued).

2.—CONDITION OF ADMISSIBILITY OF DECLARATIONS AGAINST INTEREST—TEST OF ADMISSIBILITY— PROOF—LIMITATION—(Continued).

then, of such statements might, in some cases, seriously interfere with the administration of justice; but, at the same time, it must be remembered that the Courts, while accepting them for consideration, will always have carefully to estimate their probative effect according to the circumstances in which they were made and will give them much or little weight as those circumstances may appear to require.
23 B. 63 (72). Q

(23) Form of declarations.

A declaration by a person in possession reducing his interest is admissible, whether such a declaration is made verbally—*Carne v. Nicoll*, 1 Bing. N.C. 430; *R. v. Birmingham*, 31 L.J.M.C. 63; *R. v. Exeter*, L.R. 4 Q.B. 341, and *De Bode's case*, 8 Q.B. 208—or in writing—*Doe v. Jones*, 1 Camp. 367—or by deed—*Sly v. Sly*, 2 P.D. 91—or by will though unproved—*O'Sullivan v. Burke*, Ir. R. 9 C.L. 105—or in a written statement—*Trimblestown v. Kemmis*, 9 Cl. & F. 763 (H.L.); *Tay. Ev.*, 10th Ed., S. 685, p. 485. R

(24) Extrinsic proof to be given of declarant's death.

Extrinsic proof must be given of the death of the person who makes the declaration,—unless presumable from absence for 7 years, (*Wills v. Palmer*, 59 W.R. 169). *Phip. Ev.*, 4th Ed., p. 257. S

(25) Extrinsic proof that deceased declarant made statement.

Extrinsic proof must be given that the declarant either made, wrote, or signed, the statement, or if made or written by another, that it was authorised—*Lancum v. Lovell*, 6 C. and P. 437, 443-5; *Bradley v. James*, 13 C. P. 822 and *Doe v. Hawkins*, 2 Q.B. 212—or adopted—*Doe v. Hawkins*, 2 Q.B. 212 and *Devonshire v. Neill*, 2 L.R.I. 132, 157—by the deceased person. *Phip. Ev.*, 4th Ed., p. 257. T

(26) Extrinsic proof of existence of charge shown to be liquidated.

Where the entry shows the subsequent liquidation of the charge, it is not necessary to give independent evidence of the existence of the charge. *Taylor v. Witham*, 3 Ch. D. 605; *Phip. Ev.*, 4th Ed., p. 258. U

(27) Written entry must have been executed by declarant.

In all these cases of books by bailiffs, etc., the first point is to prove the character of the individual who wrote them; if you fail in this, they cannot be evidence. In all private relations of life, you do not presume the existence of the particular character, nor does a person's acting in that character prove that he possessed it. It would let in dangerous latitude, if the Courts were once to dispense with that which is an essential preliminary before any writing, not verified on oath, can be made evidence, and which must be established *aliunde*. *Short v. Lee*, 2 J. and W. 467; *Wigm. Ev.*, 1905 Ed., S. 1472, p. 1832. Y

7.—“(3) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it damages.”

—(Continued).

2.—CONDITION OF ADMISSIBILITY OF DECLARATIONS AGAINST INTEREST—TEST OF ADMISSIBILITY— PROOF—LIMITATION—(Concluded).

(28) Signature or body of entry must be in declarant's hand-writing.

If the entry be not in the hand-writing of the steward, undoubtedly it must be signed by him; but here all these entries were written by the steward himself. *Barry v. Bobbington*, 4 T.R. 514; per *Kenyon, L.C.J.* Wigm. Ev., 1905 Ed., S. 1472, p. 1892. **W**

(29) Admissibility of account books—Direct proof of being written by agent sufficient.

Where account books are tendered in evidence, they will be admitted, though neither written nor signed by the deceased, if direct proof is given that they were written by his authorised agent. *Bradley v. James*, 22 L.J.C.P. 193; Tay. Ev., 10th Ed., S. 682, p. 482. **X**

(30) Absence of endorsement—Proof of payment.

(a) The mere absence of an endorsement on the back of a kistbundee cannot prevail against positive proof of payment. 3 W.R. Mis. Ap. 23. **Y**

(b) A stipulation in a bond that all payments should be endorsed on the back thereof, and that all other pleas of repayment would be futile, does not stop the defendant from proving by other means that the debt, or part of it, has been satisfied. 8 W.R. 316. **Z**

(c) A defendant executed a bond to the plaintiff for the payment of a balance ascertained to be due from the former to the latter upon an adjustment of their mutual dealings, containing, *inter alia*, a stipulation that the money would be paid after causing the payment to be endorsed on the back of the bond or taking a receipt for the same. Held, that the stipulation in the bond could not be permitted to control Courts of justice as to the evidence which, keeping within the rules of the general law of evidence in India, they may admit of payments; and there being nothing in that law to exclude direct oral evidence of payments, it is against good conscience and the policy of the law to reject it, and the absence of endorsement is a circumstance of some importance and ought not to be overlooked, though it is by no means conclusive. 1 B. 45 (49). **A**

(31) Limitation.

(a) An acknowledgment, which is made by, or by the direction of, a deceased creditor, of money received on account of a debt or interest due to him is admissible, as a declaration against interest, only if made *before*, but *not after*, the debt has become barred. *Briggs v. Wilson*, 5 De G. M. and G. 12; Phip. Ev., 4th Ed., p. 256. **B**

(b) Where an acknowledgment made by (or by the direction of) a deceased creditor of money received on account of a debt or interest due to him was made *after* a simple contract remedy, but *before* a remedy against lands in respect of the same debt, had become barred, the evidence was held to be inadmissible. *Newbould v. Smith*, 29 Ch. D. 882; Phip. Ev., 4th Ed., p. 256. **C**

7.—“(3) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it damages.”

—(Continued).

3.—INSTANCES OF DECLARATIONS AGAINST INTEREST HELD ADMISSIBLE AND INADMISSIBLE.

(1) Instances of declarations against interest held admissible.

- (a) In 1893, a suit to recover possession of certain land was instituted by the plaintiff, who, to prove his ownership, produced a registered mortgage-deed, executed in 1877 by N to G, in which the suit land was described, as a boundary and as the plaintiff's. In 1877, there was no litigation between the plaintiff and the defendants. N had no motive to make such a statement in the deed on behalf of the plaintiff. N was also dead at the date of this suit. *Held* that the mortgage-deed executed by an agriculturist was not a statement made in the ordinary course of business within cl. 2, S. 32, but that the document was admissible under cl. (3) of S. 32 as a statement against the pecuniary or proprietary interest of the person making it. 23 B. 63 (67). **D**
- (b) Material recitals or descriptions in a deed of mortgage by a deceased mortgagor may usually be admitted in evidence of the facts stated therein, under cl. 3 of S. 32 of the Evidence Act. It would indeed frequently be disastrous, if this were not the case. 23 B. 63 (72). **E**
- (c) On the death of one H, a Mahomedan lady, the question arose whether S and W were the legitimate children of Z, a predeceased son of H, and so were H's heirs. *Held*, that a petition presented to the *wasilka* office by S and W conjointly with F, a son of Z, since deceased, whose legitimacy is not questioned, describing H's husband, who had recently died, as their grandfather and praying that the *wasilka* (pension) allowed to him be allotted to them, was admissible as a statement made by F against his own interest, and as going to prove that their title as legitimate heirs was as good as F's. 7 C.W.N. 465. **F**
- (d) Suit for accounts by the representatives of a deceased person. A document purporting to be a copy made by the deceased of an account furnished to him by the defendant containing an entry of a payment of Rs. 5,000 by the deceased to the defendant, wherewith the defendant purchased Company's paper for the deceased was tendered in evidence. And it was proved by a witness that the deceased had stated to him that the document was a correct statement of his account with the defendant. *Held*, that this evidence was admissible and that, with the admission of this evidence, the document was also relevant as containing an entry by the deceased against his interest. 2 Ind. Jur. N.S. 54. **G**
- (e) Where a Hindu widow, in 1847, executed a *varaspatra* (a deed of heirship) in favour of B, *held* that it was admissible in evidence, under S. 32 (3), in a suit, to redeem a house and a garden, part of the property covered by the deed, by B's son, as it was a declaration manifestly against the widow's proprietary interest, whereby she divested herself of her widow's interest in the property, and, there being no evidence of her existence after 1847, she must be presumed to have been dead in 1881, the date of the suit. 11 B. 89 (93). **H**

7.—“(3) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it..damages.”

—(Continued).

3.—INSTANCES OF DECLARATIONS AGAINST INTEREST HELD ADMISSIBLE AND INADMISSIBLE.—(Continued).

- (f) An entry in an accoucheur's book that his fee had been paid for his professional services was admitted in evidence, as a statement against interest. *Higham v. Ridgway*, 2 Sm.L.C. 380; Wigm. Ev., 1905 Ed. S. 1465, p. 1828; 23 B. 63 (70); Steph. Dig., 7th Ed., Art. 28, p. 89. I
- (g) Where a customary payment by a certain part of a parish had to be proved, two entries on the same page of a parish book, signed by deceased church-wardens, admitting their ancient custom thus to apportion church-lay—chapelry of Haworth to pay one-fifth, etc.,—and recording that, after suit, a particular sum of money was received of Haworth, were held to be admissible. *Stead v. Heaton*, 4 P.R. 669; Steph. Dig., 7th Ed., Art. 28, p. 40 and Phip. Ev., 4th Ed., p. 262. J
- (h) A lessee of a corporation sued a certain person for tolls, and put in an ancient account of tolls purporting to have been rendered by a deceased treasurer of the corporation, but written by the town-clerk whose habit it was to enter the information when received from the treasurer. The present treasurer then attended before the auditors and produced vouchers verifying the clerk's statements. Held, that entries, charging the treasurer and signed by the auditor as allowed, were admissible, as being against the interest of the former. *Lancum v. Lowell*, 6 C. and P. 443-5; Phip. Ev., 4th Ed., p. 263. K
- (i) Where A propounded for probate a copy of a lost will of B, and to establish the existence of the original will, tendered a recital by a deceased person, C, who occupied land previously owned by B, in a deed whereby C charged his interest in the land, that he held a life-estate in it derived from the will of B, it was held that the recital was admissible, as being against C's interest by reason of its twofold limitation of the declarant's estate to a life interest, and under a particular document. *Sly v. Sly*, 2 P.D. 91; Phip. Ev., 4th Ed., p. 261. L
- (j) A statement made by a deceased agent of a landlord, when handing the landlord a sum of money, that “he had received it from A, as rent,” was held to be admissible, as being against interest, to prove the payment of rent by A to the landlord. *Bewley v. Atkinson*, 13 Ch. D. 283 (C.A.); Phip. Ev., 4th Ed., p. 259. M
- (k) A bill of lading in which certain goods were consigned to a certain person by the deceased master of the vessel in which they were shipped, was held to be relevant, as a declaration against the master's interest, to prove that the person in question was the owner of those goods. *Haddow v. Parry*, 3 Taunt. 303; Phip. Ev., 4th Ed., p. 259. N
- (l) The question was whether a tenant had paid rent to his landlord. A receipt for the rent given by the landlord, deceased, to his agent, or, a receipt given by the agent himself to the tenant is admissible, as being against interest. *Vivian v. Moat*, 44 L.T. 210; Phip. Ev., 4th Ed., p. 259. O

7.—“(3) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it..damages.”

—(Continued).

3.—INSTANCES OF DECLARATIONS AGAINST INTEREST HELD ADMISSIBLE AND INADMISSIBLE.—(Continued).

- (m) The plaintiff's acquisition of ownership from the deceased W being in issue, W's declaration that she had given the property to him was held to be relevant, the Court observing “The evidence ought to have been received. The admission supposed to have been made by Mrs. W., was against her own interest.” *Ival v. Finch*, 1 Taunt. 141; Wigm. Ev., 1905 Ed., S. 1476, p. 1835. P
- (n) The account entries of a deceased person, particularly a bailiff or steward, charging himself with the receipt of money, were admitted in evidence. *Barry v. Bebbington*, 4 T.R. 514; Wigm. Ev., 1905 Ed., S. 1476, p. 1835; Tay. Ev., 10th Ed., S. 673, p. 477. Q
- (o) An entry in the book of a deceased attorney of charges paid for a lease, alleged to have been drawn up on a certain day, was held to be admissible in evidence to prove that the lease was so drawn up on that day. *Doe v. Robson*, 15 East, 32; Tay. Ev., 10th Ed., S. 677, p. 480; Phip. Ev., 4th Ed., p. 258. R
- (p) Where a payment by B to A of interest on a mortgage was in question, accounts showing the receipt of such interest by a deceased steward of A, which accounts, though written by the steward's clerk, had been delivered by the steward at an audit, were held to be admissible to prove the payment, as having been adopted by the steward. *Doe v. Hawkins*, 2 Q.B. 212; Phip. Ev., 4th Ed., p. 263. S
- (q) Where the question was whether a deceased person was receiver of port dues for a corporation, evidence by the corporation that the deceased used to furnish accounts of such dues to the corporation, which accounts were produced from its records, was held to be sufficient to prove the facts, the office being a public one. *Exeter v. Warren*, 5 Q.B. 801; Phip. Ev., 4th Ed., p. 109 (110). T
- (r) Where the title to a certain land was in question, the fact that a deceased person accepted an allotment of less of the land than he was *prima facie* entitled to, is relevant even against strangers, as an admission against proprietary interest. *Gery v. Redman*, 1 Q.B.D. 161; Phip. Ev., 4th Ed., pp. 116, 117 and 261. U
- (s) The question was whether a deceased person gained a settlement in a certain parish by renting a tenement; a statement by that person, whilst in possession of a house, that he had paid rent for it, is relevant, as it reduces the interest which would otherwise be inferred from the fact of his possession. *R. v. Exeter*, 4 Q.B. 341; Steph. Dig., 7th Ed., Art. 27, p. 40; Phip. Ev., 4th Ed., p. 260. Y
- (t) To show the fact of a surrender of a life estate, the books of a deceased attorney, charging for services, in drawing and engrossing the surrender, and acknowledging payment therefor, were held to be admissible, the Court observing that, “it was a circumstance

7.—“(3) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it damages.”

—(Continued).

3.—INSTANCES OF DECLARATIONS AGAINST INTEREST HELD ADMISSIBLE AND INADMISSIBLE—(Continued).

material upon the enquiry into the reasonableness of presuming a surrender; and not to be suspected to be done for this purpose; that, if E was living, he might undoubtedly be examined to it, and that was now the best evidence.” *Warren v. Greenville*, 2 Stra. 1129; Wigm. Ev., 1905 Ed., S. 1476, p. 1835. **W**

- (u) A declaration by a wife as to the existence of a will of her husband by which she profited less than by his intestacy was held to be admissible in evidence. *Flood v. Russell*, 29 L.R. Ir. 96; Wigm. Ev., 1905 Ed., S. 1461, p. 1825; Phip. Ev., 4th Ed., p. 258. **X**

- (v) Where the question was whether a right of common existed over a certain field, a statement by a deceased tenant for a term of the land in question, that he had no such right, was held to be relevant as against his successors in the term, but not as against the owner of the field. *Papendick v. Bridgwater*, 5 E. and B. 166; Steph. Dig., 7th Ed., Art. 28, p. 40. **Y**

- (w) Where it was in dispute whether certain repairs were made at the expense of a certain person, a bill for doing them, receipted by a deceased carpenter, was held to be relevant, there being no other evidence of the repairs having been done, or of the money having been paid. *R. v. Lower Heyford*; note to *Higham v. Ridgway*, 2 Sm.L.C. 329; Steph. Dig., 7th Ed., Art. 28, p. 40. **Z**

- (x) Where it was in question whether a person received rent for a certain land, a deceased steward's account, charging himself with the receipt of such rent for the person in question, was held to be relevant, although the balance of the whole account was in the steward's favour. *Williams v. Graves*, 8 C. and P. 592; Steph. Dig., 7th Ed., Art. 28, p. 40. **A**

- (y) A statement by a deceased person that he had received money from another and paid it over to a third person, which third person, it appeared, could not give a valid discharge, was held to be admissible in evidence. *Orrett v. Corser*, 21 Beav. 52; Phip. Ev., 4th Ed., p. 259. **B**

- (z) In taking accounts between a mortgagor and a deceased mortgagee of a barge, an account book of the mortgagee, containing entries of payments made to him by the mortgagor as well as disbursements made by him on account of the barge, was held to be admissible evidence on behalf of the mortgagee's executors, on the ground of the close connection between the two sets of entries. *The Swiftsure*, 82 L.T. 389; Best Ev., 9th Ed., S. 500, p. 416; Phip. Ev., 4th Ed., p. 262. **C**

- (aa) A letter acknowledging the receipt of a certain will was held to be admissible to show that the testator sent the will to the writer of the letter. *Pyke v. Crouch*, 1 Ld. Raym. 730; Phip. Ev., 4th Ed., p. 259. **D**

7.—“(3) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it damages.”

—(Continued).

3.—INSTANCES OF DECLARATIONS AGAINST INTEREST HELD ADMISSIBLE AND INADMISSIBLE.—(Continued).

(bb) Where in a suit for enhancement of the rent of a talukdari tenure, road cess returns were tendered in evidence (S. 95, Bengal Cess Act, 1880), it was held that the returns, though not conclusive were admissible in evidence as a basis on which the assets of the taluq might be ascertained, and so fix a fair and equitable limit to enhancement. 30 C. 1033 (1042) (P.C.) ; overruling 26 C. 832. **E**

(cc) On the death of one H, a Mahomedan lady, the question arose whether S and W were the legitimate children of Z, a predeceased son of H, and so were H's heirs. Certain documents bearing dates from 1860 to 1890 were produced from the wasika office, in which H, then living, had described S and W as her heirs and their mothers as the *mutai* wives of her son. *Held*, that these documents were admissible in evidence, as containing statements by one who had the best means of knowledge made at times when the present controversy was not in contemplation. 7 C.W.N. 465. **F**

(2) Document *res inter alios acta*.

Where it was contended that certain documents were not admissible against a party, on the ground that they were *res inter alios acta* and did not come within any of the classes of evidence enumerated in S. 32 of the Evidence Act, it was held that they were admissible against him, as being clearly relevant against persons through whom he claimed. 31 C. 871 (883) (P.C.). **G**

(3) Instances of declarations against interest held inadmissible.

(a) To prove whether certain jewels, which a deceased person had delivered to his wife for her use, belonged to her absolutely or only for her life, a codicil made by the deceased and revoked by him stating that he had given them to her for her life, was held not to be a declaration, which was against the interest of the deceased person. *Re Bowes*, W.N. 138 ; Phip. Ev., 4th Ed., p. 258. **H**

(b) Where the question was whether certain shares belonged to a certain person, an entry in the day book of a deceased stock-broker—“bought for.. A ...200 L.C. Co.'s shares, £1,400,”—was held to be inadmissible as a declaration against the interest of the broker ; as, if the price fell, and he was not bound to deliver any specific shares, the transaction might be to his advantage. *Massey v. Allen*, 13 Ch. D. 558 ; Phip. Ev., 4th Ed., p. 258. **I**

(c) Where the payment by A of interest to B had to be proved, a letter written by A's former attorney—now deceased—to B, alleging that the attorney had paid to the account of B, a sum of money which he had received from A as interest, was held to be inadmissible in evidence as a statement against interest. *Newbould v. Smith*, 33 Ch. D. 127, (C.A.) ; Phip. Ev., 4th Ed., p. 259. **J**

7.—“(3) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it damages.”

—(Continued).

3.—INSTANCES OF DECLARATIONS AGAINST INTEREST HELD ADMISSIBLE AND INADMISSIBLE.—(Continued).

- (d) An entry by the deceased servant of a jobmaster of the terms upon which horses were hired from the jobmaster was held to be inadmissible, as a statement against the servant's interest, to prove the terms. *Colvert v. Canterbury*, 2 Esp. 646; Phip. Ev., 4th Ed., p. 259. **K**
- (e) A letter by a clerk, notifying the employer of the arrival of B's draft “with three huge cases, at the office,” and going on to state the terms of the contract with B, was held to be inadmissible in evidence, the Court observing, “It is no more than an admission that he has the care of the three chests which have arrived at the office, and the possibility, that this statement might make him liable in case of their being lost, is an interest of too remote a nature to make the statement admissible in evidence.” *Per Blackburn, J. Smith v. Blakey*, 2 Q.B. 326. Wigm. Ev., 1905 Ed., S. 1461, p. 1825; Phip. Ev., 4th Ed., p. 259. **L**
- (f) Where the question was whether a gate on a certain land, the property of which was in dispute, was repaired by a certain person, an account kept by that person's deceased steward, in which the latter charged the former with the expense of repairing the gate, and on the opposite side of the entry credited himself with certain disbursements and the tenants with certain allowances, was held to be irrelevant to prove the disbursements and allowances, the debit and credit items not being connected together by any specific reference. *Doe v. Bevis*, 7 C.B. 456; Steph. Dig., 7th Ed., Art. 28, p. 40, (observing that it would have been deemed relevant, if it had appeared that the person in question admitted the charge). Phip. Ev., 4th Ed., pp. 261-2. **M**
- (g) A debtor and creditor account, wherein a balance is struck in favour of the deceased declarant, but where the credit items are not otherwise connected with the debit ones, was held to be inadmissible evidence. *Whaley v. Carlisle*, 15 W.R. 1183; Phip. Ev., 4th Ed., p. 262. **N**
- (h) The question was whether a certain spot was or was not included within the waste of a certain manor. A declaration by the deceased landlord that he was entitled to the waste up to a certain point, which did not include the spot in question, was held to be inadmissible, as the lord was not in possession of the spot, and as it was not against his proprietary interest, for, though he disclaimed as to one part, he affirmed regarding the other. *Crease v. Barrett*, 1 C.M. and R. 919. See also *Pite v. Hayes*, 14 N.H. 20; Phip. Ev., 4th Ed., p. 260. But see Wigm. Ev., 1905 Ed., S. 1458, p. 1823, (where the learned professor says that a declaration as to the extent of one's land and one as to the limits of one's interest in it stand on the same footing). **O**
- (i) Held that the certificate of a deceased auditor was not admissible to prove an account, on the ground of his liability to an action of negligence, if the account turned out wrong. *Fivian v. Moat*, 44 L.T. 210; Phip. Ev., 4th Ed., p. 259. **P**

7.—“(3) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it...damages.”

—(Continued).

3.—INSTANCES OF DECLARATIONS AGAINST INTEREST HELD ADMISSIBLE AND INADMISSIBLE.—(Continued)

- (j) Where a deceased occupier of land heard another person state something respecting its ownership, a declaration by the occupier as to what he so heard is not admissible as a statement against proprietary interest. *Trimblestown v. Kemmis*, 9 C. and P. 780; *aliter* if he adds that he believes the statement to be true. Phip. Ev., 4th Ed., p. 260. **Q**
- (k) Where a deceased tenant for life made a declaration as to the boundary of the estate, it was held to be inadmissible against the remainderman. *Howe v. Malkin*, 27 W.R. 340; Phip. Ev., 4th Ed., pp. 250-1. **R**
- (l) Where the question was whether certain repairs were made at the expense of a certain person, a bill for doing them receipted by a deceased carpenter was held to be irrelevant, there being no other evidence of the repairs being done or of the money being paid. *Doe v. Vowles*, 1 M. and R. 261, *dissented from* in *Taylor v. Witham*, 3 Ch. D. 605, by *Jessel, M.R.* Steph. Dig., 7th Ed., Art. 28, p. 40. **S**
- (m) Where certain deceased tenants made certain statements in cess returns filed by them regarding the assets of the tenancy, it was held that they were not admissible in evidence, under S. 32 of the Evidence Act, as evidence in favour of the person submitting them. 26 C. 832 (838); *but* see 30 C. 1033. **T**
- (n) In a suit for accounts by the representatives of A, deceased, a document was offered as evidence purporting to be a copy made by the deceased of an account furnished to him by the defendant, containing an entry of a payment of Rs. 5,000 by the deceased to the defendant, and the purchase therewith by the defendant of Company's paper for the deceased. *Held* that by itself the document was inadmissible. 2 Ind. Jur. N.S. 54. **U**
- (o) An admission by an occupier that the property was intersected by a public highway, or that a neighbour has a right of easement upon it, or that he was not entitled to common of pasture in it, will be admissible only against himself and those who claim through him, and will not bind the landlord or a stranger. *R. v. Bliss*, 7 L.J.Q.B. 4 and *Scholes v. Chadwick*, 2 M. and R. 507; Tay. Ev., 10th Ed., S. 687, p. 487. **Y**
- (p) The report of a Special Commissioner was held to be inadmissible as evidence, as it did not come within any provision of the Evidence Act which would make it admissible. 22 W.R. 231. **W**

(4) Observations on the words “would have exposed him,” in clause 3.

“The words ‘would have exposed him’ require some observation. They will no doubt be construed to mean ‘would have exposed him at the time that the statement was made.’ It could never have been intended that a statement made after this risk had passed away, as, for example, after a suit for damages had become barred by limitation, or after the expiry of the two years within which prosecutions for offences under

7.—“(3) *When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it damages.*”

—(Concluded).

3.—INSTANCES OF DECLARATIONS AGAINST INTEREST HELD ADMISSIBLE AND INADMISSIBLE.—(Concluded).

the Indian Christian Marriage Act must be instituted (see S. 76. Act XV of 1872), should be admitted, merely because, if made some months or weeks earlier, it would have exposed the person making the statement to a criminal prosecution or to a civil suit for damages. This view has since been supported by the Calcutta High Court and is generally adopted by modern authorities.” Field’s Ev., 6th Ed., p. 196. X

8.—“(4) *When the statement gives the opinion of any such person, as to the existence of any public right arisen.*”

1.—GENERAL.

(1) Applicability of S. 32, cl. 4.

(a) S. 32, cl. 4 is not applicable to a case, where the evidence is required to prove a fact in issue, and not merely a relevant fact. 15 B. 565 (579). Y

(b) Cl. 4, S. 32 would manifestly be inapplicable to a document purporting to deal with the rights of a private individual as against the public, in which the interests of the individual formed the subject-matter of the statement. 3 Bom. L.R. 1 = 25 B. 433 (441). Z

(2) Construction of “right” in cl. 4.

The word “right” is qualified by the word “public” in cl. 4, S. 32. Per *Mitter, J.* 6 C. 171 (180) (F.B.) See also under S. 48, *infra*. A

(3) “Right,” meaning and scope of.

The word “right” is used in cl. 4, S. 32, which deals with matters of public or general “right or custom,” as including those properties only of an incorporeal nature, which, in legal phraseology, are generally called “rights,” more especially, as it is used in conjunction with the word “custom.” Per *Garth, C.J.* 6 C. 171 (186-7) (F.B.) See also under S. 48, *infra*. B

(4) Ground of admissibility.

The grounds on which declarations regarding public or general rights are admissible are (a) death; (b) necessity, ancient facts generally being incapable of direct proof; and (c) the guarantee of truth furnished by the public nature of the rights, which is calculated to shut out individual bias and to make mis-statements impossible by subjecting them to frequent contradiction. Phip. Ev., 4th Ed., p. 272. C

(5) Principle of necessity.

(a) “The necessity is here to be found in the general dearth of other satisfactory evidence of the desired fact, by reason of which we are thrown back upon reputation as a source of information. In the exceptions for land boundaries and customs, this necessity is found to exist where the matter is an ancient one, and thus living witnesses are not to be had. In the exceptions for character and marriage, the necessity lies in the usual difficulty of obtaining other evidence than reputation.” Wigm. Ev., 1905 Ed., S. 1580, p. 1932. D

8.—“(4) *When the statement gives the opinion of any such person, as to the existence of any public right, arisen.*”—(Continued).

1.—GENERAL.—(Continued).

- (b) The declarations of deceased persons, who are supposed to have had a personal knowledge of the facts, and to be quite disinterested persons, are admissible in evidence. In cases of general rights, depending upon immemorial usage, living witnesses can only speak of their own knowledge as to what has occurred in their own time; and to supply the deficiency the law admits the declarations of deceased persons. *Berkeley Peerage Case*, 4 Camp. 415; Wigm. Ev., 1905 Ed., S. 1582, p. 1933; Tay. Ev., 10th Ed., S. 608, p. 413. E
- (c) The admissibility of the declarations of deceased persons in such cases is allowed, as these rights and liabilities are generally of ancient and obscure origin, and may be acted upon only at distant intervals of time; direct proof of their existence should not, therefore, be demanded. *R. v. Bedfordshire*, 4 E. and B. 535; Wigm. Ev., 1905 Ed., S. 1582, p. 1933; Tay. Ev., 10th Ed., S. 608, p. 430. F
- (d) The fact sought to be proved being of too ancient a date to be proved by eye-witnesses, and not of a character to be made a matter of public record, unless it could be proved by tradition, there would seem to be no mode in which it could be established. It is a universal rule, founded upon necessity, that the best evidence, of which the nature of the case admits, will be always relevant. *McKinnon v. Bliss*, 21 N.Y. 218; Wigm. Ev., 1905 Ed., S. 1582, p. 1933. G
- (e) It must be obvious that when the country becomes cleared and is in a state of improvement, it is often difficult to trace the lines of a survey made in early times. The argument *ex necessitate rei* will, therefore, apply. *Montgomery v. Dickey*, 2 Yeates 213; Wigm. Ev., 1905 Ed., S. 1582, p. 1933. H
- (f) Questions of boundary, after the lapse of many years, become of necessity questions of hearsay and reputation. For, boundaries are artificial, arbitrary, and often perishable; and, when a generation or two have passed away, they cannot be established by the testimony of eye-witnesses. *Harriman v. Brown*, 8 Leigh 707; Wigm. Ev., 1905 Ed., S. 1582, p. 1934. I
- (g) Reputation or hearsay, taken in connection with other evidence, is entitled to respect in cases of boundary, when the lapse of time is so great as to render it difficult, if not impossible, to prove the boundary by the existence of the primitive landmarks, or other evidence than that of hearsay. *Daggell v. Willey*, 6 Fla. 511; Wigm. Ev., 1905 Ed., S. 1582, p. 1934. J

(6) **Circumstantial guarantee of trustworthiness.**

- (a) “The circumstances creating a fair trustworthiness are found, when the topic is such that the facts are likely to have been generally inquired about and persons having personal knowledge have disclosed facts which have thus been discussed in the community; and thus the community’s conclusion, if any has been formed, is likely to be a trustworthy one. This, under different conditions, is the common

8.—“(4) *When the statement gives the opinion of any such person, as to the existence of any public right.. arisen.*”—(Continued).

1.—GENERAL.—(Continued).

ground of trustworthiness for reputation on land boundaries and customs, for events of general history, and for character and marriage. There is, therefore, on the whole, a certain underlying unity of principle for all the recognised uses of reputation.” Wigm. Ev., 1905 Ed., S. 1580, p. 1932. K

(b) The principle on which the exception of reputation regarding public rights rests is this, —that the reputation can hardly exist without the concurrence of many parties interested to investigate the subject, and such concurrence is presumptive evidence of the existence of an ancient right, of which direct proof cannot be given in most cases. *Wright v. Tatham*, 7 A. and E. 358; Wigm. Ev., 1905 Ed., S. 1583, p. 1935; Tay. Ev., 10th Ed., S. 608, p. 430. L

(c) One exception to the hearsay rule is to be found in the case of public rights. There the general interest which belongs to the subject would lead to immediate contradiction from others, unless the statement proved were true; and the public nature of the rights excludes the probability of individual bias and makes the sanction of an oath less necessary. *Wright v. Tatham*, 5 Cl. and F. 720; per Alderson, B. Wigm. Ev., 1905 Ed., S. 1583, p. 1935; see also Tay. Ev., 10th Ed., S. 608, p. 430. M

(d) The admissibility of the declarations of deceased persons in such cases is sanctioned, because, with local matters wherein the community are interested all persons living in the neighbourhood are likely to be acquainted; because, common rights and liabilities being naturally talked of in public, what is dropped in conversation respecting them may be presumed to be true; because, conflicting interests would lead to contradiction from others, if the statements were false, and, thus, a trustworthy reputation may arise from the concurrence of many parties unconnected with each other, who are all interested in investigating the subject. Per Campbell, L.C.J. in, *R. v. Bedfordshire*, 4 F. and B. 535; Wigm. Ev., 1905 Ed., S. 1583, p. 1935. See also Tay. Ev., 10th Ed., S. 608, p. 430. N

(e) The law does not dispense with the sanction of an oath and the test of cross-examination as a pre-requisite for the admission of verbal testimony, unless it discovers in the nature of the case some other sanction or test deemed equivalent for ascertaining the truth. The matters included in the class under consideration are such that many persons are deemed cognisant of them and interested in their truth; so that there is neither the ability nor the temptation to misrepresent that exists in other cases; and the matters are presumably the subject of frequent discussion and criticism, which accomplishes in a manner the purpose of a cross-examination. After passing such an ordeal, it is reasonably safe to accept the result as an established fact. *Southwest School District v. Williams*, 48 Conn. 507; Wigm. Ev., 1905 Ed., S. 1583, p. 1935. O

8. "(4) When the statement gives the opinion of any such person, as to the existence of any public right... arisen." (Continued).

1.—GENERAL.—(Continued).

(7) Public and general rights.

- (a) "'Public rights' are those common to all members of the State, *e.g.*, rights of highway and ferry, or of fishery in tidal rivers. 'General rights' are those affecting any considerable section of the community, *e.g.*, questions as to the boundaries of a parish, or manor." Phip. Ev., 4th Ed., p. 273. See also Tay. Ev., 10th Ed., S. 609, p. 490. **P**
- (b) Where a right of common for individuals, not for the community, was involved, the Court observed, "Reputation is not admissible in the case of such separate rights, each being private, unless the proposition can be supported that, because there are *many* such rights, the rights have a public character. We think this position cannot be maintained. It is impossible to say in such a case where the dividing point is. What is the number of rights which is to cause their nature to be changed and to give them a public character? The number of these private rights does not make them to be of a public nature. *Per* Parke, B. *Dunraven v. Llewellyn*, 13 Q.B. 809; Wigm. Ev., 1905 Ed., S. 1587, p. 1939; Phip. Ev., 4th Ed., p. 273; Tay. Ev., 10th Ed., S. 614, p. 435. **Q**

(8) Test of public and general interest.

The kind of interest which must be involved is interest of a pecuniary nature, or an interest affecting the legal rights or liabilities of a community, *Il. v. Bedfordshire*, 4 E. and B. 535; Phip. Ev., 4th Ed., p. 272. See also Tay. Ev., 10 Ed., S. 615, p. 436. **R**

(9) Distinction between public and private rights.

- (a) In *Weeks v. Parke*, 1 M. and S. 689, decided shortly after *Mowood v. Wood*, 14 East 329, the argument was accepted that any fixed and arbitrary distinction between 'public' and 'private' rights should be repudiated, and a flexible test be applied in each case,—this test being whether the matter affected the interests of a large number of persons. Wigm. Ev., 1905 Ed., S. 1587, p. 1939. See also Tay. Ev., 10th Ed., Ss. 609 and 613, pp. 490-1 and 493-4. **S**
- (b) Where a right of common was in issue, the Court observed, "I take it that where the term 'public right' is used, it does not mean 'public' in the literal sense, but is synonymous with 'general,' *i.e.*, what concerns a multitude of persons." *Per* Bayley, J. *Weeks v. Sparke*, 1 M. and S. 690; Wigm. Ev., 1905 Ed., S. 1587, p. 1939; Tay. Ev., 10th Ed., S. 613, p. 493. **T**
- (c) Where a right of common was in issue, the Court observed, "Reputation-evidence has been extended to other rights which strictly cannot be called public, such as manors, parishes, and a modus, which comes the nearest to this case. That, strictly speaking, is a private right, but has been considered as public, as regards the admissibility of this species of evidence, because, it affects a large number of occupiers within a district." *Per* Dampier, J. *Weeks v. Sparke*, 1 M. & S. 690. Wigm. Ev., 1905 Ed., S. 1587, p. 1939. **U**

8. —“(4) *When the statement gives the opinion of any such person, as to the existence of any public right, arisen.*”—(Continued).

1.—GENERAL.—(Continued).

(10) **Instances of matters of public or general interest held admissible.**

- (a) Questions regarding boundaries of a county, town, parish, manor, or hamlet. *Nicholls v. Parker*, 11 East 331n. Y
- (b) Proceedings against the lord of a manor for causing or permitting, the destruction of a sea-bank by which a royal castle was damaged. *Mercer v. Denne*, 2 Ch. 559-60. W
- (c) The existence of a right to tolls on a public road. *Brett v. Beales*, M. and M. 416. X
- (d) A custom of electing the churchwardens of a parish. *Berry v. Banner*, Pea. R. 156. Y
- (e) The question whether certain landowners were bound to repair a bridge or sea-wall. *R. v. Sutton*, 8 A. and E. 516. Z
- (f) A custom of descent in a manor. *Denne v. Spray*, 1 T.R. 466. See Phip. Ev., 4th Ed., pp. 277-8, and the other cases cited therein. See also Tay. Ev., 10th Ed., S. 613, pp. 433-4. A

(11) **Private rights—Declarations inadmissible.**

The declarations of deceased persons regarding private rights are irrelevant, because these are not likely to be so commonly or correctly known, and are more likely to be misrepresented. *Dunraven v. Newelllyn*, 15 Q. B. 791, Phip. Ev., 4th Ed., p. 273; Wigm. Ev., 1905 Ed., S. 1587, p. 1939. B

(12) **Public right and private right identical—Right whether public or private—Declarations admissible.**

The declarations of deceased persons are admissible, where the question is whether a right is public or private. *It. v. Bliss*, 7 A. and E. 550—or where the private right is identical with a public right—*Thomas v. Jenkins*, 6 A. and E. 525; Phip. Ev., 4th Ed., p. 273. C

(13) **Instances of matters of a private nature held inadmissible.**

- (a) Questions regarding the boundaries between private estates. *Clothier v. Chapman*, 14 East 331n. D
- (b) The existence of a private right of way over a field. *Reed v. Jackson*, 1 East 355. E
- (c) Questions regarding the liability of the sheriff of a county or the corporation of the city to execute criminals. *It. v. Antrobus*, 2 A. and E. 793. F
- (d) A custom of electing the master of a grammar school. *Whithnell v. Gartham*, 1 Esp. 322. See also Tay. Ev., 10th Ed., S. 614, p. 435. See Phip. Ev., 4th Ed., pp. 277-8 and the cases cited therein. G

(14) **Evidence of reputation upon private titles.**

“Evidence of reputation upon general points is receivable, because, all mankind being interested, it is natural to suppose that they may be conversant with the subjects and that they should discourse together about them, having all the same means of information. But how can this apply to private titles? How is it possible for strangers to know of what concerns only these private titles?” *Morewood v. Wood*, 14 East, 329, per *Kenyon*, L.C.J. Wigm. Ev., 1905 Ed., S. 1587, p. 1939; Tay. Ev., 10th Ed., S. 616, p. 437. H

8.—“(4) *When the statement gives the opinion of any such person, as to the existence of any public right..arisen.*”—(Continued).

1.—GENERAL.—(Concluded).

(15) **English and Indian Law.**

(a) “A distinction has been drawn under English Law between the meaning of the terms ‘public and general,’ the former being applied to that which concerns every member of the State, while the latter is limited to a lesser, though still a considerable, portion of the community, as for example, to the persons living in a particular district or neighbourhood. In matters strictly public, reputation from any one has been held receivable, while in matters of general interest, the testimony of persons wholly unconnected with the place has been regarded as inadmissible. So far as *admissibility* is concerned, the Indian Act makes no distinction; but in estimating the weight to be allowed to the evidence in any particular case, it would make a wide difference whether the statements were that of a person living in the vicinity, and, therefore, likely to have information, or that of a person living at a distance and not in the habit of visiting the neighbourhood. In connection with this point, attention should be paid to the express words of the law—‘of the existence of which, if it existed, he would have been likely to be aware.’ The Indian Evidence Act here follows the English Law. It was at one time thought in England that proof of the exercise within the period of living memory of the right claimed was a necessary preliminary to the admission of this evidence;” (see *Crease v. Barrett*, 1 C.M. and R. 919) “but that doctrine has been of late years overruled, and it finds no place in the Indian Evidence Act.” Field Ev., 6th Ed., pp. 136-7. I

(b) The distinction between ‘public’ and ‘general’ is important in English Law, for when the point in issue is of a ‘public’ character, evidence regarding it from any person is admissible, though he may have no specific means of knowledge. In the case of ‘general’ rights, on the other hand, the declarant should have had competent knowledge. But, as this clause requires a probability of knowledge in all cases, this distinction has no importance in India. In both classes of rights, the right must have been one, of whose existence, if it existed, the declarant would have been likely to be aware. See A. A. and W. Ev., 4th Ed., p. 214. J

(16) **Distinction between evidence of reputation to establish and to disparage public right.**

Suit by Zemindar to recover certain hill tracts of forest lands from Government. Certain ayakut accounts, made for revenue purposes to show the sources of revenue in each village and giving the limits of the villages to which they referred, were relied on by both the parties. The Court observed that it was not material that the Zemindar claimed the hills as his private property, for the real issue was whether they were State or private property, and held that no distinction could be drawn between the evidence of reputation to establish, and that to disparage, a public right, (*Drinkwater v. Porter*. 7 C. and P. 181), and that on this point the Indian Evidence Act is in accordance with the rules accepted by the English Courts. (See S. 32, cl. 4). 9 M. 285 (294). K, L.

3.—“(4) *When the statement gives the opinion of any such person, as to the existence of any public right arisen.*”—(Continued).

2.—CONDITIONS OF ADMISSIBILITY OF DECLARATIONS AS TO PUBLIC RIGHT OR CUSTOM OR MATTERS OF GENERAL INTEREST.

(1) General conditions of admissibility.

- (a) The matter to be proved must be ancient, *i.e.*, of a past generation. The custom, boundary, etc., must be either a former one, or, if it is still in existence, its existence in a previous generation must be the subject with which the reputation is concerned;
- (b) the reputation adduced must likewise be ancient, *i.e.*, of a past generation;
- (c) if the reputation is proved by means of the reported statements of individuals, the individuals, whose statements are reported, must be proved to be deceased. Wigm. Ev., 1905 Ed., S. 1582, p. 1934. **M**

(2) Reputation must pertain to questions of general interest only.

- (a) Evidence of reputation as to an exemption of the Sheriff of Chester county from executing criminals being held to be inadmissible, the Court observed that reputation was admitted where a public interest was concerned and that it could not see how the public were interested in the question, which sheriff was to perform the duty. *R. v. Antrobus*, 2 A. and E. 793; Wigm. Ev., 1905 Ed., S. 1586, p. 1938. See also *R. v. Bedfordshire*, 4 E. and B. 535; per Campbell, L.C.J., cited *ibid.* See also Tay. Ev., 10th Ed., S. 614, p. 495. **N**
- (b) Where the fact to be proved is a particular date, though connected incidentally with a public matter, it is easy to see that it could not stand out as a salient fact for contemporaneous criticism and discussion so as to furnish any guarantee of its correctness. *Southwest School District v. Williams*, 48 Conn. 507; Wigm. Ev., 1905 Ed., S. 1586, p. 1938. **O**
- (c) The exception, as it originated in the English Courts, was confined to such boundaries as were matters of public concern, and was part of a larger exception to the rule. On questions respecting the existence of manors; manorial customs; customs of mining in particular districts; a parochial modus; a boundary between counties, parishes or manors; the limits of a town; a right of common; a prescriptive liability to repair bridges; the jurisdiction of certain Courts—matters in which the public are concerned, as having a community of interest, from residing in one neighbourhood, or being entitled to the same privileges, or subject to the same liabilities,—common reputation and the declarations of deceased persons are received, if made, *ante litem motam*, by persons in a position to be properly cognizant of the facts. *Robinson v. Dewhurst*, 15 C.C.A. 466, 68 Fed. 836; Wigm. Ev., 1905 Ed., S. 1586, p. 1938. **P**

(3) Reputation, meaning of.

Reputation is no other than the hearsay of those who may be supposed to have been acquainted with the fact, handed down from one to another. *Higham v. Ridgway*, 10 East 120; Wigm. Ev., 1905 Ed., S. 1584, p. 1935. **Q**

8.—“(4) *When the statement gives the opinion of any such person, as to the existence of any public right..arisen.*”—(Continued).

2.—CONDITIONS OF ADMISSIBILITY OF DECLARATIONS AS TO PUBLIC RIGHT OR CUSTOM OR MATTERS OF GENERAL INTEREST.—(Continued).

(4) **Reputation, not individual assertion, admissible.**

(a) The declaration did not amount to a general reputation ; for, one person's declaration of the existence of a fact cannot prove that the allegation is generally reputed to be well-founded. *Bender v. Pitzer*, 27 Pa. 335 ; Wigm. Ev., 1905 Ed., S. 1584, p. 1936. **R**

(b) The evidence is to be admitted from old persons of what they have heard other persons, of the same neighbourhoods, who are deceased, say respecting the right. *Weeks v. Sparke*, 1 M. and S. 689 ; Wigm. Ev., 1905 Ed., S. 1584, p. 1935. **S**

(5) **Individual declarations should be the outcome of established reputation.**

(a) It must be proved that the declarations establishing the reputation, and the acts done by the community in consequence, were the result of a received reputation. The principal use of evidence of this sort is to show that the act done, or declaration made, was not a new thought adapted to serve some particular occasion, but the outcome of a received notion of the existence of a custom requiring the performance of the acts and accounting for or explaining it by such declaration. Such evidence should always be general. *Moseley v. Davies*, 11 Price, 180 ; Wigm. Ev., 1905 Ed., S. 1584, p. 1936. **T**

(b) The testimony of a deceased person that he had planted a willow in a certain spot to show where the boundary had been of a way alleged to be public was rejected, the Court observing, “He does not assert that he has heard old people say what was the public road ; but he plants a tree and asserts that the boundary of the road is at that point. It is the mere allegation of a fact by an individual, that is, he knew it to be so from what he had himself observed, and not from reputation.” *R. v. Bliss*, 7 A. and E. 550 ; Wigm. Ev., 1905 Ed., S. 1584, p. 1936. See also *Tay. Ev.*, 10th Ed., S. 617, pp. 437-8. **U**

(6) **Reputation must be, not as to specific acts, but about the custom or right itself.**

(a) “A witness may be permitted to state what he has heard from dead persons respecting the reputation of the right ; but not to state facts of the exercise of it which the dead persons said they had seen.” *Pea. Ev.*, 13 ; Wigm. Ev., 1905 Ed., S. 1585, p. 1937. **Y**

(b) In admitting evidence of reputation from deceased persons as to a tithe payment, the Court observed, “I take this to be the distinction as to evidence of reputation : if they confine it to the fact of payment, it would not be evidence ; unless the tradition that came with it was a reputation that had always been the case.” *Harwood v. Sims*, Wightw. 112. Per *Macdonald*, C. B. Wigm. Ev., 1905 Ed., S. 1585, p. 1937. See also *Tay. Ev.*, 10th Ed., S. 617, p. 438. **W**

8.—“(4) *When the statement gives the opinion of any such person, as to the existence of any public right..arisen.*”—(Continued).

2.—CONDITIONS OF ADMISSIBILITY OF DECLARATIONS AS TO PUBLIC RIGHT OR CUSTOM OR MATTERS OF GENERAL INTEREST.—(Continued).

- (c) Such hearsay evidence of general customs and the common repute about them is safe, because, if not true, it can be disproved by other evidence of the same kind. But, even in these cases, hearsay is restricted from being evidence of particular facts, because, in such instances, although the evidence should be false, yet counter evidence could not be expected. *Cherry v. Boyd*, Litt. Sel. Cas., 8; Wigm. Ev., 1905 Ed., S. 1585, p. 1937. **X**
- (d) It is a rule that evidence of reputation must be confined to general matters and not touch particular facts, i.e., the act of planting the willow. *R. v. Bliss*, 7 A. and E. 550. Per Coleridge, J. Wigm. Ev., 1905 Ed., S. 1585, p. 1937. **Y**
- (e) Where the declarations not only negative a general right directly, but also do so indirectly, (as for instance, by setting up an inconsistent private claim,—*Drunkwater v. Porter*, 7 C. and P. 181), they are admissible in evidence. Phip. Ev., 4th Ed., p. 274. See also Tay. Ev., 10th Ed., Ss. 619, 615 and 620, pp. 434, 436, 440. **Z**
- (f) To render declarations as to public rights admissible, they must concern the general right, and not the particular facts which support or negative it. *R. v. Bliss*, 7 A. and E. 550; *Crease v. Barrett*, 1 C.M. and R. 919, 930. *R. v. Berger*, 1 Q.B. 823 and *Mercer v. Denne*, 2 Ch. 565; Phip. Ev., 4th Ed., p. 274. **A**
- (g) Where a general right is indirectly negatived by all mention of it being omitted where it might be reasonably expected to be mentioned, it will be held to be admissible. *Edgar v. Fisheries Comms.*, 23 L.T.N. S. 732 and *Portland v. Hill*, 2 Eq. 765; Phip. Ev., 4th Ed., p. 274. See also Tay. Ev., 10th Ed., S. 620, p. 440. **B**
- (h) Evidence of what old persons had said concerning the boundaries of parishes and manors, though not as to particular facts or transactions, was held to be admissible. *Nicholls v. Parker*, 14 East 331; Wigm. Ev., 1905 Ed., S. 1585, p. 1937; Tay. Ev., 10th Ed., S. 619, p. 434. **C**

(7) Condition of admissibility ‘*Lis mota.*’

- (a) The declarations should have been made *ante litem motam*, i.e., before the beginning of any controversy, and not simply before the commencement of any suit, involving the same subject matter. The operation of bias is thus excluded. *Berkeley Peerage Case*, 4 Camp. 401, 417; Phip. Ev., 4th Ed., p. 273. See also Wigm. Ev., 1905 Ed., S. 1588, p. 1942. **D**
- (b) Where the declarations are made after the commencement of the situation from which the controversy arises, they are admissible, if they are made before any dispute has actually sprung. *Shedden v. A.-G.*, 30 L.J.P. 217; Phip. Ev., 4th Ed., p. 273. See also Tay. Ev., 10th Ed., S. 629, pp. 446-7. **E**

8.—“(4) *When the statement gives the opinion of any such person, as to the existence of any public right..arisen.*”—(Continued).

2.—CONDITIONS OF ADMISSIBILITY OF DECLARATIONS AS TO PUBLIC RIGHT OR CUSTOM OR MATTERS OF GENERAL INTEREST.—(Continued).

(8) Declarations made after dispute.

(a) Where the declarations are made after a dispute springs up, they will be inadmissible, although the declarant might have no knowledge of the dispute, as that is a collateral matter which might be impossible to be proved. *Berkeley Peerage Case*, 4 Camp. 401 and *Shedden v. A.-G.*, 30 L.J.P. 217; Phip. Ev., 4th Ed., p. 273. See also Tay. Ev., 10th Ed., S. 634, p. 450. F

(b) A declaration made subsequently to the commencement of the dispute will be inadmissible, although it might have been fraudulently commenced with the view of excluding the declarations. *Shedden v. A.-G.*, 30 L.J.P. 217; Phip. Ev., 4th Ed., p. 273. G

(c) Where the declarations are made after the dispute arises, they will be inadmissible, even though it might involve *different parties*, or relate to *different property or claims*. Phip. Ev., 4th Ed., p. 274, referring to Tay. Ev., 10th Ed., S. 633, p. 449. H

(d) To render declarations inadmissible, as being *post litem motam* at the time of their being made, there must be not merely facts which may lead to a dispute, but *a lis mota*, or suit, or controversy preparatory to a suit, actually commenced, or dispute arisen, and that upon the very same pedigree or subject matter which forms the question under litigation. *Davies v. Lowndes*, 12 L.J.C.P. 506; Tay. Ev., 10th Ed., S. 629, pp. 446-7. I

(9) Declarations made to prevent future disputes.

Declarations as to the right will be relevant, though they may have been made for the express purpose of preventing future disputes. *Berkeley Peerage Case*, 4 Camp. 401, 417; *Monkton v. A.-G.*, 2 Russ. and M. 147; *Brisco v. Lomax*, 8 A. and E. 198; *Shedden v. A.-G.*, 30 L.J.P. 217; Phip. Ev., 4th Ed., p. 274. See also Tay. Ev., 10th Ed., S. 630, p. 445. J

(10) Declarations after claim made, but finally abandoned.

Declarations as to the right will be relevant, though they are made after a claim had been asserted, but finally abandoned. Phip. Ev., 4th Ed., p. 274. K

(11) Declarations after non-contentious legal proceedings for same right.

Declarations as to the right are relevant, though they are made after the existence of non-contentious legal proceedings involving the same rights. *Brisco v. Lomax*, 8 A. and E. 198 and *ice v. Ward*, 7 E. and B. 509; Phip. Ev., 4th Ed., p. 274. L

(12) Declarations after contentious legal proceedings.

Declarations as to the right are relevant, although they are made after the existence of contentious legal proceedings, involving different rights, or even the same right, if only collaterally and not directly. *Freeman v. Phillipps*, 4 M. and S. 486; *Devonshire v. Neill*, 2 L.R.I. 132, 156-7; Phip. Ev., 4th Ed., p. 274. See also Tay. Ev., 10th Ed., S. 632, pp. 448-9. M

8. "(4) *When the statement gives the opinion of any such person, as to the existence of any public right.. arisen.*"—(Continued).

2.—CONDITIONS OF ADMISSIBILITY OF DECLARATIONS AS TO PUBLIC RIGHT OR CUSTOM OR MATTERS OF GENERAL INTEREST.—(Continued).

(13) Opinion in judgment, whether made before controversy.

Suit for a perpetual injunction to restrain the defendants from importing into, or selling in, Bombay or other parts of India a certain kind of watches. A document, which purported to be a certified copy of a judgment by a Swiss Court against one F. S. on the point in question, was tendered in evidence, as an opinion as to a matter of public or general interest. *Held*, that it was not possible to say that the statement of opinion in the judgment could, within the meaning of the concluding words of clause, be regarded as made before any controversy as to such matter had arisen and that the clause was inapplicable. 25 B. 433 (441)—3 Bom. L.R. 1 (6). See also under S. 42, *infra*. N

(14) Declarations in support of declarant's interest.

(a) Where the declarations are made in direct support of a claim intended to be made by the declarant, or otherwise obviously to subserve his own interest, they will not be relevant. *Brochlebank v. Thompson*, 2 Ch. 344, 351-3 and *Plant v. Taylor*, 7 H. and N. 211; Phip. Ev., 4th Ed., p. 274. O

(b) But where no dispute has occurred, or where no claim has been contemplated, the fact that the declarations tend to support the declarant's own title, or that the declarant stood, or believed he stood, in *pari jure* with the party who relies on them, goes to their weight only, and not to their relevancy. *Doe v. Davies*, 10 Q.B. 314; *Dunraven v. Illewelllyn*, 15 Q.B. 791; *Moseley v. Davies*, 11 Price, 162; Phip. Ev., 4th Ed., p. 274. See also Tay. Ev., 10th Ed., S. 630, p. 440. P

(15) Declarant must have knowledge as to what he declares.

(a) The reputation, to be relevant, must have been formed among a class of persons who were in a position to have sound means of acquiring information and to make an intelligent contribution to its formation. Wigm. Ev., 1905 Ed., S. 1591, p. 1942. Q

(b) Where, from the circumstances, it appears that the declaration is made otherwise than upon the declarant's own knowledge, it will be rejected, even though it may relate to a public right. *Devonshire v. Neill*, 2 L.R.I. 159, 160; Phip. Ev., 4th Ed., p. 273. See also Tay. Ev., 10th Ed., S. 612, p. 433. R

(c) The only evidence of reputation which was received was that from persons connected with the district, such evidence being confined to what old persons, who were in a situation to know what these rights were, had been heard to say concerning them. *Weeks v. Sparke*, 1 M. and S. 689, per *LeBlanc, J.* Wigm. Ev., 1905 Ed., S. 1591, p. 1942. S

8.—“(4) When the statement gives the opinion of any such person, as to the existence of any public right..arisen.”—(Continued).

2.—CONDITIONS OF ADMISSIBILITY OF DECLARATIONS AS TO PUBLIC RIGHT OR CUSTOM OR MATTERS OF GENERAL INTEREST.—(Continued).

(d) In cases of rights or customs which are not, properly speaking, public, but of a general nature and concern a multitude of persons, it seems that hearsay evidence is not admissible, unless it is derived from persons acquainted with the neighbourhood. But, where the right is really public, a claim of highway for instance, in which all the King's subjects are interested, it seems difficult to say there ought to be any such limitation. Where all are concerned, reputation from any one is admissible; but it would be almost worthless, unless it came from persons who were shown to have some means of knowledge, as by living in the neighbourhood, or frequently using the road in dispute. *Crease v. Barrett*, 1 C.M. and R. 928; Wigm. Ev., 1905 Ed., S. 1591, p. 1943. T

(e) An alleged survey of the year 1650 by a jury of the manor was held to be inadmissible in proof of a custom, the Court observing, “The question is whether a jury of the manor are not presumed to be acquainted with its customs, so as to bring the case within the rule laid down in *Crease v. Barrett*,” and answering it in the negative. *Duke of Beaufort v. Smith*, 4 Exch. 467, 469; Wigm. Ev., 1905 Ed., S. 1591, p. 1943. U

(16) Competency of declarant presumed in cases of public rights.

But, where public rights come into question, all, being concerned, are presumed to be competent, and the result is that the absence of peculiar means of knowledge affects the weight, and not the admissibility, of the evidence. Phip. Ev., 4th Ed., p. 273. See also Tay. Ev., 10th Ed., S. 609, p. 430. Y

(17) But competency must be proved in cases of general rights.

Where “general rights” are in question, the competency of the declarants must be established. See *Crease v. Barrett*, 1 C.M.R. 928-9; *Rogers v. Wood*, 2 B. and A. 245; *Devonshire v. Neill*, 2 L.R.I. 159-60; *Mercer v. Denne*, 2 Ch. 560; and *Assheton-Smith v. Owen*, 75 L.J. Ch. pp. 188, 192; Phip. Ev., 4th Ed., p. 273. See also Tay. Ev., 10th Ed., Ss. 609 and 611, pp. 430 and 432. W

(18) When competent knowledge will be presumed.

Where the declarants have been summoned as witnesses in an ancient suit, competent knowledge will be presumed. *Freeman v. Phillips*, 4 M. and S. 486; Phip. Ev., 4th Ed., p. 279. See also Tay. Ev., 10th Ed., S. 612, p. 432. X

(19) Proof of competency.

In the case of declarations as to general rights, proof of the competency of the declarants may either be extrinsic, that is, by proof of residence in, or other connection with, the locality; or, the circumstances under which the declarations were made may afford it (*Freeman v. Phillips*, 4 M. and S. 273, and *Mercer v. Denne*, 2 Ch. 560). Phip. Ev., 4th Ed., p. 273. Y

8.—“(4) When the statement gives the opinion of any such person, as to the existence of any public right..arisen.”—(Continued).

2.—CONDITIONS OF ADMISSIBILITY OF DECLARATIONS AS TO PUBLIC RIGHT OR CUSTOM OR MATTERS OF GENERAL INTEREST.—(Continued).

(20) Identity of declarant to be proved.

“The identity of the declarant must also be established, and in the case of documents, the signatures or handwriting must be proved; unsigned or unauthenticated documents, even though produced from proper custody are inadmissible. (*Devonshire v. Neill*, 2 L.R.I. pp. 157-60).”
Phip. Ev., 4th Ed., p. 273. Z

(21) Corroboration, whether necessary for admissibility of declarations

With regard to the admissibility of declarations as to public rights, there is no need to corroborate them by proof of the exercise of the right within living memory. Such matters affect their weight. *Crease v. Barrett*, 1 C.M. and R. 919; Phip. Ev., 4th Ed., p. 274. A

(22) Form of declarations.

(a) It is immaterial what form the reputation takes. It may come in the shape of an individual's assertions, if they genuinely purport to represent a reputation, and many other forms can be found in the decided cases. Wigm. Ev., 1905 Ed., S. 1592, p. 1943. See also Phip. Ev., 4th Ed., pp. 274, 275, 276 and 277. See also Tay. Ev., 10th Ed., S. 621, p. 440 and further on. B

(b) The official return of an assembly of the tenants of a manor, reciting customs, fees, etc., was always regarded as amounting to a reputation among the tenants, and, therefore, admissible. See *Goodwin v. Spray*, 1 T.R. 473 and *Beebe v. Parler*, 5 P.R. 14; Wigm. Ev., 1905 Ed., S. 1592, p. 1943. C

(c) Old maps, so far as they have been used and resorted to by the community in dealing with the land, may be taken as containing the settled reputation of the community as to the correctness of the tenor of the map. See *R. v. Milton*, 1 C. and K. 62 (where a map of parish boundaries made from the information given by an old man was offered). Wigm. Ev., 1905 Ed., S. 1592, p. 1943. See also Tay. Ev., 10th Ed., S. 622, p. 441. D

(d) Old surveys, so far as they have been used and resorted to by the community in dealing with the land, may be taken as containing the settled reputation of the community as to the correctness of the survey. See *Bullen v. Michel*, 4 Dow. 297 and *Smith v. Earl Brounlow*, L.R. 2 Eq. 252; Wigm. Ev., 1905 Ed., S. 1592, p. 1943. E

(e) Muniments of private titles, as for instance old deeds and leases, may, in a given case, be good vehicles of reputation. *Sasser v. Herring*, 3 Dev. L. 342; *Plaxton v. Dars*, 10 B. and C. 19 and *Brett v. Beales*, 1 M. and M. 480; Wigm. Ev., 1905 Ed., S. 1592, p. 1943. See also Tay. Ev., 10th Ed., S. 621, p. 440. F

8.—“(4) When the statement gives the opinion of any such person, as to the existence of any public right, custom, or general interest.”—(Continued).

2.—CONDITIONS OF ADMISSIBILITY OF DECLARATIONS AS TO PUBLIC RIGHT OR CUSTOM OR MATTERS OF GENERAL INTEREST.—(Continued)

(23) Admissibility of judicial decrees as reputation.

A decree of Court was held to be inadmissible as evidence of reputation; the Court observed, “Here the persons acting as Judges had no knowledge of the fact, i.e., the customary rights of a city, except what they derived in the course of that proceeding.” *Rogers v. Wood*, 2 B. and Ad. 256; Wigm. Ev., 1905 Ed., S. 1594, p. 1945. See also Tay. Ev., 10th Ed., S. 624, p. 442. G

(24) Admissibility of judicial order as reputation.

Orders of sessions, made by the justices of the peace assembled in sessions, were admitted as evidence of reputation as to a local custom, because, though they were not proved to be residents in the county or hundred, they must, from the nature of their functions, alone, be presumed to have sufficient knowledge with the subject to which their declarations pertain. *Duke of Newcastle v. Brackstone*, 4 B. and Ad. 279. Wigm. Ev., 1905 Ed., S. 1594, p. 1945; Tay. Ev., 10th Ed., S. 610, p. 431. H

(25) Admissibility of award as reputation.

The opinion of an arbitrator as to a boundary is formed, not upon his own knowledge, as declarations used by way of reputation generally are. *Kvans v. Rees*, 10 A. and E. 155. Per Denman, L.C.J. Wigm. Ev., 1905 Ed., S. 1594, p. 1945. See also Tay. Ev., 10th Ed., S. 634, p. 442. I

(26) Negative reputation.

An assertion may be made by silence, and the absence of a reputation, that is, the fact that no men in the locality had ever heard of the right, custom, or boundary, being as alleged, should be admissible as a negative reputation. Wigm. Ev., 1905 Ed., S. 1595, p. 1945, referring to *Drinkwater v. Porter*, 2 G. and R. 182 and *Anglesey v. Hatherton*, 10 M. and W. 239. J

(27) Reputation of events of history, when admissible.

(a) Historical facts of general and public notoriety may indeed be proved by reputation, and that reputation may be established by historical works of known character and accuracy. But evidence of this sort is confined to cases, where, from the nature of the transactions, or the remoteness of the period, or the public and general reception of the facts, a just foundation is laid for general confidence. *Morris v. Messers*, 7 Pet. 558; Wigm. Ev., 1905 Ed., S. 1598, p. 1946. K

(b) The statements of historians of established merit are from necessity received as evidence of facts to which they relate, restricted to facts of a public and general nature. *Bogardus v. Trinity Church*, 4 Sandf. Ch. 724; Wigm. Ev., 1905 Ed., S. 1598, p. 1947. L

(c) Such evidence is only admissible to prove facts of a general and public nature, and not those which concern individuals and mere local communities. History is admissible only to prove history, that is, such facts as, being of interest to a whole people, are usually incorporated in a general history of the state or nation. *McKinnon v. Bliss*, 21 N.Y. 216; Wigm. Ev., 1905 Ed., S. 1598, p. 1947. M

8.—“(4) *When the statement gives the opinion of any such person, as to the existence of any public right..arisen.*”—(Continued).

2.—CONDITIONS OF ADMISSIBILITY OF DECLARATIONS AS TO PUBLIC RIGHT OR CUSTOM OR MATTERS OF GENERAL INTEREST.—(Continued).

(d) Where, in order to prove the boundary between two counties, Brecon and Glamorgan, Nicholl's History of Brecknockshire was offered in evidence, the Court observed, “This is a history of Brecknockshire. The writer of that history probably had the same interest in enlarging the boundaries of the county as any other inhabitant of it. It is not like a general history of Wales. I shall not receive it.” *Evans v. Getting*, 6 C. and P. 586; Wigm. Ev., 1905 Ed., S. 1598, p. 1947, remarking that “the fault of this decision is that it seems to proceed upon the principle that local interest excludes reputation,” a principle that is repudiated. See also Tay. Ev., 10th Ed., S. 1785, p. 1289. **N**

(28) Admissibility of jury's verdict as reputation.

The verdict of a jury was once held to amount to a reputation, but it was finally received, not under the reputation exception, or as hearsay at all under any exception, but as a ‘verbal act,’ that is, not as a testimonial assertion, but as an act of possession in the course of the exercise of a public right by the people of the neighbourhood. The history of the development of the final doctrine is traced *infra*. See Wigm. Ev., 1905 Ed., S. 1593, pp. 1943-4. See also Tay. Ev., 10th Ed., S. 624, p. 442. **O**

(29) The verdict of a jury is admissible as reputation.

Reputation would have been evidence as to the right of way in this case; *a fortiori*, the finding of twelve persons upon their oaths. *Reed v. Jackson*, 1 East, 357; Wigm. Ev., 1905 Ed., S. 1593, p. 1944. See, also, the learned professor's criticism on the same page. See also Tay. Ev., 10th Ed., S. 624, p. 443. **P**

(30) But Jury's verdict represented neighbourhood reputation.

In a certain case, the Court in reply to the citation of earlier cases observed: “That was when the jury was summoned *de vicineto*, and their functions were less limited than at present.” *Pim v. Curell*, 6 M. and W. 254; Wigm. Ev., 1905 Ed., S. 1593, pp. 1944. See also Tay. Ev., 10th Ed., S. 624, pp. 442-3. **Q**

(31) Jury's verdict only a sort of reputation.

It is not reputation; but it is as good as reputation. It is difficult to say that a verdict can be admitted as reputation evidence, for, a jury are summoned from the body of the county at large, and are not themselves likely to be conversant with the matter. Yet, where a matter has been before a jury, the verdict is generally given in evidence as a sort of reputation. It is not precisely evidence of reputation. *Brisco v. Lomax*, 8 A. and E. 211; Wigm. Ev., 1905 Ed., S. 1593, p. 1944. See also Tay. Ev., 10th Ed., S. 624, pp. 442-3. **R**

8.—“(4) *When the statement gives the opinion of any such person, as to the existence of any public right..arisen.*”—(Continued).

2.—CONDITIONS OF ADMISSIBILITY OF DECLARATIONS AS TO PUBLIC RIGHT OR CUSTOM OR MATTERS OF GENERAL INTEREST.—(Concluded).

(32) **Jury's verdict admissible not as reputation but as a "verbal act."**

- * Such evidence, admissible in cases in which evidence of reputation is received, is not itself, in any proper sense, evidence of reputation. It really stands upon a higher and a larger principle, especially in cases like the present, of prescription; it comes under the description of *res geste* and of declarations accompanying acts. The effect of this evidence is extremely strong to establish a state of possession and enjoyment. *Neill v. Devonshire*, L.R. 8 App. Cas. 147; Wigm. Ev., 1905 Ed., S. 1593, pp. 1944-5. See also Tay. Ev., 10th Ed., S. 624, p. 448. **S**

3.—INSTANCES OF DECLARATIONS REGARDING PUBLIC RIGHTS AND CUSTOMS HELD ADMISSIBLE AND INADMISSIBLE.

(1) **Declarations held admissible.**

- (a) Where the custom of a manor was in question, the declarations of deceased tenants of the manor, or even of mere residents in it, are relevant. *Dunraven v. Llewellyn*, 15 Q.B. 791; Phip. Ev., 4th Ed., p. 278; Tay. Ev., 10th Ed., S. 605, p. 431. **T**
- (b) The question being as to a mining custom, the declarations made by deceased owners of the surface are admissible, "for they were more likely to become adventurers than persons living at a distance." *Crease v. Barrett*, 1 C.M. and R. 919; Phip. Ev., 4th Ed., p. 278; Steph. Dig., 7th Ed., Art. 30, p. 42. **U**
- (c) Where the boundaries between two manors were in issue, former non-contentious proceedings on the joint petition of previous owners of the two manors, who stated that boundary disputes would probably arise, were held to be admissible. *Brisco v. Lomax*, 8 A. and E. 198; Phip. Ev., 4th Ed., p. 279. See also Tay. Ev., 10th Ed., S. 618, p. 434. **Y**
- (d) Depositions, in an ancient suit to have the possession of a fishery as between two private claimants decided, are relevant in a subsequent suit involving the right of the public as against the descendants of one of such claimants. *D. of Devonshire v. Neill*, 2 L.R. Ir. 132; Phip. Ev., 4th Ed., p. 279. **W**
- (e) The question was, what was the mode of assessment of a customary fine. Depositions in an ancient suit against a previous lord, in which only the amount of the fine, and not its mode of assessment, was in issue, were held to be admissible, the *lis mota* being different. *Freeman v. Philipps*, 4 M. and S. 486; Phip. Ev., 4th Ed., p. 279; Tay. Ev., 10th Ed., S. 632, p. 449. **X**
- (f) A right of common being in issue, the declarations of deceased manor tenants, that they possessed unlimited right of common, but for the sake of convenience had consented to use it in a restricted manner, were held to be relevant to prove the general right, and to negative a prescription for the restricted one. *Chapman v. Cowlan*, 13 East. 10; Phip. Ev., 4th Ed., p. 280. See also Tay. Ev., 10th Ed., S. 612, p. 432. **Y**

3. —“(4) *When the statement gives the opinion of any such person, as to the existence of any public right..actien.*”—(Continued).

3.—INSTANCES OF DECLARATIONS REGARDING PUBLIC RIGHTS AND CUSTOMS HELD ADMISSIBLE AND INADMISSIBLE.—(Continued).

- (g) On the question whether a landing place was public or private property, the declarations of ancient deceased persons, that it was the private landing place of the party and his ancestors, were held to be relevant. *Drinkwater v. Porter*, 7 C. and P. 181; Tay. Ev., 10th Ed., S. 620, p. 440, and Phip. Ev., 4th Ed., p. 279. Z
- (h) An ancient lease, granted by a former lord, where the boundaries of a manor were described, was held to be admissible in evidence. *Doe v. Whitcomb*, 6 Ex. 601 and *Bratt v. Beales*, M. and M. 416; Phip. Ev., 4th Ed., p. 280; Tay. Ev., 10th Ed., S. 621, p. 440. A
- (i) An old churchwarden's assessment is admissible evidence of reputation that the land is within the parish. *Plaxton v. Dare*, 10 B. and C. 17; Wigm. Ev., 1905 Ed., S. 1592, p. 1949; Phip. Ev., 4th Ed., p. 276. B
- (j) Decrees in Chancery, between other parties, concerning the same lands, were held to be admissible in evidence, to show the character in which the possessor enjoyed the lands, *Davies v. Lowndes*, 1 Bing. N.C. 606; cited in 11 C. 747, referring to 6 I.A. 38. C
- (k) Where the boundary of a farm was in question, and its identity with the hamlet; boundary being testified to, reputation as to the hamlet-boundary was admitted; the Court observing, “The objection comes to this, that evidence shall not be given as to the boundary of a hamlet in the same mode as on other occasions, because the proof is in the particular case only subsidiary. But I never heard that a fact was not to be proved in the same manner when subsidiary as when it is the very matter in issue.” Per Coleridge, J. *Thomas v. Jenkins*. 6 A. and E. 525; Wigm. Ev., 1905 Ed., S. 1587, p. 1941; Tay. Ev., 10th Ed., S. 614, p. 436. D
- (l) Suit by a zemindar to recover certain hill tracts of forest land from Government. Certain accounts, called ayakut accounts, were relied on as containing statements of boundaries and furnishing proof of the inclusion of the disputed tracts in the zemindari limits, or in the limits of Government villages. But, because no evidence was produced to show for what purpose, by whom, and in what circumstances those accounts were prepared and what guarantee existed to ensure their accuracy, the Court below refused to accept them as evidence of reputation. Held that, inasmuch as these accounts were, from time to time, prepared for administrative purposes by village officers, they were admissible as evidence of reputation, provided they were produced from proper custody and otherwise sufficiently proved to be genuine, and, being to some extent public documents, though not of great weight, except in relation to the purpose for which they were specially prepared, they were not to be altogether disregarded. 9 M. 285 (22314). E

8.—“(4) When the statement gives the opinion of any such person, as to the existence of any public right . . . arisen.”—(Continued).

3.—INSTANCES OF DECLARATIONS REGARDING PUBLIC RIGHTS AND CUSTOMS HELD ADMISSIBLE AND INADMISSIBLE.—(Continued).

(2) Instances of declarations held inadmissible.

- (a) Where the question was, whether, according to the custom or caste usage of the Kadwa Kunbi caste of Ahmedabad, the adoption by a widow is forbidden without the express consent of her husband, a statement was admitted in evidence, under S. 32 (4), in the Court below, signed by several hundred witnesses, to the effect that a widow of the Kadwa Kunbi caste cannot adopt, without the express authority of her husband, that Court apparently considering that it would be unreasonable to oblige the plaintiff to incur the expense of procuring the attendance of the witnesses. *Held* that the section was not applicable to a case of this kind, where the evidence was required to prove a fact in issue and not merely a relevant fact, and that the statement was, therefore, inadmissible to prove the custom as alleged. 15 B. 565 (579). F
- (b) A letter of the Collector containing a summary of the statements by Zemindars for information of the Board of Revenue in a dispute as to the right of inheritance to a zemindary in the same district, is not admissible as evidence, and, if received, could not be safely relied upon as affording clear and unambiguous proof of the existence of an ancient and invariable custom of succession in the district. 17 W.R. 553 (554) = 14 M.L.A. 570 (588) – 12 B.L.R. 396 (P.C.). G
- (c) Where the defendant claimed a prescriptive right of digging stones on the waste of a lord, as annexed to his estate, and the lord adduced evidence of reputation to disprove the existence of such right, the Court was equally divided on its admissibility. *Morewood v. Wood*,¹⁴ East, 327*n*; Tay. Ev., 10th Ed., S. 615, p. 436; Wigm. Ev., 1905 Ed., S. 1587, p. 1389. H
- (d) The boundaries of a county being in dispute, the declarations of deceased law officers and dignitaries of the Crown, who had no personal knowledge of the matter, except what they derived from an irregular judicial inquiry, were held to be inadmissible. *Rogers v. Wood*, 2 B. and Ad. 245; Phip. Ev., 4th Ed., p. 278. See also Tay. Ev., 10th Ed., S. 611, p. 432. I
- (e) Where depositions were made in answer to an information by the Attorney-General against the lord of a manor for causing the destruction of a sea-bank and so injuring a royal castle, they were rejected, competent knowledge by the deponents not being either imputable from the circumstances, or proved *aliunde*. *Mercer v. Denno*, 2 Ch. 559-60; Phip. Ev., 4th Ed., p. 279; Tay. Ev., 10th Ed., S. 617, p. 438. J
- (f) On the question whether a road was a public road, the statement of a deceased person that he planted a willow, which was still standing, to show where the boundary of the road originally was, when he was a boy, was held to be inadmissible in evidence. *R. v. Biss*, 7 A. and E. 550; Steph. Dig., 7th Ed., Art. 30, p. 49; Tay. Ev., 10th Ed., S. 617, p. 438. K

8.—“(4) *When the statement gives the opinion of any such person, as to the existence of any public right..arisen.*”—(Continued).

3.—INSTANCES OF DECLARATIONS REGARDING PUBLIC RIGHTS AND CUSTOMS HELD ADMISSIBLE AND INADMISSIBLE.—(Continued).

(g) A right of common in a manor was under dispute. The declarations of deceased manor tenants, during a prior, though irregular, inquiry, as to the right were rejected, as being *post litem motam*. *Richards v. Bassett*, 10 B. and C. 687; Phip. Ev., 4th Ed., p. 279; Tay Ev., 10th Ed., S. 614, p. 435. L

(h) The declarations of deceased tenants of a manor that “the commons belong to the tenants unstinted, who have always enjoyed the same at a yearly rent of 33s. 4d.” were held to be inadmissible in disputes as to a right of common. *Crease v. Barrett*, 1 C.M. and R. 919; Phip. Ev., 4th Ed., p. 280. M

(i) The question being whether a town extended to a certain spot, the declarations of deceased inhabitants, that there were houses formerly on that spot, were held to be inadmissible in evidence. *Ireland v. Powell*, Pea. Ev., 16; Phip. Ev., 4th Ed., p. 280; Tay. Ev., 10th Ed., S. 617, p. 438. N

(j) The statement of a deceased steward as to the existence of an old lease describing the boundary of a manor and an entry in his books purporting to state the gist of the lease, were held to be inadmissible, as being reputation, not of the boundaries, but of the contents of the lease, i.e., of a particular fact. *Doe v. Wilcomb*, 6 Ex. 601; Phip. Ev., 4th Ed., p. 280. O

(k) A map of the county, republished with corrections and additions in 1766 by the sons of K, from a map published by K thirty years before, who then made an accurate survey of the entire county, was held to be inadmissible, the later editors, not having been proved to have personal knowledge, nor to be connected with the district, so that such knowledge might be presumed. *Hammond v. Bradstreet*, 10 Ex. 390; Phip. Ev., 4th Ed., p. 281; Tay. Ev., 10th Ed., S. 622, p. 441 and Wigm. Ev., 1905 Ed., S. 1591, p. 1942. P

(3) Few examples in Indian cases.

(a) “The Indian decided cases furnish few examples. Illustration (i) is taken from those parts of the country in which the village system still exists; it has long died out, if it ever perfectly existed, in Lower Bengal. Public rights or customs are little understood; and the order of the Government or of the executive head of a district is often accepted as conclusive concerning them. In large zemindaries, questions, however, occasionally arise somewhat analogous to those which occur in manors in England, such for example as the zemindar's right to take dues on the sale of trees—1 N.W.P. 139—or to receive one-fourth of the sale-proceeds in cases of involuntary sale, as in execution—3 (2 ?) N.W.P. 204—or in case of a house sold privately—6 A. 47.” *Field Ev.*, 6th Ed., p. 138. Q

8.—“(4) *When the statement gives the opinion of any such person, as to the existence of any public right...arisen.*”—(Continued).

3.—INSTANCES OF DECLARATIONS REGARDING PUBLIC RIGHTS AND CUSTOMS HELD ADMISSIBLE AND INADMISSIBLE.—(Continued).

(b) A claim for zemindari dues in respect of the sale of garden trees ought not to be allowed on mere usage alone, but it should also be enquired into whether such dues were recognised and recorded in the settlement papers as required by Reg. VII of 1822, S. 9 and IX of 1825, S. 9. Where the settlement papers are destroyed and not forthcoming, the contents, in respect of the dues claimed, may be ascertained by the other best evidence procurable. 1 Agra 139. **R**

(c) Where a sale took place in execution of a decree, and it was proved that by custom the zemindar's right extended to one-fourth of the sale proceeds, where the sale was involuntary, held that the zemindar had a right to recover the fourth share of the proceeds from the judgment-creditor, who, in truth, reserved the sale price. The zemindar's right attached to the sale proceeds and was a prior charge upon them. 2 Agra, Part II, 204. **S**

(d) Where a house in a village is privately sold, proof of a custom in virtue of which the zemindar of the village gets one-fourth of the purchase-money on that occasion, is not proof of a similar custom with regard to sales in execution of decrees. 6 A. 47 (48) (F.B.). **T**

(4) Reputation admissible for or against Crown and ordinary party.

Evidence afforded by the declarations of deceased persons having competent knowledge, made *ante litem motam*, and admissible in proof of ancient rights of a public or general nature—which is usually included under the term “Reputation”—is admissible for or against the Crown, as well as an ordinary party. *A.—G. v. Emerson*. 1891, A. C. 649. Phip. Ev., 4th Ed., p. 272. See also Ros. Cr. Ev., 13th Ed., p. 26, for further cases. **U**

(5) Proof of custom when admissible.

S. 32, cl. 4, permits proof to be given of a statement of a deceased person that, in his family or in the sub-division of the caste to which he belonged, such and such a custom obtained, of the existence of which that person would have been likely to be aware, but it does not permit evidence to be given of a statement by such a person that, on a particular occasion, the custom was followed, or of a statement of particular facts, such as, that a man died in a state of separation, or, that a daughter survived her parents. 8 O.C. 94 (104). **V**

(6) Facts forming the grounds of the opinion of deceased person regarding custom.

Where it was contended that, where the opinion of a deceased person as to the existence of a custom is admissible under cl. 4 of S. 32 of the Act, any facts related by him, which constitute an instance of a succession according to that custom, might be proved as the grounds of his opinion, the Court observed, “Obviously, it cannot be assumed that facts related by a deceased person constituting a succession according to the custom

3.—“(4) When the statement gives the opinion of any such person, as to the existence of any public right, arisen.”—(Concluded).

3.—INSTANCES OF DECLARATIONS REGARDING PUBLIC RIGHTS AND CUSTOMS HELD ADMISSIBLE AND INADMISSIBLE.—(Concluded).

were that person's reasons for believing that such a custom existed, and we do not think that a single witness in the case has said that a person, now deceased, related to him an instance, or instances, of succession according to the custom as alleged, and stated that the occurrence of that instance, or those instances, was his reason for believing that such a custom existed.” 8 O.C. 94 (107). W

(7) Hearsay evidence regarding particular instances of application of custom—Relevancy.

Where a witness speaks to facts, which occurred in his own life-time, in his own family, village, or neighbourhood, after he emerged from childhood, it may be presumed that he is testifying to his own knowledge; but when he speaks of instances of the application of the custom, or particular facts which occurred before he was born and he does not give the source of his information, it cannot be presumed that he is repeating information acquired from his father, or grand-father, or some other person, who would be likely to have been aware of the facts. 8 O.C. 94 (106). X

(8) Opinion regarding family custom from a living witness and its grounds.

It is admissible evidence for a living witness to state his opinion on the existence of a family custom and to state, as the grounds of the latter opinion, information derived from deceased persons. The weight of the evidence would depend on the position and character of the witness and of the persons on whose statements he has formed his opinion. But it must be the expression of independent opinion, based on hearsay, and not mere repetition of hearsay. 23 A. 37 (52) (P.C.); cited in 8 O.C. 94 (108). Y

9 and 10.—“Clauses 5 and 6 of S. 32.”

1.—GENERAL.

(1) Scope of cl. 5, S. 32.

(a) Under cl. 5 of S. 32 of the Evidence Act, proof may be given of the statement of a deceased person which relates to the existence of a relationship by blood, marriage, or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised. 8 O.C. 94 (103). Z

(b) By S. 32, cl. 5, of the Evidence Act, evidence of statements made by deceased persons are relevant, when they relate to the existence of any relationship between persons as to whose relationship the person making the statement has special means of knowledge, and when the statement was made before the question in dispute was raised. For this purpose, and to this extent, statements of deceased relatives, and servants and dependents, of the family are admissible. 23 A. 37 (51) = 27 I.A. 238 (251) (P.C.). A

9 and 10.—“*Clauses 5 and 6 of S. 32.*”—(Continued).

1.—GENERAL.—(Continued).

- (c) “The statement declared to be relevant by the 5th clause is a statement relating to the existence of any relationship between persons *alive or dead* (the language imposes no restriction), as to whose relationship the person making the statement has special means of knowledge.”
Field Ex., 6th Ed., p. 139. **B**

(d) It has been held, by the Oudh and Madras High Courts and by Mr. Spankie in this Court, that this clause is not limited, as in the corresponding rule in England (see *Haines v. Guthrie*, 13 Q.B.D. 818), to cases in which the question in dispute is the existence of a particular relationship between certain persons, but applies also to cases in which the question is, when such a relationship began. 8 O.C. 94 (103), referring to 20 C. 768; 24 C. 265; 25 M. 183 and S.C. 265 (Oudh). **C**

- (e) Sub-S. 5 of S. 32 does not relate to statements made by interested parties in denial, in the course of litigation, of pedigrees set up by the opposite parties. 9 A. 467 (469, 470). **D**

(f) S. 32 of the Act, which would make the statements in a pedigree relevant, only applies where the statements are made by a person who is dead or cannot be found or has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expenses which, under the circumstances of the case, appears to the Court unreasonable. 2 Bom. L.R. 942 (944) (P.C.) = 5 C.W.N. 49. **E**

- (g) Therefore, a pedigree, where there is no evidence to that effect, is irrelevant, 27 I.A. 183 = 2 Bom. L.R. 942 = 5 C.W.N. 49 (P.C.). **F**

(h) S. 32 is wide enough to include the family priest, among persons who can be said to have special means of knowledge as to the relationship between the members of a family. In construing a section of an Act in this country, the words are to be considered with reference to the language used, and not with reference to any supposed analogy to the English Law. 4 C.L.R. 173 (174). **G**

(3) Effect of S. 32, cl. 5.

The effect of the section is to make a statement, made by a deceased person, relating to the existence of any relationship by blood, marriage, or adoption, admissible, to prove the facts contained in the statements on any issue. 24 C. 265 = 1 C.W.N. 270. **H**

(4) Evidence of custom, under cl. 5 of S. 32.

Neither cl. 4 nor cl. 5 of S. 32 of the Evidence Act justifies the admission of hearsay evidence upon the question, whether a particular person survived another, or upon the question, whether a man was, at the time of his death, joint with, or separate from, other members of his family; nor on the grounds of the opinion of a deceased person, as to the existence of a custom, even if stated to a witness, he, as such, proved under that section. 8 O.C. 94 (103-4), referring to 20 C. 768; 24 C. 265; 25 M. 183; S.C. 265 (Oudh); T.O.A. No. 46 of 1889; 10 A. 1 (P.C.); 23 A. 37 (P.C.) and 72 (P.C.); 25 A. 148 (P.C.), and 31 I.A. 217, and *Haines v. Guthrie*, 13 Q.B.D. 818 and *Harwood v. Sims*, 1 Wight. 112 (169). I

9 and 10.—“*Clauses 5 and 6 of S. 32.*”—(Continued).

1.—GENERAL.—(Continued).

(4) **Scope of cl. 6, S. 32.**

(a) Cl. 6 of S. 32 makes entries made by deceased persons evidence on questions of relationship, blood, marriage, or adoption, where the deceased person had some special means of knowledge. 17 C. 849 (851). J

(b) That sub-section makes a statement admissible, when it relates to the existence of any relationship by blood, marriage, or adoption *between persons deceased*, and is made in any will or deed relating to the affairs of the family, to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait, or other thing in which such statements are usually made, and when such statement was made before the question in dispute was raised. 9 C. 613 (614). K

(c) But a document purporting, on the face of it, to be a statement of relationship between a deceased person and a living person is not embraced by the terms of this provision. 9 C. 613 (614). L

(d) “The statement provided for by the sixth clause is a statement relating to the existence of relationship between deceased persons only. It is not necessary that it should have been made by a person who had special means of knowledge, but it must be contained in a will or deed relating to the affairs of the family to which any such deceased person belonged, or in a family pedigree, or upon a tombstone, family portrait or other thing on which such statements are usually made.” Field Ev., 6th Ed., p. 139. M

(5) **Condition of admissibility under cl. 6, S. 32.**

“The relationship, with which the statement is here concerned, must be relationship between persons deceased, and must also be contained in a will or deed relating to the affairs of the family to which any such deceased person belonged, or in some family pedigree, or upon some tombstone, family portrait, or other thing on which such statements are usually made. Bibles, prayer books, missals, almanacs among Christians, and horoscopes among Hindus are examples of other things on which such statements are usually made.” Field Ev., 6th Ed., p. 142. N

(6) **Ground on which special means of knowledge is not essential under cl. 6 of S. 32.**

“Cl. 6 of S. 32 does not deal with the question by whom the statement is to be made; nor does it require that it should have been made by a person who had special means of knowledge, possibly on the ground that it is improbable that any person would insert in a solemn deed, will, &c., any matter the truth of which he did not know, or had not satisfactorily ascertained; but states that it must be contained in the documents or other material things therein mentioned.” See A.A. and W. Ev., 4th Ed., pp. 216-7. O

(7) **Whether statement should have been made by a relative under cl. 6.**

“There is nothing in the clause of the Indian Act, now under notice, which requires that the statement in any of the things therein mentioned should have been made by a relative, or, indeed, which requires it to be shown at all by whom the statement was made.” Field Ev., 6th Ed., p. 142. P

9 and 10.—“*Clauses 5 and 6 of S. 32.*”—(Continued).

1.—GENERAL.—(Continued).

(8) Kind of things admissible under cl. 6.

“Besides the documents and other material things mentioned in the sixth clause, family bibles, coffin plates, mural tablets, hatchments, rings, armorial bearings and the like amongst Christians, and horoscopes among Hindus are examples of other documents and things on which such statements are usually made.” See A.A. and W. Ev., 4th Ed., p. 217. See also S. 65, cl. (d), *infra*, and S. 3 definition of “document,” *supra*. See also Field Ev., 6th Ed., p. 143. Q

(9) English and Indian Law—6th clause—Extent of admissibility.

“So far as the sixth clause is concerned, there is no restriction on admissibility. It is improbable that any person would insert in a solemn deed, will, etc., any matter, the truth of which he did not know, or had not satisfactorily ascertained.” Field Ev., 6th Ed., p. 141. R

(10) “Marriage,” meaning of.

The word “marriage,” in cl. 5, S. 32 of the Indian Evidence Act, will include a *muta* marriage, as such a marriage is recognised as lawful by the law governing the *shia* sect of the Mahomedans and not only a permanent marriage. 2 O.C. 115 (123); *overruled* by the Privy Council in 25 A. 236 = 30 I.A. 94. S

(11) “Controversy,” meaning of.

The expression “controversy” does not merely mean an existing suit. *Monkton v. A.-G.*, 2 Russ. and M. 158 (161); Ros. Cr. Ev., 13th Ed., p. 26. T

(12) Statements made under the clause to be cautiously received.

Though the statements mentioned in S. 32, cl. 5, Evidence Act, may be strong evidence, they are always liable to the objection that the persons making them are not subject to cross-examination, and, hence, their statements should be received with caution, especially so when the persons making them could not have had any very certain knowledge of the matters about which they made the statements. (1882). *Sangram Singh v. Rajan Bai*, D.C.R. Part X, 65. U

(13) Illustration (1)—Importance.

Illustration (1) to S. 32 would be material in cases of pedigree; but the rule which admits hearsay evidence in pedigree cases is confined to the proof of the pedigree, and does not apply to proof of the facts which constitute a pedigree, such as birth, death, and marriage, when they have to be proved for other purposes. (See *Haines v. Guthrie*, L.R. 13 Q.B.D. 818, 13 C. 92 (43); but, see, 20 C. 758. Y

(14) Grounds of admissibility of declarations as to pedigree.

The reasons which render declarations as to pedigree relevant are:—(a) death; (b) necessity, such investigations generally involving remote facts of family history which few only know and which are not capable of direct proof; and (c) the peculiar means of knowledge and absence of interest to misrepresent on the part of the persons who made the declarations, members of the family having the greatest interest in seeking, the best opportunities of obtaining, and the least motives for falsifying, information on such subjects. Phip. Ev., 4th Ed., p. 284. W

9 and 10.—“Clauses 5 and 6 of S. 32.”—(Continued).

1.—GENERAL.—(Continued).

(15) The necessity principle.

- (a) “From the necessity of the thing, the declarations of members of the family in matters of pedigree are generally admitted, the rejection of which would often be the rejection of all the evidence that could be offered. In matters of pedigree, it being impossible to prove, by living witnesses, the relationships of past generations, the declarations of deceased members of the family are admitted.” *Berkley Peerage Case*, 4 Camp. 409; Wigm. Ev., 1905 Ed., S. 1481, p. 1841. X
- (b) “Courts of law are obliged in cases of this kind to depart from the ordinary rules of evidence, as it would be impossible to establish descents according to the strict rules by which contracts are established and subjects of property regulated, by requiring the facts from the mouth of the witness who has the knowledge of them. In cases of pedigree, therefore, recourse is had to a secondary sort of evidence,—the best the nature of the subject will admit, establishing the descent from the only sources that can be had.” *Vowles v. Young*, 13 Ves 140; Wigm. Ev., 1905 Ed., S. 1481, p. 1841. Y
- (c) “Evidence afforded by the declarations of deceased persons on questions of pedigree are sometimes the only evidence available. Traditional declarations become the best evidence sometimes, when those who know the fact in question are no more.” *Eisenlord v. Clum*, 126 N.Y. 552; Wigm. Ev., 1905 Ed., S. 1481, p. 1841. Z
- (d) “Declarations on questions of pedigree are relevant on the ground of necessity. For, as in enquiries regarding relationship or descent, facts must frequently be proved that happened long before the trial and known only to a few persons, the strict observance in such cases of the rules against the admissibility of hearsay evidence would defeat the ends of justice.” *Fulkerson v. Holmes*, 117 U.S. 389; Wigm. Ev., 1905 Ed., S. 1481, p. 1841. A
- (e) In pedigree cases, hearsay evidence is admitted upon the ground of necessity, or the great difficulty, and sometimes the impossibility, of proving remote facts of such kind by living witnesses, there being no *lis mota* or other interest to affect the credibility of their declarations. *Ellicott v. Pearl*, 10 Pet. 494; Wigm. Ev., 1905 Ed., S. 1481, p. 1841. B
- (f) This exception to the general rule had its origin in the necessity of the case. The contention is that there is no necessity for a husband's declarations regarding the marriage, there being a party to the alleged marriage, *viz.*, the wife, living and competent to testify. This objection arises from a misapprehension of the rule. Such declarations are not held to be admissible or inadmissible according to the necessity of the particular case; but by the established rule of law, which, though said to have its origin in necessity, is universal in its application. *Crauford v. Blackburn*, 17 Md. 64; Wigm. Ev., 1905 Ed., S. 1481, p. 1843. C

(16) Circumstantial guarantees.

- (a) “Declarations in the family, descriptions in wills, descriptions upon monuments, descriptions in Bibles and registry books, all are admitted upon the principle that they are the natural effusions of a party, who

9 and 10.—“Clauses 5 and 6 of S. 32.”—(Continued).

1.—GENERAL.—(Concluded).

must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth.” *Whitlocke v. Baker*, 13 Ves. 514; Wigm. Ev., 1905 Ed., S. 1482, p. 1843; see also Tay. Ev., 10th Ed., S. 628, p. 446. Per *Eldon*, L.C. Prof. Wigmore says that Lord Eldon's utterances have ‘become the classical passage on the subject.’ See also Ros. Cr. Ev., 13th Ed., p. 26. D

- (b) “The admission of hearsay evidence of the declarations of the deceased persons in matters of pedigree is an exception to the general law of evidence; and it has ever been received with a degree of jealousy, because the opposite party has had no opportunity of cross-examining the persons by whom the declarations are supposed to have been made. But declarations, to be receivable in evidence, must have been the natural effusions of the mind of the party making them, and must have been made on an occasion in which his mind stood in an even position, without any attempt to exceed or fall short of the truth.” *Berkeley Peerage Case*, 4 Camp. 406, 409, 420; per *Wood*, B. Wigm. Ev., 1905 Ed., S. 1482, p. 1844. E

- (c) “If the entry be the ordinary act of a man in the ordinary course of life, without interest or particular motive, this, as the spontaneous effusion of his own mind, may be looked at without suspicion and received without objection. Such is the contemporaneous entry in a family Bible, by a father, of the birth of a child.” *Berkeley Peerage Case*, 4 Camp. 406, 409, 420; per *Eldon*, L.C. Wigm. Ev., 1905 Ed., S. 1482, p. 1844. F

- (d) “Where the relator had no interest to serve, and there is no ground for supposing that his mind stood otherwise than even upon the subject, we may reasonably suppose that he neither stops short nor goes beyond the limits of truth in his spontaneous declarations respecting his relations and the state of his family.” *Berkeley Peerage Case*, 4 Camp. 406, 409, 420; Wigm. Ev., 1905 Ed., S. 1482, p. 1844. Per *Lawrence*, J. G

- (e) “It is natural for persons to talk of their own situations and of their families. The evidence is in its nature of an unsuspicious kind; it is generally brought from remote times, when no question was depending or even thought of, and when no purpose would apparently be answered.” *R. v. Kriswell*, 3 T.R. 720; Wigm. Ev., 1905 Ed., S. 1482, p. 1843. H

2.—CONDITIONS UNDER WHICH DECLARATIONS REGARDING RELATIONSHIP, ETC., WILL BE ADMISSIBLE

(1). English and Indian Law, difference between.

The law of India regarding the admissibility of the statements of deceased persons, relating to the existence of any relationship by blood, marriage, or adoption, is different from the law of England. 24 O. 365 (268).
—T. & W. N. 270 (272). I

9 and 10.—“Clauses 5 and 6 of S. 32.”—(Continued).

2.—CONDITIONS UNDER WHICH DECLARATIONS REGARDING RELATIONSHIP, ETC., WILL BE ADMISSIBLE.—(Continued).

(2) Condition of admissibility—Legitimate relationship—English Law.

- (a) Declarations are relevant on questions of pedigres, only from persons legitimately connected by blood with the family in question, or from the husbands or wives, whether the marriage be subsisting or not, of such persons. See *Phip. Ev.*, 4th Ed., p. 285. See also *Tay. Ev.*, 10th Ed., S. 635, p. 451, *infra*. J
- (b) The admission of hearsay evidence is confined to such hearsay as emanates from persons who were *de jure* related by blood or marriage to the family in question, and who may, therefore, be considered to have had the greatest interest in seeking, the best opportunity for obtaining, and the least motive for falsifying any information regarding the matter. *Tay. Ev.*, 10th Ed., S. 635, p. 451, referring to *Johnson v. Lawson*, 2 Bing. 86; *Crease v. Barrett*, 4 L.J. Ex. 297 and other cases cited therein. K
- (c) “According to English Law, a certain degree of relationship is necessary in order to make such statements admissible, and statements of illegitimate children, accordingly, have been rejected. *Prima facie* evidence of legitimacy is sufficient to let in the statement of a declarant.” *Hitchins v. Eardley*, 2 P. and M. 248.” See *Cun. Ev.*, 10th Ed., p. 168. See also *Tay. Ev.*, 10th Ed., S. 636, p. 452. L
- (d) Declarations are not relevant on questions of pedigree, if they come from mere relatives of the husbands or wives of persons legitimately connected by blood with the family in question. *Shrewsbury Peerage*, 7 H.L.C. p. 23; *Phip. Ev.*, 4th Ed., p. 285. See also *Tay. Ev.*, 10th Ed., S. 636, p. 452. See also *Wigm. Ev.*, 1905 Ed., S. 1489, p. 1852. M
- (e) Declarations respecting matters of pedigree will not be admissible in evidence, if they should proceed from friends, servants, or neighbours of the family. *Johnson v. Lawson*, 2 Bing. 86; *Phip. Ev.*, 4th Ed., p. 285; *Ros. Crim. Ev.*, 12th Ed., p. 26; *Tay. Ev.*, 10th Ed., S. 635, p. 451 and *Wigm. Ev.*, 1905 Ed., S. 1487, p. 1851. N
- (f) Declarations of one who had been a housekeeper in the family for 24 years were rejected, the Court observing, “Evidence of that kind must be subject to limitation, otherwise, it would be a source of great uncertainty; and the limitation hitherto pursued, namely, the confining such evidence to the declarations of relations of the family, affords a rule, at once certain and intelligible. If the admissibility of such evidence were not so restrained, we would, on every occasion, before the testimony could be admitted, have to enter upon a long inquiry as to the degree of intimacy or confidence that subsisted between the party and the deceased declarant.” *Johnson v. Lawson*, 2 Bing. 86; *Wigm. Ev.*, 1905 Ed., S. 1487, p. 1851. But see the learned professor’s criticism thereon and the case cited *infra*. O
- (g) The testimony of the member of a family that an old body-servant, now deceased, had returned from Africa and told them of the death there of his master, an explorer, the ancestor in question, was held to be admissible, and the Court remarked that “There is, therefore, no

9 and 10.—“Clauses 5 and 6 of S. 32.”—(Continued).**2.—CONDITIONS UNDER WHICH DECLARATIONS REGARDING RELATIONSHIP, ETC., WILL BE ADMISSIBLE.—(Continued)**

improbability in the servant's relation which seems to have been credited at the time and ever since, and after fifty years parties are relieved from the necessities of attempting to account for him. No better evidence would be required than the account brought back by his faithful servant to his family, and accredited by them and by the Government which employed him.” *Doe v. Auldjo*, 5 U.C.Q.B. 175; Wigm. Ev., 1905 Ed., S. 1487, p. 1851. **P**

(2a) Declarations of family solicitor.

Declarations are not relevant on questions of pedigree, if they proceed from the family solicitor. *Re Palmas*, 1901 W.N. 146; Phip. Ev., 4th Ed., p. 285. **Q**

(2b) Presumption as to the kind of relative meant.

Where a competent deceased declarant has stated that another person is his relative, the presumption will be that he meant a *legitimate* relative. *Smith v. Tebbitt*, L.R. 1 P.D. 354; Phip. Ev., 4th Ed., p. 285. **R**

(2c) Declarations of deceased uncle as to nephew's illegitimacy.

Where a deceased uncle had stated that his nephew was illegitimate, his declarations were held to be inadmissible, as they legally concerned a stranger, though *in fact* related. *Crispin v. Dogliani*, 32 L.J.P. and M. 109; *Plant v. Taylor*, 7 H. and N. 211; Phip. Ev., 4th Ed., p. 285 and Tay. Ev., 10th Ed., S. 636, p. 452. **S**

(2d) Deceased parent's declarations as to child's illegitimacy.

Where a deceased parent states that his child is illegitimate, his declarations not only do not concern a relative, but also, as the ground of the child's illegitimacy might be non-access during marriage, they might contravene the rule against the bastardising of issue. *Murray v. Milner*, 12 Ch. D. 845 (819); Phip. Ev., 4th Ed., p. 285. See also Tay. Ev., 10th Ed., S. 637, p. 453. **T**

(2e) Declarations of father impeaching validity of his marriage.

Where a father impeached the validity of his marriage, and thus indirectly attempted to prove the illegitimacy of his child, or where he alleged that the child's birth preceded his marriage, his declarations have been held to be admissible. *Goodright v. Moss*, Cowp. 592; *Payne v. Bennett*, 20 T.L.R. 203; Phip. Ev., 4th Ed., p. 285. See also Tay. Ev., 10th Ed., S. 637, p. 453. **U**

(2f) Deceased husband's declarations as to wife's illegitimacy.

The declarations of a deceased husband regarding the illegitimacy of his wife were held to be admissible. *Vowles v. Young*, 13 Ves. 140 and *Doe v. Harvey*, R. and M. 297; Phip. Ev., 4th Ed., p. 285. See also Tay. Ev., 10th Ed., S. 638, p. 453. **Y**

(2g) Declarations of illegitimate members.

(a) In England, the declaration of an illegitimate member of a family would not be admissible in pedigree cases.—Whitley Stokes, Vol. II, p. 828. **W**

9 and 10.—“Clauses 3 and 6 of S. 32.”—(Continued).

2.—CONDITIONS UNDER WHICH DECLARATIONS REGARDING RELATIONSHIP, ETC., WILL BE ADMISSIBLE.—(Continued).

- (b) Where deceased illegitimate relations make declarations, they are entirely inadmissible to prove the condition of their family, as a bastard, being the son of nobody, has no relatives. *Doe v. Barton*, 2 M. and R. 28 and *Doe v. Davies*, 10 Q.B. 314; Phip. Ev., 4th Ed., p. 286. See also Tay. Ev., 10th Ed., §. 636, p. 452. X

(2b) Declarations as to declarant's own illegitimacy.

Where a deceased person made statements about his own illegitimacy, they were held to be relevant, both for or against persons claiming his estate, and, generally, as being declarations against pecuniary or proprietary interest. *Re Perton*, 53 L.T. 707. But, see *Haslam v. Cron*, 19 W.R. 968. See Phip. Ev., 4th Ed., p. 286. See also Tay. Ev., 10th Ed., §. 637, p. 458. Y

(2c) Declarations of persons of allied by marriage.

“Consanguinity, or affinity by blood, therefore, is not necessary, and for this obvious reason, that a party by marriage is more likely to be informed of the state of the family of which he has become a member than a relation who is only distantly connected by blood, as by frequent conversation the former may hear the particulars and characters of branches of the family long since dead.” *Doe v. Randall*, 2 Moo. and P. 25; Wigma. Ev., 1905 Ed., §. 1489, p. 1852. Z

(3) Condition of admissibility—Whether relationship necessary—Indian law.

- (a) Whereas, under the English Law, a certain degree of relationship is necessary for the admissibility of a person's statements as to the existence of relationship between persons, under the Indian Law, the existence of any special means of knowledge, on the part of the person making the statement, will render it admissible. See Fidd. Ev., 6th Ed., pp. 139 and 140. A

- (b) “Under the present section, the existence of any special means of knowledge on the part of the person making the statement will render it admissible.” See Curr. Ev., 10th Ed., p. 168. B

- (c) In India, the statements made by servants, friends, and neighbours, as to relationship, and statements made by a deceased person asserting his own illegitimacy, would be admissible. How doubtful this is in England, see Tay. Ev., 10th Ed., §. 637, p. 452. Whitley Stokes, Vol. II, p. 828. C

- (d) “The 47th section of the repealed Act (II of 1856), rescinded the English rule regarding the admissibility of declarations of illegitimate members of a family and admitted the declarations, not only of such persons, but also of persons who, though not related by blood or marriage, were yet intimately acquainted with the members and state of the family. The latter portion of this section would have included servants, friends, and neighbours, who are excluded under the English Law.”

9 and 10.—“*Clauses 5 and 6 of S. 32.*”—(Continued).

2.—CONDITIONS UNDER WHICH DECLARATIONS REGARDING RELATIONSHIP, ETC., WILL BE ADMISSIBLE.—(Continued).

The propriety of the extension of the rule, at least to illegitimate members of the family, cannot be doubted, having regard to domestic relations in the East; and the whole section was a strong instance of the tendency of modern reform, which, making admission the rule, and exclusion the exception, leaves it to the Court to estimate the weight to be allowed to particular kinds of evidence in individual cases.” See Field Ev., 6th Ed., p. 139. **D**

- (e) In India, the English rule has been rescinded since 1855. On this point, the Evidence Act (S. 32, cl. 5) merely requires that the declarant has special means of knowledge of the relationship, and that the statement was made before the question in dispute was raised. Whitley Stokes, Vol. II, p. 828. See also A. A. and W. Ev., 4th Ed., p. 219 and Field Ev., 6th Ed., p. 139. **E**

- (f) Under the English Law, on matters of pedigree, the declarations must be confined to such facts as are immediately connected with the question of pedigree, and declarations as to independent facts from which the date of genealogical event may be inferred, are rejected. But illustration (b) to S. 32 appears to be in conflict with the rule laid down above. See *Haines v. Guthrie*, L.R. 3 Q.B.D. 819, and 20 C. 758 (761), where the English case is not followed. **F**

- (g) Where it was contended that the law of England regarding the admissibility of the statements of deceased persons in regard to a party's date of birth is the same as the law of India, the Court observed that, when the Evidence Act was passed in this country, this question of hearsay evidence was not so definitely settled as it is now, that some of the text books supported the contention, that hearsay evidence was admissible to prove the date of birth, and that, looking at illustrations (k to m) of S. 32, such a statement was relevant. 20 C. 758 (762), (*Haines v. Guthrie*, L.R. 3 Q.B.D. 819, not F). **G**

- (h) The law in India with reference to the admissibility of statements of deceased persons relating to the existence of any relationship by blood, marriage, or adoption, is different from the law of England, and the effect of the section is to make a statement, made by such a person, relating to the existence of such relationship, admissible to prove the facts contained in the statement on *any issue*. 24 C. 265 (268-9). **H**

- (i) “This argument that a deceased person could know of his own illegitimacy only from information received from others and that, a bastard being a *filius nullius* and having no relations, the hearsay must have been derived from strangers, and is, hence, inadmissible, has no application in India, where the hearsay, not only of relations, but, also, of strangers, if they have had special means of knowledge, is admissible. There would appear to be little doubt, therefore, that the statement of a deceased person asserting his own illegitimacy is relevant against strangers under the Indian Evidence Act.” See Field Ev., 6th Ed., p. 140. **I**

9 and 10.—“*Clauses 5 and 6 of S. 32.*” —(Continued).

2.—CONDITIONS UNDER WHICH DECLARATIONS REGARDING RELATIONSHIP, ETC., WILL BE ADMISSIBLE.—(Continued).

- (j) Evidence of statements made by a deceased family priest, regarding the relationship of the members of the family, is admissible, under S. 32, cl. 5, of the Evidence Act. 4 C.L.R. 172 (174). J

(3-a) Statement as to age of one member of a family by another deceased member.

Where a statement regarding the age of the plaintiff was made by his sister, held that it was admissible in evidence after her death, under S. 32, cl. 5 of the Evidence Act, the date of birth being the commencement of a relationship by blood, and, therefore, relating to the existence of such relationship within the meaning of the section. 25 M. 183, following 20 C. 758. K

(4) Person, claiming as illegitimate son, to establish his paternity.

A person, claiming as an illegitimate son, must establish his alleged paternity, like any other disputed question of relationship, and can rely upon statements of deceased persons, under S. 32, cl. 5, for opinion expressed by conduct under S. 50 of the Evidence Act, and also upon such presumptions of fact as may be warranted by the evidence. 27 M. 32 (34-5). L

(5) English Law—Personal knowledge, whether necessary.

- (a) Under English Law, it is not essential that the declarant should have had personal knowledge of the matters stated; else, the chief object in relaxing the hearsay rule would be defeated, as most family information is procurable at second-hand only. *Phil. Ev.*, 4th Ed., p. 286. See also *Tay. Ev.*, 10th Ed., S. 639, p. 453. M
- (b) Under the English Law, it is enough if the declarant's information is obtained from other relatives, or from general family repute, or even simply from “what he has heard,” provided such “hearsay upon hearsay” is not directly derived from strangers. *Shedden v. A.—G. and Patrick*, 30 L.J.P. and M. 217; *Loval Peerage*, 10 Ap. Ca. 763; *Phil. Ev.*, 4th Ed., p. 286 and *Tay. Ev.*, 10th Ed., S. 639, p. 453. N
- (c) “It was not the opinion of Lord Mansfield, or of any Judge, that tradition, generally, is evidence even of pedigree. The tradition must be from persons having such a connection with a party to whom it relates that it is natural and likely from their domestic habits and connections that they are speaking the truth and that they could not be mistaken.” *Whitelocke v. Baker*, 13 Ves. 514; *Wigm. Ev.*, 1905 Ed., S. 1486, p. 1848. O
- (d) “General rights are naturally talked of in the neighbourhood and family transactions among the relations of the parties. Therefore, what is thus dropped in conversation upon such subjects may be presumed to be true.” *Berkeley Peerage Case*, 4 Camp. 416; *Wigm. Ev.*, 1905 Ed., S. 1486, p. 1848. P

9 and 10.—“Clauses 5 and 6 of S. 32.”—(Continued).

2.—CONDITIONS UNDER WHICH DECLARATIONS REGARDING RELATIONSHIP, ETC., WILL BE ADMISSIBLE.—(Continued).

- (e) “The declarations tendered in evidence may either refer to what the party knew of his own personal knowledge or as is much more frequently the case, to what he had heard from others to whom he gave credit.” *Monkton v. A.—G.*, 2 Russ. and M. 165; Wigm. Ev., 1905 Ed., S. 1486, p. 1848. **Q**
- (f) “Declarations of the members of a family, and perhaps of others living in habits of intimacy with them, are received in evidence regarding pedigree; but evidence of what a mere stranger has said has ever been rejected in those cases.” *L. v. Eriswell*, 3 T.R. 707; Wigm. Ev., 1905 Ed., S. 1486, p. 1849. **R**
- (g) “A pedigree declaration is evidence from the interest of that person in knowing the connections of the family. Therefore, the opinion of the neighbourhood, or what passed among acquaintances, will not do.” *Vowles v. Young*, 13 Ves. 140; Wigm. Ev., 1905 Ed., S. 1486, p. 1849. **S**
- (h) “The declaration must be from persons having such a connection with the party to whom it relates that it is natural and likely, from their domestic habits and connexions, they are speaking the truth and cannot be mistaken. The opinion of deceased neighbours or acquaintances of the family are not evidence in a question of pedigree; for, they cannot be supposed to have that certain knowledge which can be relied on. From this, it appears that the deceased relative whose declarations are given in evidence is to be considered as standing on the foot of a witness, and the hearsay declarations admitted in lieu of his testimony. It is, therefore, essential that the relative, whose declarations are given in evidence, should be named, so that the Court may be enabled to know whether his relationship, or connexion with the family whose pedigree is in question, was such that he may be supposed to know the truth of the declarations.” *Chapman v. Chapman*, 2 Conn. 349; Wigm. Ev., 1905 Ed., S. 1486, p. 1849. See also *Tay. Ev.*, 10th Ed., S. 635, p. 451. **T**
- (i) “What has been said by deceased members of the family is admissible upon the presumption that they know, from the general repute in the family, the facts of which they speak.” *Harland v. Eastman*, 107 Ill. 538; Wigm. Ev., 1905 Ed., S. 1486, p. 1849. **U**
- (j) Where the information of the declarant is derived either wholly or in part from incompetent sources, the declarations so founded will be inadmissible. *Davies v. Lowndes*, 6 M. and G. 527; Phip. Ev., 4th Ed., p. 286. See also *Res. Cr. Ev.*, 13th Ed., p. 26. See also *Steph. Dig.*, 7th Ed., Art. 31, p. 43. **Y**
- (k) The declarations need not directly state the genealogical fact. The status of a family member might be indirectly stated by declaring that, “he would have the property and be a gentleman.” *Issac v. Gompertz*, cited *Hub.* 651; Phip. Ev., 4th Ed., p. 286. See also *Tay. Ev.*, 10th Ed., S. 644, p. 457. **W**

9 and 10.—“*Clauses 5 and 6 of S. 32.*”—(Continued).

2.—CONDITIONS UNDER WHICH DECLARATIONS REGARDING RELATIONSHIP, ETC., WILL BE ADMISSIBLE —(Continued).

(6) **Personal knowledge, whether necessary under Indian Law.**

(a) A rule similar to that followed in *Shedden v. A.-G and Patrick*, see *supra*, “will be followed in cases under the Act, provided that all the statements come from the persons whose declarations on the subject are admissible (that is, persons who are shown to have had special means of knowledge); the evidence will not be rejected merely on the ground that the declarant had no personal knowledge of the facts stated.” See *A. A. and W. Ev.*, 4th Ed., p. 220. X

(b) “The rule now laid down by the Indian Evidence Act is still more general in its terms than the above quoted section 47 of the Act II of 1855, which was directed merely to modify the strict rule of English Law. It renders admissible the statements, not merely of persons deceased (whose statements only are admitted in England), but also of persons who cannot be found, or who have become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay and expense, which, under the circumstances of the case, appear to the Court unreasonable, if such persons had special means of knowledge of the relationship to which the statement relates. Proof of this special means of knowledge will be a pre-requisite to the admission of the evidence, and this proof must be given by the party who wishes to give such evidence.” *Field Ev.*, 6th Ed., p. 140. Y

(c) Under English Law, the declarations of a deceased widow respecting a statement which her husband had made to her, as to who his cousins were; the declaration of a relative in which he asserted generally that he had *heard* what he stated; and even general repute in a family, proved by the testimony of a surviving member, have been admitted. It may be doubtful whether statements could be admitted under the fifth clause of the Indian Evidence Act. Special means of knowledge, having regard to the meaning usually given to these words, might be held scarcely to include opportunities of hearing that, of the truth of which the hearer had no special means of judging. *Field Ev.*, 6th Ed., p. 140. See also *Tay. Ev.*, 10th Ed., S. 630, p. 453. Z

(7) **Personal knowledge and belief essential for admissibility of deceased's statement.**

Personal knowledge and belief of the deponent must be found or presumed in any statement of a deceased person, which is to be admitted in evidence. 7 C.W.N. 209 = 25 A. 143 (P.C.). A

(8) **Condition of admissibility—Contemporaneousness.**

(a) To render the declarations of deceased relatives, *ante litem motam*, relevant on questions of pedigree, it is not necessary that they should refer to contemporaneous events. Statements respecting events that occurred six generations ago have been held to be admissible. *Phil. Ev.*, 4th Ed., p. 286, citing *Hubb. Ev. of Succession*, p. 659; *Monkton v. A.-G*, 2 Russ. and Myl. pp. 157-8 and *Davies v. Lowndes*, 6 M. and G., p. 527. See also *Tay. Ev.*, 10th Ed., S. 639, p. 434, for the reasons which underlie this principle. B.

9 and 10.—“*Clauses 5 and 6 of S. 32.*”—(Continued).

2.—CONDITIONS UNDER WHICH DECLARATIONS REGARDING RELATIONSHIP, ETC., WILL BE ADMISSIBLE.—(Continued).

- (b) Where a person had made a declaration that his grand-mother's maiden name was, that declaration was held to be relevant. *Monkton v. A.-G.*, 2 Russ. and M. 158; Phip. Ev., 4th Ed., p. 286; Ros. Cr. Ev., 13th Ed., p. 26. As *Ld. Brougham* says, “such a restriction would defeat the purpose for which the hearsay in pedigree is let in, by preventing it from ever going back beyond the lifetime of the person whose declaration is to be adduced in evidence.” See *Tay. Ev.*, 10th Ed., S. 639, p. 454. C

(9) Declarations must have been made before controversy.

- (a) “When the contest has originated, people take part on one side or the other; their minds are in a ferment, and, if they are disposed to speak the truth, facts are seen by them through a false medium. It would hold out an invitation to fabricated testimony, if declarations could be received in evidence which have been made when the contest was actually begun.” *Berkeley Peerage Case*, 4 Camp. 413; *Wigm. Ev.*, 1905 Ed., S. 1483, p. 1844. D

- (b) Where the declarations are made after the controversy had arisen on the point under dispute, they will not be admitted in evidence. (*Ibid.*) *Ros. Cr. Ev.*, 13th Ed., p. 26. E

- (c) “Prove that the person concocting or making the declaration took part in the controversy. Show me even that there was a contemplation of legal proceedings, with a view to which the pedigree was manufactured, and I shall hold that it comes within the rule which rejects evidence, fabricated for a purpose, by a man who has an interest of his own to serve.” *Monkton v. Attorney-General*, 2 Russ. & M. 160, per *Brougham*, L.C. *Wigm. Ev.*, 1905 Ed., S. 1483, p. 1846. F

- (d) “If there be *lis mota*, or anything which has precisely the same effect upon a person's mind with *lis contestatio*, that person's declaration ceases to be admissible in evidence. It is no longer, what Lord Eldon calls, a natural effusion of the mind. It is subject to a strong suspicion that the party was in the act of making evidence for himself. If he be in such circumstances that what he says is said, not because it is true, not because he believes it, but because he feels it to be profitable, or that it may hereafter become evidence for him, or for those in whom he takes an interest after his death, it is excluded. The question then always will be, was the evidence in the particular circumstances manufactured, or was it spontaneous and natural?” *Monkton v. A.-G.*, 2 Russ. and M. 160; *Wigm. Ev.*, 1905 Ed., S. 1483, p. 1844. G

(10) Relevancy of declarations subserving declarant's own interest.

- (a) Where the declarations are otherwise made to subserve the declarant's own interests, they have been held to be inadmissible in evidence. *Plant v. Taylor*, 7 H. and N. 211 and *Dysart Peerage Case*, 6 App. Case 489; *Phip. Ev.*, 4th Ed., p. 286. H

9 and 10.—“*Clauses 5 and 6 of S. 32.*”—(Continued).

2.—CONDITIONS UNDER WHICH DECLARATIONS REGARDING RELATIONSHIP, ETC., WILL BE ADMISSIBLE.—(Continued).

(b) “Perhaps the learned Judge was right in rejecting the evidence on the ground that any declaration made by Thomas Taylor, the father, would be a declaration by a person whose mind could not be free from bias. It was manifestly in many ways directly for his interest to make a declaration tending to disavow his first marriage, or having a tendency to show that it was an illegal marriage and consequently did not invalidate the second. No case has been cited in which the declaration of a deceased person obviously for his interest has been received.” *Plant v. Taylor*, 7 H. and N. 237; Wigm. Ev., 1905 Ed., S. 1484, p. 1846. I

(11) Relevancy of declarations in direct support of future intended claim.

Where the declarations were in direct support of a claim intended to be made by the person who made them, they were held to be inadmissible. *Slane Peerage Case*, 5 C. and F. 39 (40); Phip. Ev., 4th Ed., p. 286. J

(12) Relevancy of declarations made before controversy, but directly supporting declarant's title.

Where declarations as to pedigree have been made before dispute, or before any claim was intended to be made, they would be relevant, notwithstanding that they directly support the title of the declarant, or of another in *pari jure* with him. *Doe v. Tarrver*, Ry. and M. 141; Phip. Ed., 4th Ev., p. 286. K

(13) Mere bias will not exclude.

The declarations of deceased relatives should not be totally excluded, because there may be room for a suspicion that they may have been made for a sinister purpose, if the party making them has no interest in their truth. *People v. Fire Insurance Company*, 25 Wend. 215, and *Shields v. Boucher*, 2 Russ. and M. 147; Wigm. Ev., 1905 Ed., S. 1484, p. 1847. L

(14) Whether suit necessary to constitute a *lis*.

“The *lis* would surely have dated at least from the time when the parties had respectively assumed a hostile attitude. A suit is not necessary to constitute a *lis*.” *Butler v. Mountgarret*, 6 H.L.C. 641; Wigm. Ev., 1905 Ed., S. 1483, p. 1846. M

(14-a) Relevancy of statement in document executed by several persons some only of whom are dead.

A statement relating to the existence of any relationship contained in a document signed by several persons, some only of whom are dead, is admissible in evidence under cl. 5 of S. 32 of the Evidence Act. 26 C. 286 (238). N

(15) Family conduct and repute in cases of marriage—English Law.

(a) “Family conduct is usually treated as part of the subject by English text-writers. Such conduct has been admitted as evidence from which the opinion and belief of the family may be reasonably inferred.” *Field Ev.*, 6th Ed., p. 141, referring to 11 W.R. (P.C.), 6=12 M.I.A. 203; 14 M.I.A. 67 and 8 C. 726=1 C.L.R. 118=4 I.A. 228. See also under Ss. 8, 9 and 11, *supra*, and under S. 50, *infra*. O

9 and 10.—“Clauses 5 and 6 of S. 32.”—(Continued).

2.—CONDITIONS UNDER WHICH DECLARATIONS REGARDING RELATIONSHIP, ETC., WILL BE ADMISSIBLE.—(Continued).

(b) Where a marriage is in question, there is no need to restrict the evidence of repute and conduct to the family, reputation among and treatment by friends and neighbours being equally admissible. Phip. Ev., 4th Ed., p. 288. P

(c) Where a witness testifies to the existence of a general reputation among friends and neighbours, he must not be permitted to state what some particular individual has stated upon the subject; and, where it appears that his evidence is founded barely upon the declarations of such individual, it ceases to be admissible as general reputation, and can then be only relevant if the declarant was a deceased member of the family. *Shedden v. A.—G. and Patrick*, 30 L.J.P.M. and A. 217; Phip. Ev., 4th Ed., p. 288. Q

(16) Repute and conduct in marriage—Indian Law.

“According to English Law, in the case of marriage, repute and conduct need not be confined to the family. General reputation among and treatment by friends and neighbours being receivable, except in certain criminal cases, when stricter proof is required, as evidence of marriage. But the testimony must be general; if it is based merely on the statements of some particular person, it ceases to be admissible as general reputation, and can only be tendered on a question of pedigree in England, as the statement of a deceased relation, or in India, as the statement of a person having special means of knowledge made *ante litem motam*.” See A. A and W. Ev., 4th Ed., p. 220. R

(17) Evidence of marriage under S. 32—Sufficiency.

(a) Strict proof of marriage must be given, where it is an ingredient in an offence, as in adultery, bigamy, and enticing away a married woman. S. 32 of the Evidence Act, which allows a less strict proof of marriage, has no application here. 5 C.L.R. 597 (F.B.) = 5 C. 566. S

(b) Case of conviction for adultery under S. 497, Penal Code. The only evidence of the marriage of the woman was the statement of the prosecutor and that of the woman that they were man and wife by marriage. *Held* that a conviction for adultery could not be sustained upon such evidence of the marriage. 5 C. 566 = 5 C.L.R. 597 (F.B.); *followed* in 5 A. 238. T

(18) Declarations as to particular facts admissible on questions of pedigree.

(a) “In cases of general rights, which depend upon immemorial usage, living witnesses can only speak of their own knowledge as to what passed in their own time; and to supply the deficiency, the law receives the declarations of persons who are dead. There, however, the witness is only allowed to speak to what he has heard the dead man say respecting the reputation of the right of way, or of common, or the like. A declaration with regard to a particular fact, which would support or negative the right, is inadmissible. In matters of pedigree, it being

9 and 10.—“Clauses 5 and 6 of S. 32.”—(Continued).

2.—CONDITIONS UNDER WHICH DECLARATIONS REGARDING RELATIONSHIP, ETC., WILL BE ADMISSIBLE.—(Continued).

impossible to prove by living witnesses the relationships of past generations, the declarations of deceased members of the family are admitted; but here, as the reputation must proceed on particular facts, such as marriages, births, and the like, from the necessity of the thing, the hearsay of the family as to these particular facts is not excluded. General rights are naturally talked of in the neighbourhood; and the family transactions among the relations of the parties. Therefore, what is thus dropped in conversation upon such subjects may be presumed to be true.” *Berkeley Peerage Case*, 4 Camp. 415 (H.L.), per *Mansfield*, C.J. Tay. Ev., 10th Ed., S. 649, p. 456. U

- (b) Where a father was proved to have declared that he made an entry for the express purpose of establishing the legitimacy of his son and the time of his birth, in case the same should be called in question after the father's death, *held* that the entry was admissible in evidence, notwithstanding the professed view with which it was made; though its particularity would be a strong circumstance of suspicion, still it would be admissible, whatever the credit might be to which it would be entitled. *Berkeley Peerage Case*, 4 Camp. 418; Wigm. Ev., 1905 Ed., S. 1484, p. 1847. Y

- (c) Where particular facts or instances may be proved by hearsay, it must be shown that, in each case, the witness derived his information from a person likely to have been aware of the facts related by him. 8 O.C. 94 (107). W

(19) “Genealogical purpose” and “matters of pedigree,” meaning of.

- (a) The expressions “genealogical purpose” and “matters of pedigree” seem to be restricted to questions of family succession, whether testate or intestate; relationship, legitimacy; and, to such particular incidents of family history as are directly connected with, and are necessary to prove, those questions—as, for example, the birth, the marriage, and death of members of the family, with the respective dates and places of those facts; age, celibacy, issue or failure of issue; and, probably, as occupation, residence and similar incidents of family history which are required to identify persons in question. Fhip. Ev., 4th Ed., p. 285, referring to Tay. Ev., 10th Ed., Ss. 648-6, pp. 456, 457 and 458; Steph. Dig., 7th Ed., Art. 31, p. 43; Hubb. Ev., Succ., citing *Hood v. Lady Beauchamp*, 8 Sim. 26; *Shields v. Boucher*, 1 DeG. & S. 49; *Rishton v. Nesbitt*, 2 M. & R. 554 and *Lovat Peerage*, 10 App. Cas. 763. X

- (b) Pedigree is a matter about which the members of a family are presumed to be particularly interested to ascertain and declare the truth. Every one, from a feeling of nature, attempts to know who his relations are and will rarely declare such as are not his relatives to be his kinsmen. *Moffitt v. Witherspoon*, 10 Ired. 192; Wigm. Ev., 1905 Ed., S. 1482, p. 1844. Y

9 and 10.—“*Clauses 5 and 6 of S. 32.*”—(Continued).

2.—CONDITIONS UNDER WHICH DECLARATIONS REGARDING RELATIONSHIP, ETC., WILL BE ADMISSIBLE.—(Continued).

(20) What are not cases of pedigree.

- (a) Where the declarations of a father as to the bastard birth and as to the place of birth of a pauper were held to be inadmissible in the case of the settlement of the pauper, the Court observed, “The only doubt which has been introduced into this case has arisen from improperly considering it as a question of pedigree. The controversy was not, as in a case of pedigree, from what parents the child has derived its birth; but in what place an undisputed birth, derived from known and acknowledged persons, has happened. The point thus stated turns on a single fact involving no question but of locality and therefore not falling within the principle of, or governed by, the rules applicable to cases of pedigree.” *R. v. Erith*, 8 East 539; Wigm. Ev., 1905 Ed., S. 1503, p. 1861. Z

- (b) “A case is not necessarily a case of pedigree, because it may involve questions of birth, parentage, or relationship. Where these questions are merely incidental and the judgment will simply establish a debt, or a person’s liability on a contract, or his proper settlement as a pauper, and things of that nature, the question is not one of pedigree.” *Eisenlord v. Clum*, 126 N.Y. 552; Wigm. Ev., 1905 Ed., S. 1503, p. 1861. A

(21) Relevancy of incidents of family history.

Where incidents of family history, although inferentially tending to prove, are not directly connected with questions of pedigree, or where such incidents are not required for some genealogical purpose, (*Haines v. Guthrie*, 13 Q.B.D. 818), they are inadmissible in evidence. See Phip. Ev., 4th Ed., p. 285. B

(22) Kind of issue or litigation need not relate to inheritance.

Where the main issue in a case was about a pauper’s settlement, the Court, admitting evidential declarations, observed, “Upon principle, we can see no reason for such a limitation. If this evidence is admissible to prove such facts at all, it is equally so in all cases, whenever they become legitimate subjects of judicial enquiry and investigation.” *North Brookfield v. Warren*, 16 Gray 175; Wigm. Ev., 1905 Ed., S. 1503, p. 1863. C

(23) Relevancy of statement in a pedigree.

- (a) The statement in a pedigree, made by a deceased member of one branch of a family regarding the descendants of another branch thereof, before any dispute arose as to the latter, is relevant and admissible in evidence. 32 C. 6 (15). D

- (b) A genealogical table purported to have been made by a person since deceased. It was shown to be simply an exhibit binding on him for the purposes of a former suit. Held, that, as it was made without the personal knowledge and belief that must be found or presumed in any admissible statement of a deceased person, it was inadmissible in evidence. 25 A. 143 (P.C.). E

9 and 10.—“*Clauses 5 and 6 of S. 32.*”—(Continued).

2.—CONDITIONS UNDER WHICH DECLARATIONS REGARDING RELATIONSHIP, ETC., WILL BE ADMISSIBLE.—(Continued).

(24) English and Indian Law regarding family pedigrees.

(a) With respect to family pedigrees, the Indian Act follows the principle laid down after much discussion in the case of *Davies v. Lowndes*. Field Ev., 6th Ed., p. 142. See *infra*. F

(b) Under the English Law, the rule which admits hearsay evidence in pedigree cases is confined to the proof of the pedigree and does not apply to the facts which constitute it, such as birth, death, or marriage, when they have to be proved for other purposes. It was long doubted in England whether evidence as to the date and place of birth was admissible under this rule, but in India the question has been settled in the affirmative by authoritative decisions under this section. Declarations are admissible on any issue, if they relate to a fact relevant to the case. Field Ev., 6th Ed., p. 141. G

(25) Proof of pedigree.

The appellants were held, in the absence of evidence to the contrary, to have sufficiently proved their title, as reversionary heirs to the estate of the deceased, by oral evidence of reputed common descent, relevant under S. 32, cl. 5, and by documentary evidence, that the widow of the deceased, had recognised, long before suit, under conditions, that her husband's heirs were entitled to succeed her, and that she was not prepared to contest the claim of the appellant's predecessors to be such heirs. The appellants were held not bound by those conditions as they claimed in their own right, nor were they bound by contracts made with those through whom they traced their descent. 24 A. 94 = 6 C.W.N. 169 = 29 I.A. 1. H

(26) Unnecessary to prove individual authorship, where family adopts declaration.

(a) With reference to a pedigree chart, the Court said, “They are in their nature public, openly exhibited, and well-known to the family, and, therefore, they may be presumed to possess that authenticity which is derived from the tacit and common assent of those interested in the facts which they record.” *North Brookfield v. Warren*, 16 Gray 174; Wig. Ev., 1905 Ed., S. 1496, p. 1858. I

(b) “Proof of the handwriting or the authorship of the entries is not required when the book is shown to have been the family Bible or testament, for then the entries, as evidence, derive their weight, not more from the fact that they were made by any particular person, than that, being in that place as a family registry, they are to be taken as assented to by those in whose custody the book has been kept.” *Jones v. Jones*, 45 Md. 160; Wig. Ev., 1905 Ed., S. 1596, p. 1858. J

(27) Statement as to age, when admissible.

(a) A statement as to the age of a member of a family, made by his sister, is admissible after her death, under S. 32 (5) of the Evidence Act, illustration (e) and 20 C. 758. 25 M. 183 (209). K

9 and 10.—“*Clauses 5 and 6 of S. 32.*”—(Continued).

2.—CONDITIONS UNDER WHICH DECLARATIONS REGARDING RELATIONSHIP, ETC., WILL BE ADMISSIBLE.—(Continued).

- (b) The question was whether the defendant was a minor on the date of the execution of a promissory note. The defendant produced a document called a *wirasat-nama* alleged to have been executed and deposited by his father in the *wasika* office, at Lucknow. The document purported to be a statement, by his father, of his heirs of every kind, and the defendant's name was not entered therein. *Held* that the statement was one relating to the date of the defendant's birth, and that, having been made before the dispute, as to the date of his birth, arose, it was admissible in evidence under S. 32 (5). S.C. 265 (Oudh). (20 C. 758, *F*; and 18 C. 42, *not F.*). L

(28) Principle on which declaration as to age is admissible.

The time of one's birth relates to the commencement of one's relationship by blood, and a statement, therefore, of one's age made by a deceased person having special means of knowledge, relates to the existence of such relationship, within the meaning of S. 32 (5). 25 M. 193 (210) M

(29) Burden of proof regarding age.

The prospectus of a Life Insurance Company contained a stipulation that evidence of the age of the assured person should be furnished in every case, before a claim under a policy could be paid; and recommended assurers to provide evidence of age as soon as possible, as it was required on the settlement of the claim, if not previously produced. *Semble*, that the effect of the condition was to throw, upon the assured person, or his representatives, the *onus* of proving the correctness of the age, as warranted by the assured. 25 M. 183. N

(30) Horoscope, admissibility of.

- (a) The plaintiff brought an administration suit against the executors of her late husband and obtained a rule *nisi* and an *interim* injunction against them. The solicitors of the defendant gave notice to the plaintiff's solicitor that she was a minor suing without a next friend, and that the plaint must be struck off the file consequently. The plaintiff's solicitor, on looking into the horoscope, made an application to amend the plaint by adding her father as next friend. *Held* that the suit was not vexatious, as the father swore that he believed his daughter was of age and as her horoscope was not in his possession and that he could be admitted on the record, on paying all the costs of the application, having been guilty of gross carelessness in not having consulted the horoscope, whose existence he must have known. 13 B. 7 (11-2). O

- (b) Suit for cancellation of a sale of the plaintiff's share in a *mittah*. The question was whether the suit was time-barred, as not having been brought within six months from the date of the plaintiff's attaining majority, as proved by his horoscope produced by his mother, which had been a public record from a period *ante litem motam*, and relied upon by the defendants, not under S. 32, but more as an admission under S. 17 and S. 19 of the Evidence Act. *Held* the suit was time-barred, under S. 59 of Act II of 1864. 17 M. 184 (139). See also 13 B. 7. P-

9 and 10. —“*Clauses 5 and 6 of S. 32.*” —(Continued).2.—CONDITIONS UNDER WHICH DECLARATIONS
REGARDING RELATIONSHIP, ETC., WILL BE
ADMISSIBLE.—(Continued).

(31) S. 17 (b), Registration Act of 1877—Statement in will—Admissibility, under cl. 6.

S. 17 (b) of the Registration Act of 1877, does not render a passage in a will inadmissible in evidence, which passage does not purport or operate to extinguish an interest in the present or in the future, but states only past facts. The statement contained in the passage would, if proved, be admissible, also under S. 32 (6) of the Evidence Act, and the statement could, therefore, be proved. 20 B. 562 (564). Q

(32) Hearsay on question of survival.

It has never been held that this clause justifies the admission of what, for the sake of brevity, may be called ‘hearsay’ upon the question whether a particular person survived another, and it is obvious that this clause does not justify the admission of hearsay upon the question, whether a man was at the time of his death joint with, or separate from, other members of his family. 8 O.C. 94 (103). R

(33) Grounds of deceased's opinion.

The grounds of an opinion held by a deceased person, even if stated to a witness, cannot, as such, be proved under S. 32. 8 O.C. 94 (107). S

(34) Form of declarations.

(a) Statements regarding family history may be oral or written, may consist of words or conduct, and they may be made in the declarant's own writing, or by assenting to, or adopting, the writing of another person. Whether the declarations tendered be the declarations of an individual, or the family repate, they are equally true. Wigm. Ev., 1905 Ed., S. 1495, p. 1857. See also Tay. Ev., 10th Ed., S. 648, p. 459 and Phip. Ev., 4th Ed., p. 287. T

(b) Entries in a family Bible are admissible on grounds of publicity and family acknowledgment, without proof of identity, relationship, or, probably, death. *Berkely Peerage Case*, 4 Com. 401; *Monkton v. A.—G.*, 2 R. and M. pp. 162–3, and *Hubbard v. Tees*, L.R. 1 Ex. 255; Phip. Ev., 4th Ed., p. 287. U

(c) “Suppose from the hour of one child's birth to the death of its parent, it had always been treated as illegitimate, and another introduced and considered as the heir of the family, that would be good evidence. An entry in the father's family Bible, an inscription on a tombstone, a pedigree hung up in a family mansion (as the Duke of Birmingham's was), are all good evidence.” *Goodright v. Moss*, Cowper, 594; Wigm. Ev., 1905 Ed., S. 1495, p. 1857. Y

(d) “Inscriptions upon tombstones are admitted, as, it must be supposed, the relations of the family would not permit an inscription without foundation to remain. So, engravings upon rings are admitted upon the presumption that a person would not wear a ring with an error upon it.” *Vowles v. Young*, 13 Ves. 140; Wigm. Ev., 1905 Ed., S. 1495, p. 1857. W

9 and 10.—“*Clauses 5 and 6 of S. 32.*”—(Continued).

2.—CONDITIONS UNDER WHICH DECLARATIONS REGARDING RELATIONSHIP, ETC., WILL BE ADMISSIBLE.—(Concluded).

(e) “If the father is proved to have brought up the party as his legitimate son, this is sufficient evidence of legitimacy till impeached, and indeed it amounts to a daily assertion that the son is legitimate.” *Berkeley Peerage Case*, 4 Camp. 416; Wigm. Ev., 1905 Ed., S. 1495, p. 1857. **X**

(f) “Such statements by deceased members of the family may be proved not only by showing that they actually made the statements, but by showing that they acted upon them, or assented to them, or did anything that amounted to showing that they recognized them.” *Sturlu v. Freccia*, L.R. 5 App. Cas., 641; Wigm. Ev., 1905 Ed., S. 1495, p. 1857. **Y**

(35) Admissibility of letters, correspondence, etc.

“Whether letters, correspondence, etc., will be held to be so far *ejusdem generis* as to be included among ‘other things,’ may be doubtful. Their admissibility under cl. 5 on proof of special means of knowledge is clear enough.” Field Ev., 6th Ed., p. 142, Note 2. **Z**

3.—INSTANCES OF DECLARATIONS AS TO RELATIONSHIP, ETC., HELD ADMISSIBLE AND INADMISSIBLE.

(1) Instances of declarations regarding relationship, etc., held admissible.

(a) Where a plaint in a former suit was verified by a deceased member of a family, and, as such, having special means of knowledge, the plaint was held to be relevant, under S. 32, cl. 5, to prove the order in which certain persons were born and their ages. 21 C. 265 (269)=1 C.W.N. 270 (272). **A**

(b) A *wasikadar*, in accordance with the practice of the *wasika* office which is a department of the Government, made, when no controversy on the matter was under contemplation, a number of statements as to who were the heirs of a Mahomedan woman. Letters written by her in answer to enquiries made by the *wasika* officer, explaining and confirming such statements, and the *wasikadar's* statements above mentioned, tendered in evidence to prove the legitimacy of her heirs, were held to be relevant, and under the circumstances, to be conclusive in favour of such heirs. 25 A. 236=7 C.W.N. 465. **B**

(c) An adoption was in question. It was proved that the dispute had been referred to a punchayet, whose report, dated 7-2-1819, was recorded in the Collector's office, whence it was produced. A minute local enquiry was clearly shown to have been made into the history of the family before a competent local tribunal, and the litigants were also proved to have signed the report to the effect that each acquiesced in what was therein stated. *Held*, that the findings in the report were strong evidence in matters of family pedigree. 25 B. 1 (P.C.)=3 C.W.N. 130 =26 I.A. 48. **C**

9 and 10.—“*Clauses 5 and 6 of S. 32.*”—(Continued).3.—INSTANCES OF DECLARATIONS AS TO
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- (d) Suit by the plaintiffs to recover a moiety of certain property belonging to the last member of a divided branch of the family of the plaintiffs and the defendants, governed by the *Aliyasantana* law. To prove the relationship of the parties, the plaintiffs relied partly on a certified copy of a *kararnamah* entered into by the plaintiff and an ancestor of one of the defendants, which had been set aside as against the defendants in a former suit. It was found that the parties were reversioners of equal grade to the *Surjis*. *Held* that, though the *kararnamah* was set aside on other grounds, the relationship therein set forth might be considered, and, though the evidence was partly hearsay, such evidence was admissible on questions of pedigree. 10 M. 362. D
- (d-1) The incidental mention of a child's age in the recital of a will is no proof of the exact age of that child. The proceedings after the deviser's death granting a certificate to the guardian of the girl are merely proof of being a minor at that time, and do not disclose what her exact age then was. In the absence of proof of the person, who made a sale, being a minor at the time she executed a deed of sale to the plaintiff, the *onus* of which lay on the defendant, the sale by her was upheld. 8 W.R. 371. E
- (e) “The published report of this case does not show whether the child was dead at the time the evidence was offered. If dead, the case is no longer law.” Field Ev., 6th Ed., p. 142. F
- (f) The plaintiff sued to recover possession of a raj as the nearest agnatic kinsman of the last raja in possession, who died leaving him surviving a widow and a daughter by her, both of whom died before the suit. The plaintiff offered in evidence a pedigree not stated, in any document put forward, that it had existed in the family before the suit. It was contended that there were no steps in the pedigree, the evidence produced regarding which did not include proof of statements made by deceased persons having no means of knowledge, or proof of other statements, within S. 32 of the Evidence Act, and as to which the evidence was insufficient. *Held* that the evidence, both oral and documentary, was sufficient to prove that the plaintiff was related to the deceased raja and that the opinion of their Lordships was founded upon the documentary evidence in the case. 17 A. 456 (474) (P.C.). G
- (g) Where the question was whether the succession to an estate was governed by the rule of primogeniture, their Lordships of the Privy Council in setting out the evidence relied upon the statements of 7 *thakurs* who were said to have affirmed the custom in general terms, established the installation of the defendant and his father by direct evidence, and affirmed other installations by tradition and hearsay. 19 A. 1 (15) (P.C.)=23 I.A. 147. H
- (h) A witness may state, as the ground of his opinion as to the existence of a family custom, information derived from deceased persons. But, this must be the statement of independent opinion; and, though derived

9 and 10.—“Clauses 5 and 6 of S. 32”—(Continued).

3.—INSTANCES OF DECLARATIONS AS TO
RELATIONSHIP, ETC., HELD ADMISSIBLE AND
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from hearsay, must not be the mere “repetition of hearsay.” The weight of such evidence depends upon the character of the witness and of the deceased. 23 A. 37 (P.C.) = 27 I.A. 238. I

- (i) The elder of two brothers having obtained possession of all the family estate, the younger, suing for his half share under the general Hindu law, was met by the defence that there was in this family a custom of primogeniture. In the evidence as to tradition regarding the family, learned by witnesses from deceased persons, their statements were held to come within Sub-S. 5 of S. 32 of the Evidence Act, 1872. 23 A. 37 = 27 I.A. 238. J

- (j) The widow of a last male owner died in 1892. The plaintiffs then claimed certain lands as his collateral heirs, alleging that the last male owner was descended in the same degree from a common ancestor, as the persons whose descendants in the direct line the plaintiffs themselves were. These persons had made a similar claim through the common ancestor in 1847, when the settlement of the estate with the widow was being made, alleging themselves to be her husband's reversionary heirs (the widow being then in possession of the lands in dispute). The principal evidence consisted of statements made by the plaintiffs regarding their descent, the information as to which they had received from their ancestors. Objection was taken that such of these statements as were made since 1847 were inadmissible in evidence under cls. 5 and 6 of S. 32 of the Evidence Act as being *post litem*. Held that they were relevant, the heirship of the then claimants not being really in dispute at that time. 24 A. 94 (P.C.) = 6 C.W.N. 169. K

- (k) Where the question was whether a suit was barred by limitation, the plaintiff had to prove the date of his birth. The plaintiff and another witness proved statements made to them by the plaintiff's deceased relatives during the negotiations for the plaintiff's marriage. Held that such statements were admissible in evidence, looking at illustrations (k to m) of S. 32 of the Act. (*Haines v. Guthrie*, not F). 20 C. 758 (762). L

- (l) A statement relating to the existence of any relationship contained in a document signed by several persons, some only of whom are dead, is admissible under cl. 5 of S. 32, Evidence Act, as each of the executants must be taken to have made the statement for himself, and, if any of the executants of the document is dead, the statement made by that person would be admissible under S. 32, if it comes under one or other of its clauses, as being the statement of a person who is dead. 26 C. 296 (298) = 3 C.W.N. 88 (90). M

- (m) The evidence of a deceased person in a proceeding under the Land Registration Act would be admissible in evidence under S. 32 (8), where the statement was against the pecuniary or proprietary interest of the deponent, even in a suit which related solely to a question of title. 32 C. 6. N

9 and 10.—“*Clauses 5 and 6 of S. 32.*”—(Continued).3.—INSTANCES OF DECLARATIONS AS TO
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- (n) Where a statement was made in a genealogical table by a deceased member of the family as to the descendants of another member of the family before any question arose as to the latter, *held*, it was relevant, under S. 32 (5) of the Evidence Act. 32 C. 6 (15). **O**
- (o) A person sought to prove a pedigree which would prove his title to be reversioner to the estate of a Hindu widow. To prove the pedigree he adduced the evidence of some of his own kinsfolk. It was held to be admissible in quality and derived special weight from the fact that Hindu boys are taught the names of their paternal and maternal ancestors up to the seventh (or even a higher) degree as a matter of necessity. Such evidence could come only from the person's relatives, and would be worthless if it came from strangers. It should not be treated, therefore, with more than the ordinary caution with which testimony is sifted, where sympathy with one side is taken for granted. 32 C. 84—9 C.W.N. 161 (P.C.). **P**
- (p) Suit to recover money on a policy of life insurance. A document purporting to be a declaration with regard to the age of the deceased, made by his sister who was alive at the time, but who died before the trial, would be admissible in evidence, under S. 32 (5), as a declaration made by a deceased person, provided that the evidence established that the declaration was, in fact, made. 25 M. 183 (199). **Q**
- (q) A statement of the deceased person, whose life was assured, as to his age, contained in the proposal form and in the declaration, is legally admissible in favour of a person who claims the benefit of the policy, as the person entitled to it, under S. 32 (5) and S. 21, cls. 1 and 3 of the Evidence Act, though it can carry but little weight, when opposed to prior statements made by the assured himself in respect of his age. 25 M. 183 (207). **R**
- (r) Where an accused person was dead, his confession, implicating himself and an accomplice in an offence, is admissible, under S. 32 (3), Evidence Act, and is not excluded by illustration (b) to S. 30. U.B.R. 1906, 3rd Quarter, Ev. p. 3. **S**
- (s) In an action for freehold property by B as A's heir, A's death and the death of any of his relatives entitled in preference to B may be proved by family repute as being matters of pedigree. *Doe v. Griffin*, 15 East 293; Phip. Ev., 4th Ed., p. 289. **T**
- (t) The declarations of a deceased person regarding his own age, birthplace, or illegitimacy are admissible, though they may be necessarily founded upon hearsay. *Re Perton*, 53 L.T. 707 and *Sturla v. Freccia*, 5 App. Cas. 623; Phip. Ev., 4th Ed., p. 290. **U**
- (u) Where a person devised his lands to his son for life, then to his son's sons in succession, in an action by one of the son's sons for the recovery of the lands, the deaths of the son and of the other brothers of the plaintiff may be proved by family repute. *Palmer v. Palmer*, 18 L.R. Ir. 192; Phip. Ev., 4th Ed., p. 290. See also Tay. Ev., 10th Ed., S. 645, p. 468. **Y**

9 and 10.—“Clauses 5 and 6 of S. 32.”—(Continued).

3.—INSTANCES OF DECLARATIONS AS TO
RELATIONSHIP, ETC., HELD ADMISSIBLE AND
INADMISSIBLE.—(Continued).

- (v) Where, on a question of pedigree to show that A was B's son, a notarial protest and the record of proceedings in an action on a bill of exchange, which involved no pedigree question, and in which A was sued as, and admitted himself to be, the son and representative of B, were held to be admissible in evidence, provided that proof *aliunde* was given connecting A with the family. *Lyell v. Kennedy*, 14 App. Cas. pp. 450-1; Phip. Ev., 4th Ed., p. 291. See also Tay. Ev., 10th Ed., S. 640, p. 454. **W**
- (w) Where a person sued for the recovery of land as the heir of X, an affidavit stating the plaintiff's relationship to X, and made by a deceased relative in a former non-contentious proceeding in Chancery, wherein an enquiry was ordered as to who was X's heir and next-of-kin, was held to be relevant, such a proceeding not being a *lis mota*. *Gee v. Ward*, 7 E. and B. 509; Phip. Ev., 4th Ed., p. 291. **X**
- (x) Where a declaration on matters of pedigree was contained in a draft will, not signed or executed by the testator, but in his handwriting, it was held to be relevant. *Re Lambert*, 56 L.T. 15; Phip. Ev., 4th Ed., p. 291. **Y**
- (y) Where an entry relating to pedigree was made in a Roman Catholic mass book, amongst various similar entries, and shown to be in the handwriting of a deceased parent, it was held to be relevant. *Slane Penrage*, Hubback, 673; Phip. Ev., 4th Ed., p. 291. **Z**
- (z) The declarations of a deceased mother, as to when her son was born, are admissible, although the father is alive and not summoned. *R. v. Birmingham*, Hubb. Succ. 660; Tay. Ev., 10th Ed., S. 641, p. 455. **A**
- (aa) Where a man made a will, taking in it no notice of his family and bequeathing by it his property to strangers or collateral relations, it is a good evidence of his having died without issue. *Hungate v. Gascoigne*, 2 Phill. 25; Tay. Ev., 10th Ed., S. 649, p. 461. **B**
- (bb) “A declaration in a deed was objected to on account of the interest they had in making out things to be as there represented; and at least this intention of disposing of property was said to be equivalent to a *lis mota*. But this objection was held to fail. The parties did what they had a right to do, if members of the family. Almost every declaration of relationship is accompanied with some feeling of interest, which will often cast suspicion on the declarations, but has never been held to render them inadmissible.” *Doe v. Davies*, 10 Q.B. 325. Per Denman, L.C.J. Wigm. Ev., 1905 Ed., S. 1484, p. 1847. **C**
- (cc) “The law resorts to hearsay of relations upon the principle of interest in the person from whom the descent is to be made out. As far as hearsay is evidence of anything within the knowledge of a man, no man can be supposed to be ignorant of the reputation of the descent of his wife. But it must be considered whether that can extend to mere collateral declarations of this kind (a wife's illegitimacy), where

9 and 10.—“*Clauses 5 and 6 of S. 32.*” — (Continued).3.—INSTANCES OF DECLARATIONS AS TO
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there is no interest in the husband. Consider, then, whether the knowledge of the husband as to the legitimacy of his wife is not likely to be more intimate, and his interest stronger, than that of any relation, however near in blood. First, if she has an estate tail, he is tenant by the curtesy. Has he not an interest in knowing her legitimacy, his expectation depending upon it? So, as to her personal estate, he is entitled to all that comes to her. Is not that a strong interest?” *Vowles v. Young*, 13 Ves. 140; Wigm. Ev., 1905 Ed., S. 1489, p. 1852. **D**

(dd) Where the question was whether M was the legitimate child of J and L, the declarations of M were held to be admissible, after a *prima facie* case of legitimacy was otherwise made out. *Hitchins v. Eardley*, L.R. 2 P. and D. 248; Wigm. Ev., 1905 Ed., S. 1492, p. 1855; (but see the learned professor's remark that the requirement is too much). **E**

(ee) Where a signed chart was admitted in evidence, the Court observed, “It is urged that the principle would exclude such a pedigree as this, which was not hung up or in any way made public. But why is it that the publicity is relied upon in those cases? Why is it that the family Bible, the public wearing of a ring, the public exposure of an inscription upon a tombstone, and the public hanging up of the family pedigree in the mansion, are all relied upon in respect of their publicity? It is because in all those cases the publicity supplies a defect there existing,—the want of connection between the pedigree, the tombstone, the ring, or the Bible with particular individuals, members of the family. The presumption is, it would not be suffered to remain if the whole of the family did not more or less adopt it and thereby give it authenticity.” *Moulton v. A.—G.*, 2 Russ. and M. 163; Wigm. Ev., 1905 Ed., S. 1496, pp. 1858-9. **F**

(ff) The Court, holding in favour of the admissibility of statements concerning the place of birth, the place of residence, and the like, so far as material in a pedigree case, observed, “I own myself not convinced that the reasons and grounds (so far as I can collect and understand them) upon which births and time for births, marriages, deaths, legitimacy, illegitimacy, consanguinity generally, and particular degrees of consanguinity and of affinity, are allowed to be proved by hearsay (from proper quarters) in a controversy merely genealogical, are not as applicable to interrogatories like the present. Who, generally, is more likely to know whence a man or a family came than the man or the family? Does the emigrant, living or dying, forget his native soil? Is a woman less likely to state her country than her age with accuracy? Nor are there, perhaps, any recollections or traditions of the old more readily communicated or more acceptable to an auditory of descendants than the original seat of the family, its former residences and possessions, its migrations, its local and other distinctions of the past, its advancement or its decay. If

9 and 10.—“*Clauses 5 and 6 of S. 32.*”—(Continued).8.—INSTANCES OF DECLARATIONS AS TO
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such topics are not strictly genealogical, they are at least intimately connected with genealogy and in the most striking manner with the reason of the rule.” *Shields v. Boucher*, 1 DeG. and Sm. 53. Per *Knight-Bruce*, V.C. Wigm. Ev., 1905 Ed., S. 1501, p. 1860. **F1**

(2) *Instances of declarations regarding relationship, etc., held inadmissible.*

- (a) A suit was brought by D, with M, to whom D had transferred his interest in a portion of the property in dispute, for possession, by right of inheritance, of the ancestral estate of his maternal uncle C. The defendant N was the widow of R, who, she alleged, had been adopted by C, who had died without natural issue. After the death of C, (who was a separated Hindu) in 1867, his widow, K, succeeded to the property and enjoyed it till 1878. A written statement of K, filed in an action, brought in 1875 against her and R by L and B, as heirs of C, to succeed K after her death, was tendered in evidence, with the object of showing that K denied that L and B were of C's family. The statement was held to be inadmissible, under S. 32, cl. 5 of the Evidence Act. 9 A. 467 (469). **G**
- (b) In a suit for inheritance claimed by the plaintiffs, alleging themselves to be collateral relations and heirs of the last male owner, through an ancestor common to him and to them, a pedigree was tendered in evidence. The persons from whose statements, at no distant date, the pedigree had been drawn up, were absent, and it was not shown that this had been for any one or other of the reasons mentioned in S. 32 of the Evidence Act. Held that the appellate Court had rightly rejected the document as inadmissible in evidence. 23 A. 72 (P.C.) **H**
- (c) A report or a certificate by a civil surgeon who was not called as a witness regarding the mental capacity of an alleged lunatic, given in the course of, and for the purpose of, a case, is not admissible in evidence in a contentious proceeding, either under S. 32 of the Evidence Act, or under S. 5 of the Lunatic Estates Act (XXV of 1858). 7 O.C. 354. **I**
- (d) A party to a suit relating to succession supported his claim by producing a genealogical table, filed on behalf of a deceased member of the family, in a former suit brought by such member to establish his own claim to certain property. This table was held to be inadmissible, as the document had been in no way brought home to the deceased person, save as being an exhibit binding upon him for the purposes of that suit. 25 A. 143 = 7 C.W.N. 209 (P.C.). **J**
- (e) Suit to recover possession of immoveable property. The plaintiff adduced a horoscope in evidence, alleged to have been given him by his mother, used at the time of his marriage and seen by certain members of his family, but could not say who wrote the horoscope, or an endorsement on it, purporting to state his name. Held that it was inadmissible,

9 and 10.—“*Clauses 5 and 6 of S. 32.*”—(Continued).3.—INSTANCES OF DECLARATIONS AS TO
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under S. 32, cl. 6, as the document was not a statement relating to the existence of any relationship by blood, marriage, or adoption, between persons deceased, but purporting on the face of it, to be a statement of relationship between a deceased person and a living person, and that S. 32 did not embrace such a case. 9 C. 613 (614). **K**

- (f) Where the question was as to the existence of relationship, the statement of a person (since deceased) employed as *mukhtar* by certain members of the family, which appeared to have been made simply from his knowledge derived from his being instructed as such *mukhtar*, he not having been a member of the family, nor intimately connected with it, nor having had any special means of knowing its concerns, was held inadmissible under cl. 5, S. 32 of the Evidence Act. 12 C. 219 (P.C.) = 12 I A. 183. **L**

- (g) Where a suit was brought on a promissory note, to which the only defence was that the defendant was a minor at the time when the note was signed, a statement of the minor's age made to a witness by the minor's father, who died after this event, but before legal proceedings had been contemplated, was held to be inadmissible as evidence under S. 32, cl. 5 of the date of the son's birth. 13 C. 42 (43); but see 20 C. 758. **M**

- (h) Where a horoscope was tendered in evidence by the plaintiff, alleging that it had been given to him by his mother, had been seen by members of his family, and used on his marriage occasion but that he could not say who wrote it, or the endorsement on it purporting to state his name, held that, as the plaintiff could not say whether the writer was dead or could not be found or became incapable of giving evidence, the document was inadmissible. 9 C. 613 (614). **N**

- (i) Where a minor sued to have a decree set aside on the ground of his minority, a horoscope was tendered in evidence, by the minor to prove his age. It was held that it was inadmissible as it was not shown that the person who made the horoscope had any special means of knowledge, and as the question before the Court was not one either of relationship by blood, marriage, or adoption. 17 C. 849 (851) (9 C. 613, F.) **O**

- (j) The statements of certain witnesses, who were supposed to be speaking from information derived from others, and who did not, however, state the names of the persons from whom they derived their information, nor at what period of time they derived it, were held to be inadmissible, under S. 32 of the Evidence Act, on a question of relationship. 9 C.W.N. 105 (P.C.) = 26 C. 581. **P**

- (k) Where, to prove his relationship, the plaintiff produced a pedigree which was prepared, from the statements of bards and papers produced by them, sometime ago by a Rajah to settle the class of Thakurs to which he belonged, held, that the pedigree was not relevant; since, neither

9 and 10.—“*Clauses 5 and 6 of S. 32.*”—(Continued).3.—INSTANCES OF DECLARATIONS AS TO
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any of the bards nor the Rajah who assembled the bards of the family and with their assistance had the pedigree prepared was called as a witness and no proof was given that they were within any of the descriptions given by S. 32, Evidence Act, which made it unnecessary to call them. 2 Bom. L.R. 942 (P.C.)=5 C.W.N. 49=27 I.A. 183. **Q**

(l) Suit on a policy of life insurance. Solemn declarations made by certain persons as to the age of the assured were held to be inadmissible in evidence as the declarants were alive, some of them having in fact been examined as witnesses in the case. 25 M. 183 (210). **R**

(m) A reversioner brought an action for use and occupation against a tenant *pour autre vie*, who had held over after the death of the *cesti qui vie*. It was held that the declarations of deceased relatives could not be adduced to prove the *cesti qui vie's* death, as not being a matter of pedigree. *Whitlock v. Waters*, 4 C. and P. 375; Phip. Ev., 4th Ed., p. 289; Steph. Dig., 7th Ed., Art. 31, p. 45 and Tay. Ev., 10th Ed., S. 645, p. 458. **S**

(n) Where an action was brought against a person for goods sold and the defendant pleaded infancy, his infancy, cannot, for the same reason, be shown by an affidavit, of the deceased father of the infant, filed in a previous chancery suit, whereto the plaintiff was no party. *Haines v. Guthrie*, 13 Q.B.D. 818. See Phip. Ev., 4th Ed., p. 290 and 13 C. 42; Steph. Dig., 7th Ed., Art. 31, p. 45. **T**

(o) Questions regarding the age of the deceased in an action on a life policy are not questions of pedigree. *Splents v. Lafevre*, 11 L.T.N.S. 114; Phip. Ev., 4th Ed., p. 291. **U**

(p) Where the question was regarding the legitimacy of a person, the declarations of his deceased aunt that she had suckled him, with proof that her own child was born after the marriage of her nephew's parents, were held to be inadmissible. *Issac v. Compertz*, Hubb. Ev. Succ. 650-1; Phip. Ev., 4th Ed., p. 290. **V**

(q) On the question whether two persons were X's cousins, the declarations of X's father-in-law that they were X's cousins were held to be inadmissible in evidence. See *Shrewsbury Peerage Case*, 7 H.L.O. p. 23; Phip. Ev., 4th Ed., p. 290. **W**

(r) The declarations of a deceased person about his own illegitimacy have been held to be inadmissible, as being necessarily founded upon hearsay. *Haslam v. Cron*, 19 W.R. 968; Phip. Ev., 4th Ed., p. 290. **X**

(s) Where A's descent was in question, a pedigree in the handwriting of an ancestor of A, purporting to be derived *partly* from “parish registers, wills, monumental inscriptions, family history and records” (not proved to be lost) and *partly* from personal knowledge and the information of other deceased relatives, was held to be inadmissible so far as its first part was concerned, but was held to be admissible with reference to its latter part. *Davies v. Loundes*, 7 Scott. 211; Phip. Ev., 4th Ed., p. 290. See also Ros. Cr. Ev., 19th Ed., p. 26. **Y**

9 and 10.—“*Clauses 5 and 6 of S. 32.*”—(Continued).3.—INSTANCES OF DECLARATIONS AS TO
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- (t) Where a deceased father of the defendant has written letters, they cannot be adduced in evidence to prove a defence of infancy. *Figg v. Wedderburne*, 6 Jur. 280; Tay. Ev., 10th Ed., S. 645, p. 458. **Z**
- (u) Where a deceased person was shown to have lawfully married B, but some evidence indicated that a woman, C, living with him at the time, was reputed to be his wife, a declaration by the deceased that C, and not B, was his legal wife, was held to be inadmissible in evidence both under the English and the Scotch Law. *Dysart Peerage Case*, 6 App. Cas. 489; Phip. Ev., 4th Ed., p. 291. **A**
- (v) Where an entry pertaining to a pedigree, regarding which there was no proof as to who made it, was made in a prayer book alleged to have belonged to the family, it was held to be inadmissible in evidence. *Tracy Barony*, Hubback 673; Phip. Ev., 4th Ed., p. 291. **B**
- (w) Where a person alleged that one of his *natural* brothers had died without issue, his statement was held to be inadmissible in evidence. *Doe v. Barton*, 2 M. and Rob. 28; Tay. Ev., 10th Ed., S. 636, p. 452. See also *Doe v. Davies*, 10 Q.B. 314. **C**
- (x) Where a brother made a declaration that another brother had an illegitimate son, his declaration was held to be inadmissible in evidence. *Crispin v. Dujlwin*, 32 L.J.P. and M. 109; Tay. Ev., 10th Ed., S. 636, p. 452. **D**

(3) Statement in cl. 6 must be written —“*Verbal,*” applicability of.

“It may be observed that the statements made relevant by clauses 6 and 7 must be *written* and the word ‘*verbal*’ at the commencement of the section has no application to these clauses.” Field Ev., 6th Ed., p. 143 (Foot-note). **E**

(4) Copy of mortgage deed held admissible under S. 32, cl. 2.

Suit to redeem a mortgage. The defendant contended that the copy (attested to be a true copy by a certificate under the seal of a dead *kazi*, whose duty it was, in the ordinary course of business, to attest deeds) of the mortgage to the defendant’s ancestors, produced by the plaintiff and in accordance with which his claim was decreed, was inadmissible in evidence. Held that the copy was admissible in evidence, as secondary evidence. 49 P.R. 1882. **F**

5) Proof of *dakilahs* under S. 32 (2).

Held that it was sufficient proof of their genuineness that a tenant producing *dakilahs* should swear that he received them on payment of rent. 24 C. 251 (255), following 12 W.R. 34 and 20 W.R. 264; 8 W.R. 488 and 14 W.R. 211, referred to and distinguished. **G**

9 and 10.—“*Clauses 5 and 6 of S. 32.*”—(Concluded).

8.—INSTANCES OF DECLARATIONS AS TO RELATIONSHIP, ETC., HELD ADMISSIBLE AND INADMISSIBLE.—(Concluded).

(6) Statement as to relationship in previous deposition admissible under S. 32 (5).

The plaintiffs claimed for the recovery of certain lands as the reversionary heirs of N, alleging that N was the son of S and that they were descended from J, brother of S. A statement made by one of the plaintiffs, in a Land Registration case in 1878, that J and S were brothers, was held to be admissible in evidence, having regard to S. 21 (1), S. 32 (5) and S. 157, Evidence Act. 12 C.W.N. 266 (267). H

(7) Evidence of marriage under S. 32, cl. 5—Admissible.

Living as husband and wife for fifty years is good evidence of marriage and of its issue being legitimate. The admission of the deceased husband on this point is admissible in evidence, under S. 32, cl. 5, Evidence Act, and is the most valuable evidence in such a case. 47 P.W.R. 1908—64 P.L.R. 1908. I

II.—“(7) When the statement is contained in any deed..S. 13, cl. (a).”

(1) Scope of cl. 7, S. 32.

(a) Cl. 7, S. 32, says that a statement of relevant facts, made by a person who is dead, is itself a relevant fact, if the statement is contained in any deed, will, or other document which relates to any such transaction as is mentioned in S. 13, cl. (a), *i.e.*, transactions by which a right or custom in question was created, claimed, modified, recognised, asserted or denied. 11 C.W.N. 703 (704). J

(b) Since S. 13 relates to both public and private rights and customs, cl. 7, S. 32, also, relates to public and private rights and customs. See A.A. and W. Ev., 4th Ed., p. 222. K

(c) “Cl. 7 does not declare all reputation to be relevant, but only that which consists of statements contained in any deed, will, or other document, relating to any transactions by which any right or custom was created, claimed, modified, recognised, asserted, or denied, or which was inconsistent with its existence. The clause, therefore, does not provide for the admissibility of *parol* evidence of reputation in the case to which it applies. Of the documents which are admissible under this clause, judgments and decrees are not the least important.” Field Ev., 6th Ed., p. 144. L

(2) Applicability of term “verbal” to cl. 7.

The word “verbal,” at the beginning of this section, does not apply to cls. 6 and 7. Field Ev., 6th Ed., p. 143. M

(3) Statements under cl. 7 must be written.

Statements made relevant by cls. 6 and 7 must be *written*. Field Ev., 6th Ed., p. 143. N

II.—“(7) When the statement is contained in any deed..S. 13, cl. (a).”
—(Continued).

(4) English and Indian Law—Reputation on matters of private rights.

- (a) “It is well settled in England, notwithstanding the doubts raised by *Morsewood v. Wood*, 14 East 327n, that evidence of reputation is inadmissible to prove particular facts or upon matters of private right.” Field Ev., 6th Ed., p. 143, referring to *Didsbury v. Thomas*, 14 East 323. **O**
- (b) Under the English Law, hearsay evidence, or evidence of reputation, is not admissible upon questions of mere private rights. (See *R. v. Bedfordshire*, 4 E. and B. 535). But, under the Indian Law, such evidence would be relevant. See Field Ev., 6th Ed., p. 143 and Phip. Ev., 4th Ed., p. 272. **P**
- (c) S. 32 provides for the admissibility; in Indian Courts, of evidence of reputation to prove particular facts or matters of private right. Field Ev., 6th Ed., p. 143. **Q**

(5) Proof, under cl. 7, of hearsay on matters of general interest.

“Hearsay as to matters of general interest may be proved, under cl. 7, by recitals and descriptions of the public or general right in wills, deeds, leases, maps, surveys, assessment and the like, however recent such documents may be, the words of the clause being ‘in any deed, will, etc.’” See A.A. and W. Ev., 4th Ed., p. 222. **R**

(6) Proof of declarations as to transactions specified in S. 13, cl. (a).

Old deeds, leases, etc., which recite or describe a public right may be tendered in evidence. *Brett v. Beales*, M. and M. 416; *Curzon v. Lomax*, 5 Esp. 60; and *Plaxton v. Dara*, 10 B. and C. 17. See Phip. Ev., 4th Ed., p. 275 and Tay. Ev., 10th Ed., S. 621, p. 440. **S**

(7) Principle of admissibility of ancient documents.

- (a) Ancient documents are often the only available evidence, and the necessity of the case induces the law to allow them to be adduced in evidence on behalf of parties claiming under them, and against persons in no way privy to them, provided that they are not bare narratives of past events, but purport to have formed a part of the act of the ownership, exercise of right, or other transaction, to which they relate. Tay. Ev., 10th Ed., S. 658, p. 467, referring to *Malcolmson v. O’Dea*, 10 H.L.C. 593 and *Blundy-Jenkins v. Dunraven*, 2 Ch. 121; see also Phip. Ev., 4th Ed., p. 277. **T**
- (b) Ancient documents are admissible in evidence, not as proving the truth of the facts stated, but simply as presumptive evidence of possession. Phip. Ev., 4th Ed., p. 95, criticising Taylor’s observations in S. 658, cited *supra*. **U**
- (c) The grounds on which ancient documents are admissible are two fold :—
1. necessity, ancient possession not being capable of direct proof by witnesses;
 2. the fact that such documents are themselves acts of ownership, being real transactions between persons, which are intelligible only upon the footing of title, or at least of a *bona fide* belief in title; for, in the ordinary course of things, parties do not execute such documents without acting

11.—“(7) When the statement is contained in any deed..S. 13, cl. (a).”

—(Continued).

upon them. Phip. Ev., 4th Ed., p. 95, referring to *Malcolmson v. O'Dea*, 10 H.L.C. 593; *Bristow v. Cornucan*, 3 App. Cas. 641 and *Blandy-Jenkins v. Dunraven*, 2 Ch. 121. **Y**

- (d) A demise by copy of ancient Court-Roll is an assertion of a right of ownership, and enjoyment under such deed is proof of ownership. *Al.—G. v. Emerson*, 1891, A.C. p. 658; Phip. Ev., 4th Ed., p. 95. **W**

(8) Ancient public assessment—Admissibility.

- (a) Entries in old vestry books are admissible as evidence of reputation, if they do not relate to private rights or particular facts. *Cooke v. Banks*, 2 C. and P. 478; Phip. Ev., 4th Ed., pp. 276 and 320. See, however, *Tay. Ev.*, 10th Ed., S. 618, p. 438. **X**

- (N.B.) In this case, it was held that vestry books were inadmissible as evidence of reputation to prove repairs to a pew, on the ground that the entry concerned a particular fact and not a general right. See Phip. Ev., 4th Ed., p. 320 and *Tay. Ev.*, p. 438, cited *supra*. **Y**

- (b) A deceased manor-steward's books, showing the amount of fine levied, are admissible as evidence of a custom to take such fines, at least when coupled with some evidence of their payment. *Ely v. Caldecott*, 7 Bing. 433; Phip. Ev., 4th Ed., p. 276. **Z**

- (c) An old Churchwarden's assessment is admissible as evidence of reputation that the land belongs to the parish. *Plaxton v. Darc*, 10 B. and C. 17; Phip. Ev., 4th Ed., p. 276. See also *Wigm. Ev.*, 1905 Ed., S. 1592, p. 1943. **A**

(9) Declarations in or regarding old leases—Admissibility.

- (a) “Old leases have always been considered to be admissible as being evidence of acts of ownership. The circumstances of giving and taking them are real transactions between man and man, not intelligible except on the footing of title, or at least an honest belief in title.” *Bristow v. Cornucan*, L.R. 3 App. Cas. 641. Per *Cairns*, L.C. *Wigm. Ev.*, 1905 Ed., S. 157, p. 215. **B**

- (b) “Inasmuch as, after a long time, all the witnesses who could prove such possession are dead, the law permits ancient documents, either with or without evidence of ancient payment of rent, to be given in evidence, from which the Jury may properly draw an inference that there was such possession. For, in the ordinary course of things, men do not make leases, unless they act on them, and lessees do not pay rent unless they are in possession, so that the ancient payment of rent lends weight to the ancient documents.” *Bristow v. Cornucan*, L.R. 3 App. Cas. 641, per Lord Blackburn. *Wigm. Ev.*, 1905 Ed., S. 157, pp. 215-6. **C**

- (c) An ancient lease granted by a previous lord wherein the boundaries of the manor were recited was held to be admissible in evidence to prove its boundaries. *Doe v. Wittcomb*, 6 Ex. 601 and *Brett v. Beales*, M. and M. 416; Phip. Ev., 4th Ed., p. 280. **D**

11.—“(7) When the statement is contained in any deed..S. 13, cl. (a).”

—(Continued).

- (d) A counterpart of a lease was held to be admissible in evidence as being equivalent to it, without accounting for the original lease or showing possession. *Doe v. Pulman*, 3 Q.B. 622; Wigm. Ev., 1905 Ed., S. 167, p. 216. **E**
- (e) Where a custom to hold land exempt from a right of common was in question, leases of 71 and 128 years of age were admitted in evidence to prove prescriptive exercise; the Court observing that they were so old that nobody could speak to possession under them. *Clarkson v. Woodhouse*, 5 T.R. 412. *Per Mansfield*, C.J. Wigm. Ev., 1905, Ed., S. 157, p. 216. See also Tay. Ev., 10th Ed., S. 427, p. 329. **F**
- (f) Declarations regarding matters of public and general interest may be made in deeds and leases between private persons. *Plaxton v. Dare*, 10 B. and C. 17; Steph. Dig., 7th Ed., Art. 30, p. 43. **G**
- (g) Where a deceased steward had made a statement, that there existed an old lease reciting the boundaries of a manor, and an entry in his books purporting to state the substance of the lease, they were held to be inadmissible to prove the boundaries of that manor, on the ground that they were reputation, not of the boundaries, but of the lease which was a particular fact. *Doe v. Willcomb*, 6 Ex. 601; Phip. Ev., 4th Ed., p. 280. **H**

(10) Private Acts—Admissibility.

- (a) *Private Acts* were held to be admissible as reputation on matters of public right. See *Curzon v. Lomax*, 5 Esp. 60 and *Carnarvon v. Villebois*, 13 M. and W. 313; Phip. Ev., 4th Ed., p. 275. **I**
- (b) An old *Private Act* under which a manor had been sold, and wherein it was so described was held to be relevant on the question of the existence of that manor. *Curzon v. Lomax*, 5 Esp. 60; Phip. Ev., 4th Ed., p. 280. See also 3 B. 452 (725). **J**
- (c) The recitals in an old Inclosure Act, and a proviso therein preserving a lord's right of free-warren, were held to be admissible to prove that right. *Carnarvon v. Villebois*, 13 M. and W. 313; Phip. Ev., 4th Ed., pp. 280-1. See also Tay. Ev., 10th Ed., S. 625, p. 444. **K**
- (d) *Private Acts* were held to be inadmissible as evidence of reputation on matters of public right. *Beaufort v. Smith*, 4 Ex. 450; Phip. Ev., 4th Ed., p. 275. **L**

(11) Manor books and presentments—Admissibility.

- (a) Court Rolls are admissible in evidence either as acts of ownership—*A.—G. v. Emerson*, 1891, A.C. 649, 658—or as public documents, or as evidence of reputation—*Roe v. Parker*, 5 T.R. 26, 31-2. See Phip. Ev., 4th Ed., p. 276. **M**
- (b) The draft of a surrender was held to be admissible in evidence, notwithstanding the fact that no entry appeared on the roll. *Doe v. Callo-way*, 6 B. and C. 484. See Phip. Ev., 4th Ed., p. 276. **N**

11.—“(7) When the statement is contained in any deed..S. 13, cl. (a).”
 —(Continued).

(12) Public surveys—Admissibility.

- (a) Public surveys are admissible as evidence of reputation, provided they are made under competent authority, are ancient, and are produced from proper custody. *Freeman v. Read*, 4 B. and S. 174 and *Smith v. Brownlow*, L.R. 9 Eq. 241; Phip. Ev., 4th Ed., p. 275. **O**
- (b) Public surveys are admissible as evidence of reputation, provided they are made by persons of competent knowledge, besides being ancient and produced from proper custody. *Beaufort v. Smith*, 4 Ex. 450, 468 and *Daniel v. Wilkin*, 7 Ex. 429. See Phip. Ev., 4th Ed., p. 275. **P**
- (c) Where the boundaries of a manor had to be proved, a public survey of that manor, made under the authority of the Crown, or of the Duke of Cornwall, while it was the property of either, was held to be admissible in evidence. *Smith v. Brownlow*, L.R. 9 Eq. 241; Phip. Ev., 4th Ed., p. 282. **Q**
- (d) A public survey of a manor, whose boundaries were in question, made under the authority of the Parliament during the Commonwealth, was held to be admissible in evidence. *Freeman v. Read*, 4 B. and S. 174; Phip. Ev., 4th Ed., p. 282. **R**
- (e) Where the boundaries of a manor had to be proved, surveys taken by former lords and founded upon unsigned presentments of jurors, were held to be inadmissible in evidence. *Daniel v. Wilkin*, 7 Ex. 429 and *Beaufort v. Smith*, 4 Ex. 450. See Phip. Ev., 4th Ed., p. 282. **S**

(13) Maps made under various circumstances—Admissibility.

- (a) Where the question was as to a matter of public or general interest, a tithe map was held to be admissible as evidence of reputation. *Smith v. Lister*, 72 L.T. 20; Phip. Ev., 4th Ed., p. 275. **T**
- (b) The boundaries of a parish being in issue, a map 34 years old, made by a surveyor, who testified that he had prepared it from information received from a deceased parishioner, who had shown him the boundary, was held to be admissible in evidence. *R. v. Milton*, 1 C. and K. 58 and *Smith v. Lister*, 72 L.T. 20. See Phip. Ev., 4th Ed., p. 281. **U**
- (c) A map used by a steward, deceased, to define the public ways of the manor was held to be admissible to prove such a public right. *Pige v. Fulcher*, 28 L.J.Q.B. 12; Phip. Ev., 4th Ed., p. 281. **V**
- (d) An ordinance survey map, made under a statutory authority, and, to some extent, from competent sources, was held to be inadmissible in England, (*Bidder v. Bridges*, W.N. 1866, p. 148), but not so in Ireland, where it was held to be admissible, (*Grant's Causeway Co. v. A.—G.*, 118 L.T.Jo. 544). See Phip. Ev., 4th Ed., p. 275. **W**
- (e) Private maps would be evidence of reputation, provided they are shown to have been prepared by, (or under the direction, or from the information, of), deceased persons possessing competent knowledge. *Mercer v. Denne*, 2 Ch. 545-6; *Assheton-Smith v. Owen*, 75 L.J. Ch. pp. 188, 192; *Smith v. Lister*, 72 L.T. 20; *Hammond v. Bradstreet*, 10 Ex. 390 and *R. v. Milton*, 1 C. and K. 58. See Phip. Ev., 4th Ed., p. 275. **X**

11.—“(7) *When the statement is contained in any deed..S. 13, cl. (a).’*”

—(Continued).

(f) Private maps will be admissible as evidence of reputation, provided they are shown to have been recognised or used by such persons for the purpose of defining the general right, and not simply particular facts. *Pipe v. Mulcher*, 28 L.J.Q.B. 12 and *Daniel v. Wilkin*, 7 Ex. 429. See *Philp. Ev.*, 4th Ed., p. 275. **Y**

(g) Where the boundaries of a county were in question, a map of that county, republished in the year 1766, with corrections and additions, by K's sons from a map published 30 years earlier by K, who then had made an accurate survey of the whole county, was held to be inadmissible, as it was not proved that the new editors had personal knowledge or were connected with the district, so that it might be presumed. *Hammond v. Bradstreet*, 10 Ex. 390; *Philp. Ev.*, 4th Ed., p. 281. **Z**

(14) **Ancient documents in proof of ancient possession.**

(a) Ancient documents over thirty years old, whereby any rights of property purport to have been exercised and which are produced from proper custody, are admissible in evidence, even on behalf of the grantor, or his successors, in proof of ancient possession. See *Philp. Ev.*, 4th Ed., p. 95; *Tay. Ev.*, 10th Ed., ss. 658-667, pp. 467 to 473 and *Steph. Dig.*, 7th Ed., Art. 5, p. 7. **A**

(b) Ancient documents purporting on the face of them to show exercise of ownership, such as a lease or a license, may be given in evidence without proof of possession or payment of rent under them, as being in themselves acts of ownership and proof of possession: this rule is sometimes stated with the qualification, provided that possession is proved to have followed similar documents, or that there is some proof of actual enjoyments in accordance with the title to which the documents relate. *Malcolmson v. O'Dea*, 10 H.L.C. 593; *Wigm. Ev.*, 1905 Ed., S. 157, p. 216. **B**

(c) Where an ancient document was tendered in evidence to prove ancient possession, it was held to be admissible on the principle that such documents, when they are shown to have been in proper custody and when they purport on the face of them to exercise ownership, such as leases and licenses, may be admitted in evidence as being in themselves acts of ownership and evidence of possession. *Lord Advocate v. Lord Lovat*, 5 App. Cas. 273. See *A. A. and W. Ev.*, 4th Ed., p. 470. **C**

(d) The documents should purport to constitute the transaction which they bring about. Mere prior directions to do the act, or subsequent narratives of them, are inadmissible. *Malcolmson v. O'Dea*, 10 H.L.C. 593; *Bristow v. Cormican*, 3 App. Cas. 641, etc.; *Philp. Ev.*, 4th Ed., p. 95. **D**

(e) Thus, though expired leases, licenses, and grants may be tendered even against strangers, to prove ancient possession of the property demised or reserved from the demise, recitals therein of other documents or facts will be rejected, except as admissions. *Bristow v. Cormican*, 3 App. Cas. p. 662; *Philp. Ev.*, 4th Ed., p. 95. **E**

11.—“(7) When the statement is contained in any deed..S. 13, cl. (a).”
 —(Continued).

- (f) Deeds of this nature must, to ensure genuineness, be, like other ancient documents, produced from proper custody. Phip. Ev., 4th Ed., p. 96 **F**
- (g) Deeds of this nature should, to be of any weight, be corroborated by proof, within living memory, of payments made under, or enjoyment had in pursuance of, them. Phip. Ev., 4th Ed., p. 96. **G**
- (h) The absence of evidence of modern enjoyment, however, goes merely to the weight, and not to the admissibility, of such document. Phip. Ev., 4th Ed. p. 96. **H**
- (i) “Ancient documents, admissible as acts of ownership, may be tendered on questions either of public or private right; and must be distinguished from those ancient documents receivable as evidence of reputation, which latter may consist of bare assertions, or recitals, of the right, but are confined to questions of public and general interest.” Phip. Ev., 4th Ed., p. 96, referring to *Malcolmson v. O’Dea*, 10 H.L.C. 593. **I**
- (j) In an action by A against B for trespass to a fishery appurtenant to A’s manor, bills and answers in a chancery suit brought by A’s ancestors are admissible in evidence, not as evidence of the facts therein mentioned, but as evidence of a pending suit and as assertions of ownership submitted to, though by strangers in title to B, *Malcolmson v. O’Dea*, 10 H.L.C. 593, Phip. Ev., 4th Ed., p. 113. **J**
- (k) Where alleged licenses of fishing and dredging, dating from 1661 to the close of that century, were objected to on the ground that no rent appeared to have been paid under them, the Court thought this unnecessary, “as they were of such an ancient date that it could not reasonably be supposed that evidence of such payments was still preserved, however, to give any weight to them, the receipt of payment, or other acts of ownership, must be shown in later times.” *Rogers v. Allen*, 1 Camp. 309; Wigm. Ev., 1905 Ed., S. 157, p. 216. See also Tay. Ev., 10th Ed., S. 666, p. 472. **K**
- (l) Where a right to a fishery was in question, ancient entries in Corporation books purporting not to constitute licenses to fish, but directions to prepare such licenses, or narratives of them, are not admissible in evidence. *Malcolmson v. O’Dea*, 10 H.L.C. 593; Phip. Ev., 4th Ed., p. 113. **L**
- (m) The register maintained by a Bishop of chapter leases has been admitted as evidence of reputation, where the question was as to the limits of a parish. *Coombs v. Catlwr*, M. and M. 398; Phip. Ev., 4th Ed., p. 275. See also Tay. Ev., 10th Ed., S. 1600, p. 1151 and Wigm. Ev., 1905 Ed., S. 157, p. 216. **M**

(11-a) Statement in *hebanama* held inadmissible.

Where the question was, whether a tenant held lands under the *nakdi* or *bhaoli* system of rent, and the Court founded its decision upon a statement in a *hebanama* executed by the tenant’s deceased grandfather, held that the *hebanama* was inadmissible in evidence, under S. 32 (7), read with S. 13 (a), of the Evidence Act. 11 C.W.N. 703 (704). **N**

11.—“(7) *When the statement is contained in any deed..S. 13, cl. (a).’*
—(Continued).

(15) **Modern possession, proof of.**

(a) “Modern possession, being susceptible of proof by witnesses, cannot be established by modern grants and leases, etc., even though supported by evidence of payments thereunder.” Phip. Ev., 4th Ed., p. 96, referring to *Hirstow v. Cormican*, 3 App. Cas. p. 668 and *Clarkson v. Woodhouse*, 3 Doug. 189. **O**

(b) After proof has been given *abunde* of possession, such documents will become evidence of the interests which are conferred by them. *Doe v. Penfold*, 8 C. and P. 536; *Doe v. Oliver*, 1 C. and K. 543 and *Taylor v. Parry*, 1 M. and Gr. 604. See Phip. Ev., 4th Ed., p. 96. **P**

(15-a) **Proof of custom under cl. 7.**

To prove or disprove a right or custom, it is not enough to offer evidence of a transaction wherein, or during which, the right or custom was asserted or denied. The transaction will be relevant, under S. 13, cl. (a) of the Evidence Act, if it be one by which the right or custom was asserted or denied. 11 C.W.N. 703 (704). **Q**

(16) **Statement in writing by a party to the suit who is dead.**

Suit to establish the existence of a family custom. The plaintiffs offered in evidence a deed containing a recital that the family custom was as alleged in the plaint, and a covenant to do nothing against it. The deed was executed only 18 months before the action was brought by the present plaintiffs, as well as by a plaintiff who had died since the institution of the suit, and also by a considerable majority of the family; but the defendant was not a party to it. *Held* that the deed was admissible on behalf of the plaintiffs, though they could themselves be called as witnesses; but that the custom must be proved *abunde* against the defendant. 10 B.L.R. 263. **R**

(17) **Ayakut accounts admissible as reputation.**

Suit to recover certain hill tracts of forest land from Government. Certain *ayakut* accounts were adduced in evidence as proving that the said tracts were included in the limits of the zemindary of the plaintiff. *Held* that, having been prepared from time to time for administrative purposes by village officers and being produced from proper custody and otherwise sufficiently proved to be genuine, they were admissible as evidence of reputation. 9 M. 285 (294). **S**

(18) **Reports accompanying police orders, admissibility of.**

Reports accompanying orders for possession, under the Crim. Pro. Code, which are simply police orders preventive of a breach of the peace and deciding no questions of title, or accompanying the maps referred to by those orders and not referred to in the orders, may be admissible as hearsay evidence of reputed possession. (See Tay. Ev., S. 517). 29 C. 187 (198) (P.C.). **T**

(19) **Attestation of a deceased subscribing witness.**

(a) Where the declarations of a deceased attesting witness, whose handwriting had been proved, were tendered in evidence, as amounting to an admission of forgery, they were held to be inadmissible in evidence. *Stobart v. Dryden*, 1 M. and W. 615; Wigm. Ev., 1905 Ed., S. 1505, p. 1864; see also S. 1038, p. 1201. See also Phip. Ev., 4th Ed., p. 206. **U**

11.—“(7) When the statement is contained in any deed..S. 13, cl. (a).”

—(Concluded).

- (b) The Court, in the above case, observed, “One of the grounds of argument was that, as the plaintiff used the declaration of the subscribing witness, evidenced by his signature, to prove the execution, the defendant might use any declaration of the same witness to disprove it. The answer to this is, that evidence of the handwriting in the attestation is not used, as a declaration by the witness, but to show the fact that he put his name in that place and manner in which in the ordinary course of business, he would have done, if he had actually seen the deed executed. A statement of the attesting witness by parol, or written on any other document than that offered to be proved, would be inadmissible. The proof of actual attestation of the witness is, therefore, not the proof of a declaration, but of a fact.” *Stobart v. Dryden*, 1 M. and W. 615; Wigm. Ev., 1905 Ed., S. 1505, p. 1864. **Y**

(20) Admissibility of copies and abstracts.

- (a) Since the contents of a document are in the nature of a particular fact and are not provable by reputation, bare copies and abstracts of old deeds, leases, etc., containing declarations as to public rights are not generally admissible in evidence. *Doe v. Wittcomb*, 6 Ex. 601; Phip. Ev., 4th Ed., p. 275; see also Tay. Ev., 10th Ed., S. 429, p. 380. **W**
- (b) But copies and abstracts of old deeds and leases, containing declarations regarding public rights are, when produced from proper custody and when the existence and the loss of the originals are shown, admissible as secondary evidence. Phip. Ev., 4th Ed., p. 275, referring to *Doe v. Wittcomb*, 6 Ex. 601. **X**

12.—“(8) When the statement was made by a number of persons.. question.”

1.—GENERAL.

(1) Scope of cl. 8.

The 8th clause of S. 32, Evidence Act, is to the effect that a statement becomes a relevant fact, when it is made by a number of persons, and expresses feelings or impressions on their part, relevant to the matter in question. 23 W.R. (Cr.), 35 (38). **Y**

(2) Meaning of cl. 8, S. 32.

The meaning of cl. 8 of S. 32 evidently is that, when a number of persons assemble together to give vent to one common statement, which statement expresses the feelings or impressions made in their minds at the time of making it, that statement may be repeated by the witnesses, and is evidence. 23 W.R. (Cr.), 35 (38). **Z**

(3) What cl. 8 does not mean.

Cl. 8 of S. 32 certainly does not mean that a police officer may go round, collect a great number of statements from persons in different places, and afterwards put those statements in secondhand before the Court as evidence which may affect the result of a criminal trial. 23 W.R. 35 (38) (Cr.). **A**

12.—“(8) When the statement was made by a number of persons.. question.”—(Continued).

1.—GENERAL.—(Continued).

(4). Principle of admissibility of declarations under cl. 8.

The oral or written statements tendered in evidence may be the natural or inseparable concomitants of the principal fact in controversy. In such cases, the writing or words do not fall under the category of hearsay, but are original and independent facts, admissible in proof of the issue. *Tay. Ev.*, 10th Ed., S. 576, p. 406, referring to *Bartlett v. Delpratt*, 4 Mas. 702 (Am.), and *Dubost v. Beresford*, 2 Camp. 512. **B**

(5) Condition of admissibility under clause

“It will be observed that, in the sub-clause as in the illustration, reference is made to a number or crowd of persons. If these persons were known to the witness and could be called, his statement could not be admitted under the section. If they were not known or could not be found, it is not easy to see how the fact that there were many of them is material. In the English cases, it does not seem to have been proved that the persons who made the observations could not be called.” *Cun. Ev.*, 11th Ed., p. 95. **C**

(6) Illustration (n) to S. 32.

“With regard to illustration (n) to S. 32, I may observe that the case does not belong to S. 32 at all. The evidence would be equally admissible, whether the bystanders could be called or not as witnesses. When the bystanders, on seeing a caricature, call out ‘there’s X,’ and evidence is given of their words, what is relied on is, not their statements, but the fact of recognition; the fact, that is, that the caricature at once recalls the person X to the minds of those who see it.” *Mark. Ev.* p. 31. **D**

(7) Declarations out of Court on mental and physical conditions.

Where a person’s opinions at a given time are, *per se* and irrespective of any act, material, expressions thereof made at such time are receivable. *R. v. Hardy*, 24 How. St. Tr. 1093 4; *Phip. Ev.*, 4th Ed., p. 52. **E**

(8) Declarations of third parties, when relevant.

Case of cheating by pretending to be bewitched. One, Dr. M. had been censured by the populace for helping to exonerate Sarah M., who had been tried for bewitching the defendant. It being contended that other people’s censuring the doctor cannot be admitted as evidence, the Court replied, “What other people have said, abstractedly considered, ought not to affect Richard Hathaway. But if there be evidence that Hathaway had been guilty of deceit and a design to deceive people, will you not allow it to be given in evidence that the people have been deceived?” Now Dr. Martin’s evidence is what Hathaway did and that people did believe him to be bewitched.” *Hathaway’s Trial*, 14 How. St. Tr. 639, 654; *Wigm. Ev.*, 1905 Ed., S. 266, p. 392. **F**

(9) Declarations of a number of persons are relevant as circumstantial evidence.

Where an anonymous picture exhibited is charged as a libel upon D, the remarks of the spectators, that D ought to bring an action against the painter, are admissible *circumstantially*, as revealing that the picture was believed by them to represent D. See *Du Bost v. Beresford*, 2 Camp. 511; *Wigm. Ev.*, 1905 Ed., S. 1715, p. 2206. **G**

12.—“(8) *When the statement was made by a number of persons.. question.*”—(Continued).

1.—GENERAL.—(Concluded).

(10) **Admissibility of fact of looking at object.**

It has been held in America, that the fact of looking at an object is an act which such declarations could accompany and explain. *Chase v. Loucell*, 151 Mass. 422; Phip. Ev., 4th Ed., p. 52 and Wigm. Ev., 1905 Ed., S. 266, p. 333. H

(11) **Jury may consider language of assembly in cases of unlawful assembly.**

Held that, in determining whether an assembly was unlawful, the jury should take into their consideration, *inter alia*, the language used by the persons assembled and by those who addressed them, and then consider whether sober and rational men, having their families and property there, would have reasonable grounds to apprehend a breach of the peace. *R. v. Vincent*, 9 C. and P. 91. See Warburton L.C. Cr. T., 4th Ed., pp. 85-6. I

(12) **Declarations of a number of persons as to motive or intention.**

On an indictment for exciting a seditious mob, expressions of motive or intent by persons attending the meeting, were held to be admissible to show the purpose of its various members and its character as a seditious assembly. *Redford v. Birley*, 1 St. Tr. N.S. 1071; Wigm. Ev., 1905 Ed., S. 1729, p. 2225. J

(13) **Solicitations to join an unlawful assembly.**

In a case of battery in dispersing a mob, solicitations by persons present to others to join them were admitted in evidence. *Redford v. Birley*, 1 St. Tr. N.S., p. 1070=3 Stark, 87; Wigm. Ev., 1905 Ed., S. 1079, p. 1242. K

(14) **Expressions of alarm showing feelings.**

Where a person was charged with raising a seditious mob, expressions of alarm by persons in the neighbourhood were admitted in evidence to show the feelings produced by the gathering. *Redford v. Birley*, 1 St. Tr. N.S. 1071; Wigm. Ev., 1905 Ed., S. 1730, p. 2228. L

(15) **Opinion of witnesses regarding character of unlawful assembly.**

In a case of battery in dispersing a seditious assembly, evidence of the opinions of witnesses as to whether the mob, in their judgment, endangered the public tranquillity, was admitted. *Redford v. Birley*, 1 St. Tr. N.S. 1071; Wigm. Ev., 1905 Ed., S. 1978, p. 2624. M

(16) **Conduct and utterances as evidence of knowledge or belief, etc.**

Held that the declarations of the spectators, while they looked at a picture in a picture gallery, were evidence to show that the figures portrayed were meant (rather, were understood,) to represent the sister and brother-in-law of the defendant. *Du Bost v. Beresford*, 2 Camp. 511. Per Lord Ellenborough, Wigm. Ev., 1905 Ed., S. 266, p. 333. N

(17) **Admissibility of declarations without summoning declarants.**

Complaints made to the police by persons alarmed at violent Chartist meetings were held to be admissible in evidence, although the persons were not called. *R. v. Vincent*, 9 C. and P. 275; Wigm. Ev., 1905 Ed., S. 1730, p. 2228. O

12.—“(8) When the statement was made by a number of persons..
question.”—(Continued).

2.—DECLARATIONS OF A NUMBER OF PERSONS HELD ADMISSIBLE AND INADMISSIBLE.

(1) Declarations of a number of persons held admissible.

- (a) Where, in an action against a corporation for negligence for not removing a dangerous tree from a public road, notice of the rottenness of the roots was in issue, and, to show knowledge by the city, the evidence of acts of persons in looking at the roots was offered, the Court observed, “The acts of persons in looking at the roots were an important part of the evidence. From this, it might be inferred that they noticed the decayed condition of the roots. The remarks made at the time rendered it certain that the view of the roots gave notice of the defect to those who then saw them.” *Chase v. Lowell*, 151 Mass. 422; Wigm. Ev., 1905 Ed., S. 266, p. 333 and Phip. Ev., 4th Ed., p. 57. **P**
- (b) Evidence that a plaintiff was publicly laughed at in consequence of a libel was held to be admissible to prove that that libel referred to the plaintiff. *Cook v. Ward*, M. and P. 99; Phip. Ev., 4th Ed., p. 355. **Q**
- (c) In a suit for damages by A against B for destroying a picture called “Beauty and the Beast,” where B’s answer was that the picture was a libellous caricature upon his sister and his brother-in-law, evidence of exclamations of recognition to that effect, uttered by spectators, while looking at the picture in a public gallery in which it was exhibited, was held to be admissible. *Du Bos v. Beresford*, 2 Camp. 511, 512; Phip. Ev., 4th Ed., pp. 52 and 370. See, also, Tay. Ev., 10th Ed., S. 579, p. 409; Wigm. Ev., 1905 Ed., S. 1715, p. 2206. **R**
- (d) In a case of false imprisonment, where the defence was fear of the raising of a seditious mob by the plaintiff, statements made to the defendant, that a mob was being raised by the plaintiff, were admitted as evidence of the defendant’s apprehensions. *Fabrigas v. Mostyn*, 20 How. St. Tr. 137; Wigm. Ev., 1905 Ed., S. 258, p. 328. **S**
- (e) Case of cheating by pretending to be so bewitched by S.M., that he could not eat. To show that the community was imposed upon by the fraud, evidence was offered of the abuse and imprecations uttered by sundry persons against Dr. M., who had procured the liberation of the supposed witch and had stood up to expose the fraud. They were objected to as hearsay. But the Court held this evidence to be proper; “he is indicted for a cheat, for endeavouring to begot an opinion in people by his fraudulent practices that he is bewitched. Now is not this an evidence that his pretending himself to be bewitched begot that opinion in the people?” *Hathaway’s Trial*, 14 How. St. Tr. 653; Wigm. Ev., 1905 Ed., S. 1731, p. 2228. **T**
- (f) On a prosecution for high treason, the cry of the mob that accompanied the prisoner was held to be admissible in evidence, as part of the *res gestae*. *Lord George Gordon’s trial*, 21 How. St. Tr. 535; Ros. Cr. Ev., 13th Ed., p. 28. See, also, Tay. Ev., 10th Ed., S. 582, p. 412, and Phip. Ev., 4th Ed., p. 64. **U**

12.—“(8) *When the statement was made by a number of persons.. question.*”—(Continued).

2.—DECLARATIONS OF A NUMBER OF PERSONS HELD ADMISSIBLE AND INADMISSIBLE—(Continued).

(g) In a case of riot, evidence of expressions of a general feeling of insecurity and alarm and of the riotous conduct was held to be admissible. *People v. O'Laughlin*, 3 Utah. 133; Wigm. Ev., 1905 Ed., S. 1730, p. 2328. **Y**

(h) Where the question was whether a libel referred to the plaintiff, though it did not mention him by name, evidence on oath of the plaintiff and his friends that, upon reading the libel, they understood it to refer to him, is admissible. *R. v. Barnard*, 43 J.P. 127; Phip. Ev., 4th Ed., p. 370. **W**

(i) On a charge of conspiracy to procure large meetings to assemble in order to excite terror in the community, evidence by the police, that several persons, not called as witnesses, had complained to them that they were alarmed and requested them to send for military assistance, is admissible without calling the declarants. *R. v. Vincent*, 9 C. and P. 275; Phip. Ev., 4th Ed., p. 69; Tay. Ev., 10th Ed., S. 579, p. 409. **X**

(j) In a case of battery for dispersing a mob, evidence whether persons expressed to the Magistrates their apprehensions of a danger was admitted, not as evidence of the alarm, but as facts on which the Magistrates might properly have acted. *Redford v. Birley*, 1 St. Tr. N.S. 1071; Wigm. Ev., 1905 Ed., S. 258, p. 328. **Y**

(2) **Declarations of a number of persons held inadmissible.**

(a) In an action for libel by A against B for having written that A should “return to his natural and sinister obscurity,” the opinions of witnesses were held to be inadmissible to explain these words, there being nothing to show that they were not used in their ordinary sense. *Brunswick v. Harmer*, 3 C. and K. 10; Phip. Ev., 4th Ed., p. 370. See also Tay. Ev., 10th Ed., S. 1414, p. 1020. **Z**

(b) Where a person was indicted for exciting a seditious assembly, the remarks made by persons more than an hour after the meeting were held to be inadmissible in evidence. *R. v. O'Connell*, 5 St. Tr. N.S. 1, 244. See Wigm. Ev., 1905 Ed., S. 1079, p. 1282. See also Tay. Ev., 10 Ed., S. 594, p. 420. See also Phip. Ev., 4th Ed., p. 86. **A**

(c) The statement of a police officer, who goes about from place to place and collects information from different persons which he afterwards puts in secondhand before the Court as evidence which may affect the result of a criminal trial, ought not to be received as evidence, under cl. 8 of S. 32 of the Evidence Act. 23 W.R. (Cr.), 35 (38). **B**

(d) Where, in a case of battery in dispersing a mob, counsel asked the witness whether he believed there was anybody cut, the question was disallowed, the Court observing that that fact must be elicited from a witness who saw the wound inflicted. *Redford v. Birley*, 1 State Tr. N.S. 1071; Wigm. Ev., 1905 Ed., S. 658, p. 754. **C**

12.—“(8) *When the statement was made by a number of persons.. question.*”—(Continued).

2.—DECLARATIONS OF A NUMBER OF PERSONS HELD ADMISSIBLE AND INADMISSIBLE—(Continued).

(e) Case where statements about bad smells were held to be inadmissible in evidence. (“But here the statements were probably assertions of external facts.”) *Gloystine v. Coin.*, 33 S.W. 824. See *Wigm. Ev.*, 1905 Ed., S. 1730, p. 2228. **D**

(f) A father's declarations denying a deed were held to be inadmissible against a claimant under the deed, in favour of the devisees of the father. *Bartlett v. Delpratt*, 4 Mass. 702, 707; *Wigm. Ev.*, 1905 Ed., S. 1084, p. 1297. See, also, *Tay. Ev.*, 10th Ed., S. 576, p. 406. **E**

(3) “Course of business,” meaning of.

(a) The phrase “in the course of business” does not apply to any particular transaction of an exceptional kind, such as the execution of a deed of mortgage, but to business or professional employment in which the declarant was ordinarily, or habitually, engaged. 13 C.W.N. 71 (73), referring to 23 B. 63 (70). [This comes under S. 32 (2).] **F**

(b) The “business” referred to may be of a temporary character; and, while the business lasts, any entries which are uniformly made in the ordinary course of business are relevant. 13 C.W.N. 71 (73). [This comes under S. 32 (2).] **G**

(4) Relation between S. 32 (2) and S. 35, Evidence Act.

S. 35 of the Evidence Act does not cover an entry of the situation and boundaries of *chakran* land, made in the *chowkidari* register, kept under Reg. XX of 1817, but in such a case, S. 32 (2) of the Act applies, rendering the entry admissible in evidence. 13 C.W.N. 71 (73). [This comes under S. 32 (2).] **H**

(5) Reg. XX of 1817.

—does not impose on the *daroga* any duty of keeping a register of *chowkidari chakran* lands. From the precise and uniform character of the entries as to such lands, appearing in a register kept under the Regulations, held, that there could be no doubt that they were made under proper direction in the ordinary course of business, though outside the statutory duty of the person who made them. 13 C.W.N. 71 (72-3). [This comes under S. 32 (2).] **I**

(6) Confession of deceased accused implicating himself and an accomplice.

The confession of an accused person, who is dead, implicating himself and an accomplice in a crime, is admissible, under S. 32 (3), as a statement, which exposes him to a criminal prosecution. Not only is that part of the statement, which is against interest, admissible, but all those parts of it, which relate to connected facts, including the share taken by the others in the crime. U.B.R. (1906), Evidence 3-5 Cr. L.J. 900. [This may come under S. 32 (3).] **J**

12.—“(8) *When the statement was made by a number of persons.. question.*”—(Continued).

2.—DECLARATIONS OF A NUMBER OF PERSONS HELD ADMISSIBLE AND INADMISSIBLE—(Continued).

(7) Register of baptism how far evidence of age.

A register of baptism, while evidence of that fact and of the date of it, furnishes, even if it states the date of a person's birth, no proof of the age of that person further than that, at the date of such ceremony, the person referred to was already born. Evidence regarding the date of a man's birth has been held under certain circumstances to be admissible under S. 32 (5) of the Evidence Act; but in the case of an entry in the register in question, there is nothing to show by whom the statement entered was made, much less that the person making the statement had any special means of knowledge. 2 N.L.R. 34. (This may come under S. 32, cl. 5). **K**

(8) Proof of date of birth after lapse of years.

In India, it is difficult to prove such facts as the date of birth after the lapse of many years, and it would be unreasonable to demand such a class of evidence as would justly be demanded in England. But the evidence must be such as to carry reasonable conviction to the mind. 11 C.W.N. 130=1 M.L.T. 429. [This may come in under S. 32 (5).] **L**

(9) Statement on relationship by family members before dispute.

Pedigrees, which did not constitute ancient family records handed down from generation to generation and added to as a member of the family died or was born, but were drawn up on a particular occasion for a specific purpose by members of the family, must be treated as mere declarations made by the persons who respectively drew them up or adopted them. Such of them as were made *post litem motam* are inadmissible in evidence. But, in order to make such a statement inadmissible on this ground, the same thing must be shown to have been in controversy before and after the statement was made. 13 C.W.N. 1. (This may come in under cl. 5). **M**

(10) Pedigree, proof of.

edigree put forward by the plaintiffs in support of their claim was accepted by the Court of first instance as proved; but, on appeal, the appellate Court held the evidence adduced in support of it to be worthless, and, moreover, observed that “at the hearing of the appeal practically no attempt was made to support the finding” of the Court of first instance; held, upon a consideration of the circumstances of the case, that the plaintiffs were not estopped on this appeal from endeavouring to sustain the finding of the Court of first instance in their favour. 13 C.W.N. 1. (This may come under clause 5, S. 32.) **N**

(11) Proof of custom.

A valid custom must be shown, by clear and unambiguous evidence, to be ancient, continuous, reasonable and definite. 8 O.C. 94, referring to 14 M.I.A. 570. (This may come under S. 32, cl. 7 and S. 13, *supra*.) **O**

12.—“(8) *When the statement was made by a number of persons.. question.*” —(Concluded).

2.—DECLARATIONS OF A NUMBER OF PERSONS HELD ADMISSIBLE AND INADMISSIBLE—(Concluded).

(12) Documents in proof of custom.

Where it was argued that certain documents filed by the defendants were inadmissible as they related to the succession to a *raj* or *gaddi*, whereas it was expressly admitted that the succession to the estate in question was not regulated by any such rule, *held* that they were admissible in proof of the custom alleged by the defendants, though they related to the estates that descended upon a single heir. 8 O.C. 94, referring to 7 I.A. 63=5 C. 744, F.C.A. No. 99 of 1897 and F.C.A. No. 2 of 1898. (This may come under S. 32, cl. 7). P

(13) Proof of custom in family and in tribe of family.

A suit for possession of an estate on the allegation that the plaintiff was the daughter of its last undisputed owner was resisted on the ground that a custom, obtaining in the family and tribe to which the parties, who were *Songarha Chauhans*, belonged, excluded the plaintiff from inheritance. *Held*, that a party might plead that a custom obtained both in a family and in a tribe to which that family belonged, but that he should prove that the custom was binding on the family, whether he confined his evidence and plea to the family or not. 8 O.C. 94; referring to 20 C. 649 (P.C.) and 7 A. 1 (P.C.). (This may come under S. 32, cl. 7 or S. 13, *supra*.) Q

14) Transactions *inter alios*.

Where it appeared that, as early as 1837, the owners of an estate received *kabuliyats* from tenants carrying on *jhum* cultivation in the disputed land, that in 1842 and 1843 they succeeded in defeating an attempt on the part of persons interested in the adjoining *mouzah* to exercise the rights over the land, and that on several occasions they successfully resisted proposals on the part of the Revenue authorities to settle portions of the land as *ilam* land, open for settlement; *held* that from this and other evidence of continuous possession and enjoyment, it should be inferred that the land was included within the permanently settled estate of the owners, and that Regulation III of 1891 had no application to it. 12 C.W.N. 1095 (P.C.). (This may come under S. 13, *supra*.) R

33. Evidence given by a witness in a judicial proceeding, or

before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states ¹, when the witness is dead ² or cannot be found ³, or is incapable of giving evidence ⁴, or is kept out of the way by the adverse party ⁵, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable ⁶:

Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated.

Provided—

that the proceeding was between the same parties or their representatives in interest⁷;

that the adverse party in the first proceeding had the right and opportunity to cross-examine⁸;

that the questions in issue were substantially the same in the first as in the second proceedings⁹.

Explanation ¹⁰.—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

(Notes).

1.—“Evidence given by a witness in a judicial proceeding..states.”

1.—GENERAL.

(1) Nature of section.

S. 33 of the Evidence Act gives the Court new powers, which require to be exercised with great caution. There is no doubt that it is still necessary (just as much as ever it was) to produce every witness at the trial, unless it is proved to be either actually impossible to produce him, or to be so difficult to do so that it is, under the circumstances, unreasonable to insist on his production. 20 W.R. (Cr.), 69; cited in 4 C.L.R. 504 (511). S

(2) Scope of the section.

S. 33 of the Evidence Act enumerates the cases in which the evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding or at a later stage of the same judicial proceeding, the truth of the facts which it states. 2 A.L.J. 91 (96). T

(3) Purpose for which depositions are admissible.

But the Act also provides for cases in which the fact that evidence was given on a different occasion is to be admissible, either to prove the matter stated, (S. 33), in order to contradict (Ss. 155, 3), or in order to corroborate (S. 157), the witness. Steph. Introd., p. 140. U

(4) Grounds of admissibility under section.

(a) Evidence of depositions in former trials is admissible, as it forms an exception to the hearsay rule. Steph. Dig., 7th Ed., Art. 32 (45), referred to in Phip. Ev., 4th Ed., p. 407. Y

(b) As, to make evidence of former depositions admissible, oath and cross-examination are required, the requirements of the hearsay rule may be said to be satisfied. See Wigm. Ev., 1905 Ed., S. 1370, p. 1710, referred to in Phip. Ev., 4th Ed., p. 407. W

(c) Evidence of former depositions is admissible, as an exception to the rule excluding secondary evidence, on the supposition that this rule excludes secondary evidence, not only of documents, but of oral testimony also. Tay. Ev., 10th Ed., S. 464, p. 364, referred to in Phip. Ev., 4th Ed., p. 407. X

1.—“Evidence given by a witness in a judicial proceeding..states.”

—(Continued).

1.—GENERAL—(Continued).

- (d) Dr. Wharton thinks that its admissibility is based on the consideration that, the parties and the issues being the same and full opportunity of cross-examination having been allowed, the second trial is virtually a continuation of the first. Phip. Ev., 4th Ed., p. 407. **Y**
- (e) The principle which sanctions the admissibility of depositions and former testimony is the simple principle of *necessity*,—that is, the want of any other means of utilising the knowledge of the witness. Wigm. Ev., 1905 Ed., S. 1402, p. 1761. **Z**
- (f) If, where it is impossible to obtain his testimony given afresh in Court, it is not admitted at least in the form in which it survives and can be had, it will be lost entirely for the purpose of doing justice. Wigm. Ev., 1905 Ed., S. 1402, p. 1761. **A**
- (g) It is a general rule that the best evidence of which the nature of the case admits should always be given. Tay. Ev., 10th Ed., S. 391, p. 303. **B**
- (h) “In this case, the deposition is the best that can possibly be had, and that answers what the law requires.” (Gilbert, C. B. Evidence, 61; Wigm. Ev., 1905 Ed., S. 1402, p. 1762. **C**
- (i) “What a deceased witness, or one who from other causes has become incapacitated to give evidence, has sworn upon a former trial, is admitted on the principle that it is the best of which the case admits.” *State v. Hill*, 2 Hill S.C. 609; Wigm. Ev., 1905 Ed., S. 1402, p. 1762. **D**
- (j) “In requiring the production of the best evidence which is applicable to each particular fact, it is meant that no evidence shall be received which is merely substitutionary in its nature, so long as the original evidence is attainable.” Tay. Ev., 10th Ed., S. 391, p. 303. **E**
- (k) “For instance, depositions are in general admissible, only after proof that the parties, who made them, cannot themselves be produced.” Tay. Ev., 10th Ed., S. 391, p. 303. **F**
- (l) “A preliminary agreement followed by the execution of a deed a conveyance is not admissible to show what parcels were subsequently conveyed.” *Williams v. Morgan*, 15 Q.B. 782; Tay. Ev., 10th Ed., S. 391, p. 303; Phip. Ev., 4th Ed., p. 398. **G**
- (m) Held that the evidence of an absent witness was improperly admitted under S. 33, because there was nothing to show that, by ordinary care and the use of ordinary means, the witness could not have been procured. 20 W.R. (Cr.) 69 (70). **H**
- (n) A deposition made by a person, wherein he denied on oath that he had presented a certain petition in Court, which purported to be from him, was held to be inadmissible as evidence under S. 33, as the person might have been brought into Court, but was not brought by those who pleaded the said deposition. 23 W.R. 343 (344). **I**

1. "Evidence given by a witness in a judicial proceeding..states."

—(Continued).

1.—GENERAL—(Concluded).

(o) "The depositions, if published, could not be read at law, unless it was proved to the satisfaction of the Court that the witness could not be examined at the trial." *Andrews v. Palmer*, 1 Ves. and B. 22; Wigm. Ev., 1905 Ed., S. 1402, p. 1762. J.

(p) "The cause of the subsequently accruing incompetency is not material. It may arise from absence, from sickness, from interest, from death, or from newly-created statutory incompetency; but the principle controlling them all is that if, at the time the deposition or testimony was taken, the witness was competent, it may be given in evidence after the incompetency had arisen. Such is the sense of all the modern decisions, and we think the conclusion is reasonable and just." *Wells v. Ins. Co.*, 187 Pa. 166; Wigm. Ev., 1905 Ed., S. 1402, p. 1762.

(q) "The same principle will lead us farther to conclude that in all cases where the party has without his own fault or concurrence irrecoverably lost the power of producing the witness again, whether from physical or from legal causes, he may offer the secondary evidence of what he testified in the former trial. If the lips of the witness are sealed it can make no difference in principle whether it be by the finger of death or by the finger of law." *Greenleaf*. Ev. S. 168; cited Wigm. Ev., 1905 Ed., S. 1402, p. 1762. L.

2.—CONDITIONS OF ADMISSIBILITY OF FORMER TESTIMONY.

(1) Conditions of admissibility under section.

(a) The cases in which former depositions are relevant are, when a witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable. Even in these cases a safeguard is provided. 2 A.L.J. 91 (96). [See, also, Wigm. Ev., 1905 Ed., Ss. 1403-1410, pp. 1762-1770, where the learned professor considers 11 specific cases of unavailability.] M

(b) "Where a witness has given oral testimony under oath in a judicial proceeding in which the adverse litigant had the power of cross-examination, the testimony so given will, if the witness himself be incapable of being called, be admitted in any subsequent suit between the same parties and those claiming under them, if such suit relate to the same subject, or substantially involve the same material questions." Tay. Ev., 10th Ed., S. 464, p. 354, and the cases there cited. N

(c) Such evidence is only admissible when the proceeding was between the same parties, or their representatives in interest; and the adverse party in the first proceeding had the right and opportunity to cross-examine; and the questions in issue were substantially the same in the first, as in the second, proceeding. 2 A.L.J. 91 (96). O

(d) For a former deposition in order to be admissible under S. 33, the proceedings in which the evidence was given must have been between the

1.—“Evidence given by a witness in a judicial proceeding..states.”
—(Continued).

2.—CONDITIONS OF ADMISSIBILITY OF FORMER
TESTIMONY—(Continued).

same parties, or their representatives in interest, and the person against whom such depositions could be heard must have had an opportunity of cross-examining the witnesses. 8 A. 672 (675). **P**

(e) For a former deposition to be admissible under S. 33, it must be proved that the proceedings were between the same parties and the issues were substantially the same. If this is shown, and if it is shown that the witness is dead, then his deposition, in the prior proceedings, becomes admissible in the subsequent proceedings. 23 C. 441 (442). **Q**

(f) The admissibility of former depositions would seem to depend rather on the right to cross-examine than upon the exact identity of the parties or the issue; what is essential is but a substantial identity on these points. Phip. Ev., 4th Ed., p. 407, referring to Tay. Ev., 10th Ed., S. 467. **R**

(g) Only in cases where the production of the primary evidence is beyond the party's power is secondary evidence of oral testimony admissible. Tay. Ev., 10th Ed., S. 464, p. 354. **S**

(h) Except where the case be one provided for by statute, or by a rule of Court, it must be shown that the witness himself cannot be personally produced. Tay. Ev., 10th Ed., Ss. 1754-5, p. 1268. **T**

(2) Depositions in former suits—English common law.

(a) “At common law, testimony given by a witness in a civil or criminal proceeding is admissible in a subsequent, or in a later stage of the same, trial, in proof of the facts stated, provided—

(1) that the proceedings are between the same parties or their privies;

(2) that the same issues are involved;

(3) that the party, against whom, or whose privy, the evidence is tendered, had, on the former occasion a full opportunity of cross-examination; and,

(4) that the witness is incapable of being called on the second trial.” Phip. Ev., 4th Ed., p. 406. **U**

(b) “Should any of the four last mentioned conditions be absent, the evidence will be inadmissible either as *res inter alios acta*, or, as hearsay, since, though the oath and right to cross-examine may be present, yet there is not the advantage of the demeanour of the witness in the subsequent proceeding.” See Phip. Ev., 4th Ed., p. 406. **Y**

(c) Former depositions, even when not fulfilling the conditions stated, are generally relevant as admissions, or to contradict the same witness on the subsequent trial, or, after the death of the deponent, in proof of public rights or pedigree. Phip. Ev., 4th Ed., p. 406. **W**

(d) “In *ex parte* applications, evidence taken in other proceedings may be read, with the permission of the Judge, and, in all other cases, on two days' previous notice to the adversary.” Phip. Ev., 4th Ed., p. 406. **X**

Note.—(“This provision is only intended to save the expense of the order necessary under the old Chancery practice, and does not alter the law as above stated; *Printing Co. v. Drucker*, 2 Q.B. 801”). (*Ibid*).

1.—“Evidence given by a witness in a judicial proceeding..states.”

—(Continued).

2.—CONDITIONS OF ADMISSIBILITY OF FORMER TESTIMONY—(Continued).

(3) Evidence must have been given in a judicial proceeding.

- (a) “To render secondary evidence of the testimony of a witness admissible, it must be proved that the witness was duly sworn in some *judicial proceeding*, to the authority of which the party, against whom his testimony is offered, was legally bound to submit, and in which he might have exercised the right of cross-examination. If this were not the rule, the preposterous consequence would follow, that secondary evidence of testimony might be received under circumstances that would exclude the testimony itself.” Tay. Ev., 10th Ed., S. 465, p. 355. [See, also, Civ. Pro. Code, 1882, Chap. XXV, and Act IV of 1871, Act V of 1899, and Ss. 174-176, Crim. Pro. Code, 1898.] **Y**
- (b) “Therefore, should it appear that depositions were taken, either by parties not legally authorised to take them, or without the sanction of an oath or affirmation, or in the absence of the party against whom they are offered, when, as in most criminal investigations, his presence was requisite, they cannot be received.” Tay. Ev., 10th Ed., S. 465, p. 355. **Z**
- (b1) “A deposition is inadmissible, unless taken by an officer or other person authorised by law.” Wigm. Ev., 1905 Ed., S. 1376, pp. 1714-5. **A**
- (c) “For a former deposition to be admissible, the witness should have been duly sworn in some *judicial proceeding* to which the person, against whom it is adduced in evidence was legally bound to submit.” Phip. Ev., 4th Ed., p. 407, *referring to* Tay. Ev., S. 485 and Stark. Ev., 4th Ed., 415-18; (see, also, Ss. 80, 57 (7), 91, Exception 1, *infra*, for the mode of proving the evidence to have been given in a judicial proceeding. See, also, Ss. 74, 76, 77 and 79, *infra*, which provide for proof by a certified copy.) **B**
- (d) For example, depositions taken in a revived suit, where a bill of revivor did not lie, have been held inadmissible. Phip. Ev., 4th Ed., p. 407. **C**
- (e) “Where the matter was within the jurisdiction of the Court, but the bill of revivor was dismissed, as it was not proper for a decree in equity, the depositions were held to be admissible.” Phip. Ev., 4th Ed., p. 407, *referring to* Stark. Ev. 416. **D**
- (f) Depositions taken, without objection, in Judge’s chambers, where it was the practice not to cross-examine, were held to be admissible. *Lawrence v. Maul*, 4 Drew 472; Phip. Ev., 4th Ed., p. 407. See Tay. Ev., 10th Ed., S. 465, p. 354. **E**
- (g) Previous statements of witnesses on oath are not available as evidence in a subsequent trial. 7 W.R. (Cr.), 8. **F**
- (h) Where a sworn deposition was made by one of several accused, in the capacity of a witness in a previous inquiry, under Ss. 162 and 163 of the Indian Companies Act (VI of 1882), *held* it was admissible in evidence against that person only, and not against the other accused. 16 A. 88. **G**

1.—“Evidence given by a witness in a judicial proceeding..states.”
—(Continued).

2.—CONDITIONS OF ADMISSIBILITY OF FORMER
TESTIMONY—(Continued).

(i) The evidence of a prisoner taken by a Collector cannot be used against him on his trial before a Magistrate. 10 W.R. (Cr.), 23. **H**

(j) When a Civil Court authorising a criminal prosecution, in cases of offences against public justice, instead of completing the investigation itself and committing the parties for trial before the Court of Session, simply refers the proceedings and leaves it to the Magistrate to commit or not, as he thinks proper, the depositions taken before the Civil Court are not admissible in evidence before the Sessions Court, as depositions taken before the Magistrate are, in certain cases, under S. 369, Crim. Pro. Code, 1861. 6 W.R. Cr. 41. **I**

(k) The deposition of a person other than a merchant seaman is not admissible in evidence under S. 111 of the Merchant Seaman's Act (I of 1859). 1 Hyde, 195. **J**

(4) Evidence given in proceeding declared to be *coram non judice*.

Evidence of a witness, when it was given in a proceeding, subsequently pronounced to be one *coram non judice*, is not admissible, where the witness is no more, during a retrial before a Court of competent jurisdiction. 3 M. 48 (51)—2 Weir 756. **K**

(5) Grounds of admitting absent witnesses' evidence to be recorded.

(a) When the evidence of an absent witness is admitted under S. 33, the grounds for its admission should be stated fully and clearly, so as to enable the High Court to judge of the propriety of its admission. 20 W.R. (Cr.), 69. **L**

(b) Admitting evidence given in a former judicial proceeding, under S. 33 of the Evidence Act, without explaining the reasons for so doing, is an irregularity that should not be repeated. 1 A.W.N. 38. **M**

(6) Objections to depositions.

(a) “When depositions are tendered in evidence as secondary proof of oral testimony, they are open to all the objections which might have been raised, if the witness himself had been present during the trial. Leading and other illegal questions, are, therefore, constantly suppressed, together with the answers to them; and this, too, whether the testimony has been taken *viva voce*, or by written interrogatories.” Tay. Ev., 10th Ed., S. 548, p. 389; Phip. Ev., 4th Ed., p. 409, referring to *Small v. Nairne*, 13 Q.B. 840. **N**

(b) “But a party cannot repudiate an answer which has been given to an illegal question put on his own side.” Tay. Ev., 10th Ed., S. 548, p. 389, referring to *Hutchinson v. Bernard*, 2 M. and Rob. 1. See, also, Steph.Dig., 7th Ed., Art. 125, p. 144, and Phip. Ev., 4th Ed., p. 409. **O**

(c) Wherever “objections are taken to interrogatories on the ground of their being couched in a leading form, the Judge is vested with a wide discretion as to how much, if any, of the depositions returned he will in consequence strike out.” *Small v. Nairne*, 13 Q.B. 840; Tay. Ev., 10th Ed., S. 548, p. 389; Phip. Ev., 4th Ed., p. 409. **P**

1.—“Evidence given by a witness in a judicial proceeding..states.”

—(Continued).

2.—CONDITIONS OF ADMISSIBILITY OF FORMER TESTIMONY—(Continued).

(d) “Where a witness, on being examined upon interrogatories in a foreign country, stated, in one of his answers, the contents of a letter which was not produced, that part of the deposition was suppressed at the trial, though it was urged that, as the witness was beyond the jurisdiction of the Court, no means existed for compelling the production of the letter.” Tay. Ev., 10th Ed., S. 548, pp. 389-390, referring to *Steinkeller v. Newton*, 9 C. and P. 319. See, also, Phip. Ev., 4th Ed., p. 409, referring to *Tufts v. Whitmore*, 12 A. and E. 370. Q

(e) “Mr. Justice Stephen says that the credit of the declarant may be impeached, in the same way as that of a witness, who had denied in cross-examination the imputations suggested (art. 135).” Phip. Ev., 4th Ed., p. 409R

(f) Where, after objection, admissible evidence has been rejected, or inadmissible evidence admitted, the Court may suppress the depositions wholly or in part. See *Lumley v. Gye*, 3 F. and B. 114 and *Small v. Nairne*, 13 Q.B. 840; Phip. Ev., 4th Ed., p. 437. S

(7) Proof of the former testimony.

(a) Where the testimony is oral, it may be proved from memory or notes, by any one who can swear as to its accuracy, as for instance, a Judge, Counsel, or Reporter. *R. v. Morgan*, 6 Cox. 107; *R. v. Bird*, 5 Cox. 11. See Phip. Ev., 4th Ed., p. 409. See Tay. Ev., 10th Ed., S. 416, p. 322. T

(b) The oral testimony of a witness may be proved by any person who will swear from his own memory. *Strutt v. Bovingdon*, 5 Esp. 56; *Mayor of Doncaster v. Day*, 3 Taunt. 262 and *R. v. Jolliffe*, 4 T.R. 290; Tay. Ev., 10th Ed., S. 546, p. 388. See, also, Wigm. Ev., 1905 Ed., S. 2098, p. 2832. U

(c) A witness's oral testimony may be proved by notes taken at the time by any person, who will swear to their accuracy. *Mayor of Doncaster v. Day*, 3 Taunt. 262. See Tay. Ev., 10th Ed., S. 546, p. 388. Y

(d) Former oral testimony may also be proved, possibly from the necessity of the case, by the Judge's notes. *Mayor of Doncaster v. Day*, 3 Taunt. 262. See Tay. Ev., 10th Ed., S. 546, p. 388. W

(e) Proof of former oral testimony by the Judge's notes is liable to very serious, if not insuperable, objections, for such notes form no part of the record, nor is the Judge bound to take them, nor do they possess the sanction of his oath to their accuracy or completeness. *Conradi v. Conradi*, L.R. 1 P. and D. 514; Tay. Ev., 10th Ed., S. 546, p. 388. See, also, Phip. Ev., 4th Ed., p. 409. X

(f) Where oral testimony is sought to be proved, it may not be proved by the Judge's notes, unless at least by consent. *R. v. Child*, 5 Cox. 197, 203; *Griffin's Divorce Bill*, 1896, A.C. 193; Phip. Ev., 4th Ed., p. 409, referring to Tay. Ev., S. 546. Y

1.—“Evidence given by a witness in a judicial proceeding..states.”

—(Continued).

2.—CONDITIONS OF ADMISSIBILITY OF FORMER TESTIMONY—(Continued).

(g) Where a juror had fallen ill, the Judge's notes of the evidence were read over to the new juror, all the witnesses being re-sworn. *The Veronica Case*, 67 J.P. 267; Phip. Ev., 4th Ed., p. 409. **Z**

(h) “Where the depositions are written, they may be proved either by office copy, or examined or certified copy.” Phip. Ev., 4th Ed., p. 409. **A**

(i) In proving former oral testimony, it will suffice to give the substance merely, and not the exact words, of the examination and the cross-examination. Phip. Ev., 4th Ed., p. 409, referring to Tay. Ev., Ss. 546-7. **B**

(j) “How far it may be necessary to prove the *precise words* spoken does not clearly appear. It is said that in one case the evidence of a witness was rejected ‘as he could not undertake to give the words, but merely to swear to the effect of them’.” Tay. Ev., 10th Ed., S. 546, p. 388, referring to *R. v. Jolliffe*, 4 T.R. 290. **C**

(k) “To insist upon strict accuracy would exclude this sort of evidence altogether, while extreme particularity and minuteness in a witness's narrative and an undertaking by him to repeat with exactness every word of the deceased's testimony, ought to arouse just doubts of the witness's honesty and the truth of his evidence.” Tay. Ev., 10th Ed., S. 546, p. 388, and the cases there cited. **D**

(8) Burden of proof.

As to whether the burden, of proving that the conditions essential to the admissibility of depositions, under S. 33, have been complied with, lies on the person who tenders the evidence under this section, see S. 114, *infra*. **E**

(9) Duty of Court in trial.

The Court is bound to try the matter between the parties who are before it upon such evidence as those parties in their discretion produce for the purpose, and, at the time when the evidence is tendered, to decide whether or not it is legally admissible. 9 W.R. 587 (588). **F**

(10) Evidentiary value of former depositions.

(a) The weight of depositions in former trials, as distinct from their admissibility, is affected by the loss of the demeanour of the witness, though it may rank as high as oral testimony. See Phip. Ev., 4th Ed., p. 407. **G**

(b) Evidence of depositions in former trials was observed to be of as high a nature, and as direct and immediate, as *viva voce* testimony. Per Tindal, C.J. *Wright v. Tatham*, 1 A. and E. 3, 22. See Phip. Ev., 4th Ed., p. 407. **H**

(11) Value of former testimony not to regulate admissibility.

Whether the Court does or does not consider evidence given on another occasion and between other parties appropriate and valuable for the decision of the case which is before it is not of itself a reason for the admission or rejection of such evidence, 9 W.R. 587 (588). **I**

1.—“Evidence given by a witness in a judicial proceeding..states.”
—(Continued).

2.—CONDITIONS OF ADMISSIBILITY OF FORMER TESTIMONY—(Continued).

(12) Caption of depositions.

(a) Where a deposition was without a caption or title, it was to be inadmissible. *R. v. Newton*, 1 F. & F. 641; *R. v. Galvin*, Ir. C.C.R. 10 Cox. 198; *R. v. Rees*, S. Wales Circ., Times, 20 Dec. 1888; Phip. Ev., 4th Ed., p. 441. See, also, Tay. Ev., 10th Ed., S. 487, p. 366. **J**

(b) A caption which does not mention where a deposition was taken is inadmissible. *R. v. Curtis*, 21 T.L.R. 87; Phip. Ev., 4th Ed., p. 441. **K**

(c) A caption or title, being an integral part of the deposition, must be added at the time and not afterwards. *R. v. Prestridge*, 72 L.T.Jo. 93; Phip. Ev., 4th Ed., p. 441. **L**

(d) The words descriptive of the witness, put at the head of a deposition, form no part of it and are no evidence to prove the facts stated. 26 A. 108—31 L.A. 38. **M**

(13) Case where strict application of section necessary.

Where everything turned on the evidence of an absent witness, and, without it, the prosecution must fail, it was held to be, therefore, a case in which the provisions of S. 33 ought to be most strictly applied. 20 W.R. (Cr.), 69. **N**

(14) Discrepancies in depositions.

In a trial before a Sessions Court, the attention of the Jury may be called to the discrepancies between the evidence given by the witnesses in such Court and that given before the committing Magistrate, without the depositions before the Magistrate being put in. 6 C.L.R. 390. **O**

(15) Deposition of approver before committing Magistrate.

There is a grave doubt whether the deposition of an approver, taken before the committing Magistrate, may be used as evidence against his accomplices on their trial before the Court of Sessions, where the approver's conditional pardon is withdrawn. 7 C.L.R. 66. Per *Field, J.* See, also, 13 C.L.R. 326. **P**

(16) Deposition of deceased witnesses as against strangers.

The depositions of deceased witnesses will, in some cases, be admissible even against strangers: as, for instance, if they relate to a custom, prescription, or pedigree, where reputation would be evidence; for, as the unsworn declarations of persons deceased would be here received, their declarations on oath are much more admissible. Tay. Ev., 10th Ed., Ss. 1754-5, p. 1268; see, also, Phip. Ev., 4th Ed., p. 406, cited *supra*. **Q**

(17) Depositions in counter case.

When accused persons are on their trial, their depositions, as witnesses, given in a counter case, may be used as evidence against them, but such depositions will be evidence only against the persons making them. 21 C. 392. (3 M. 271 and 12 B. 440, F). **R**

1.—“Evidence given by a witness in a judicial proceeding..states.”
—(Continued).

2.—CONDITIONS OF ADMISSIBILITY OF FORMER
TESTIMONY—(Concluded).

(18) Documents tendered in civil case—False evidence, trial for giving.

Documents, which were tendered in the civil suit, if relied on in a prosecution for giving false evidence, must be *proved* in the Criminal Court before they can be received as evidence. 9 W.R. (Cr.), 58. S

(19) Evidence—Former case—Consent of parties.

(a) A Judge is warranted, with the consent of the parties, to a suit, in deciding the questions in dispute on the basis of evidence contained in the record of a former case. 4 N.W.P. 125. T

(b) Evidence given, when a party never had the opportunity either to examine or to cross-examine the witnesses, or to rebut their testimony by fresh evidence, is not legally admissible for or against him, unless he *consents* that it should be so used. 9 W.R. 587. U

(c) In a case of inheritance, it was held with regard to the evidence in one suit having been imported *en masse* into another at the first hearing; and the admission of evidence upon the trial of the new issue; that the parties intended that the evidence should be admitted and that no irregularity had taken place materially affecting the decree of the High Court. 14 A. 366. Y

3.—EFFECT OF CERTAIN PROVISIONS IN THE CRIM.
PRO. CODE ON S. 33, EVIDENCE ACT.

(1) Relation between S.—33, Evidence Act, and S. 491, Crim. Pro. Code, 1872.

S. 33 of the Evidence Act does not justify a Magistrate, when proceeding under S. 491, Crim. Pro. Code, 1872, in using evidence taken in a previous criminal trial, in supersession of evidence given in the presence of the accused. 22 W.R. 36 (37) (Cr.). (S. 491, Crim. Pro. Code, 1872, corresponds to S. 107, Crim. Pro. Code, 1882). W

(2) S. 288, Crim. Pro. Code, 1882.

(a) “The provision of the law contained in S. 288, Crim. Pro. Code, 1882, applies when a witness at a trial gives an account of the matter different from that which he gave on the preliminary enquiry. It proceeds on the assumption that the first statement of the witnesses is as likely to be true as the second. If this were really so, why is it necessary always to examine the witnesses a second time when the accused is committed for trial? Probably, the only real use, intended to be made of the earlier depositions in such cases, is to destroy the credit of the witnesses, if their evidence on the trial contradicts that given on the preliminary enquiry, in which case the evidence given on both occasions ought to be treated as worthless.” Mark Ev., p. 39. X

(b) The discretion conferred by S. 249, Crim. Pro. Code, 1872, should be exercised upon substantial materials rightly before the Court, and reasonably sufficient to guide the judgment of the Court to the truth of the matter, and not upon mere speculation or conjecture. 12 B.L.R. Ap. 15. Y

1.—“Evidence given by a witness in a judicial proceeding..states.”

—(Continued).

3.—EFFECT OF CERTAIN PROVISIONS IN THE
CRIM. PRO. CODE ON S. 33, EVIDENCE ACT—(Continued).

(c) Under S. 288, Crim. Pro. Code, a Judge may base his judgment on the evidence given before the Magistrate in the presence of the accused, where there are special and particular reasons for considering that evidence to be honest and true, and when that evidence is, to a certain extent, corroborated by independent testimony before himself. 12 B.L.R. Ap. 15, cited in 10 M. 295 (314). **Z**

(d) S. 288, Crim. Pro. Code, 1882, was never intended to be used so as to enable a Court trying a cause to take a witness's deposition bodily from the Magistrate's record, and to treat it as evidence before itself; at any rate, the Judge was bound to put to the witnesses he proposed to contradict by their former statements, the whole or such portions of their depositions as he intended to rely upon in his decision, so as to afford them an opportunity of explaining their meaning, or denying that they had made any such statements, and so forth. 7 A. 862 (863), approving 12 B.L.R. Ap. 15. **A**

(e) There can be no doubt the provision was intended to enable the Court to read the previous evidence as substantive evidence in the case at the trial, where, for the purposes of justice, the adoption of such a course is found necessary by the Judge. Such evidence may be used as much in favour of the defence as in support of the prosecution. 21 M. 114 (116) — 2 Weir 377. **B**

(f) In a case in which the accused was charged with murder, the Sessions Judge considered the evidence given before him by the witnesses for the prosecution to be false, but nevertheless convicted the accused, acting under S. 219 of the Crim. Pro. Code (Act X of 1872), and relying on the evidence which had been given by the same witnesses before the committing officer. Held that S. 219, Crim. Pro. Code, 1872, did not apply to this case. 12 B.L.R. Ap. 15. **C**

(g) The confession of a witness in the shape of a former deposition can be used as evidence against a prisoner, only on the condition prescribed by S. 249, Crim. Pro. Code, that is, it must have been duly taken by the committing officer in the presence of the person against whom it is to be used. The certificate of the Magistrate appended to such confession in order to afford *prima facie* evidence, under S. 80 of the Evidence Act, of the circumstances mentioned in it relative to the taking of the statement, ought to give the facts necessary to render the deposition admissible under S. 249, Cr.P.C., 1872. 21 W.R. (Cr.), 5. **D**

(h) A Court of Session is not at liberty, under Act X of 1872, S. 249, to ground its judgment on the depositions taken by the Magistrate, without taking the examinations of the witnesses afresh. 24 W.R. (Cr.), 11. **E**

(i) The purpose of S. 249, Crim. Pro. Code, 1872, as recently amended, is to make depositions, given before Magistrates in the preliminary enquiry, evidence for the purposes of the trial in the Court of Sessions, only when the Sessions Judge determines, in the exercise of his discretion,

1.—“Evidence given by a witness in a judicial proceeding ..states.”

—(Continued).

3.—EFFECT OF CERTAIN PROVISIONS IN THE
CRIM. PRO. CODE ON S. 33, EVIDENCE ACT—(Continued).

that they are to be used in this way. But, this discretion, considering it as a matter of fact or law, is open to review by the High Court in appeal. 11 B.H.C.R. 281 (282). **F**

(j) When a case is under trial in a Court of Sessions, the Sessions Judge has the depositions, given in the Magistrate's Court, before him. If he finds that the statements of the witnesses in his own Court differ materially from those previously made by the same witnesses, it is his duty to examine them as to the discrepancies, and more so when the prisoners are undefended and contradictory testimony is given for the prosecution. (*Ibid*). **G**

(k) But, if he does examine the witnesses, he ought (see Tay. Ev., Ss. 1300, 1301 and Evidence Act, S. 155), in ordinary cases, to make the depositions, upon which he has examined them, evidence in the case; he is at liberty to do so, and the power should be exercised, so as to bring all relevant matter, so far as possible, under consideration in forming a judgment on the case. (*Ibid*). **H**

(l) If the Sessions Judge has omitted to examine the witnesses on obvious and important discrepancies in their statements, the High Court will, in general, direct that such an examination be made and the Sessions Judge having the witnesses before him for such a purpose, will, in most cases, feel it his duty to make former depositions evidence, *quantum valeant*, for the purposes of the final adjudication in appeal. (*Ibid*). **I**

(m) The alternative is for the High Court in such cases to order a new trial, on the ground that there has been a mis-use of the discretion of the Sessions Judge which may have defeated the ends of justice; but a new trial will not be ordered, except in special cases. (*Ibid*). **J**

(n) Depositions read, under S. 288, Crim. Pro. Code, 1882, and retracted at the trial, are not by themselves material corroboration. 12 M. 123=2 Weir 376. **K**

(o) S. 288 of the Crim. Pro. Code does not permit the production of the evidence given before the committing Magistrate, only for the purpose of contradicting the witness at the Sessions trial. If that were all, the provision would be quite unnecessary and superfluous, inasmuch as evidence could be adduced, for the purpose stated, under the Evidence Act. 24 M. 414 (415-6). **L**

(p) Where there are two sets of evidence, neither of which can alone be accepted without corroboration, they cannot each, in its turn, be taken to corroborate the other, and joined together so as to justify any Court in taking action on such evidence. 27 C. 295=4 C.W.N. 129. **M**

(q) Evidence, brought in under S. 288, Crim. Pro. Code, cannot be accepted as a proper corroboration of a confession made to a Magistrate and retracted at the Sessions trial, especially when the confession was not fairly obtained and was not voluntary. 27 C. 295 (307)=4 C.W.N. 129. **N**

1.—“Evidence given by a witness in a judicial proceeding..states.”

—(Continued).

3.—EFFECT OF CERTAIN PROVISIONS IN THE
CRIM. PRO. CODE ON S. 33, EVIDENCE ACT—(Concluded).

(r) S. 288, Crim. Pro. Code, allows evidence taken before the committing Magistrate to be treated as evidence in the case, but a conviction based on such evidence alone will not be justified. Ratanlal's Unrep. Crim. Cases 894 (895). O

(s) Although S. 503, Crim. Pro. Code, 1882, may include any party to a proceeding, it is principally intended for the purpose of some witness other than the parties principally concerned, persons “whose presence could not be obtained without an amount of delay and expense, which, under the circumstances of the case, the Court considers unreasonable.” 19 C. 113 (121). P

(3) S. 507, Crim. Pro. Code, 1882.

S. 33 of the Evidence Act differs altogether from the language used in the Crim. Pro. Code, 1882, S. 507. The Code allows the issue of a commission in the case of unreasonable delay, expense or inconvenience. 19 C. 113. (120-1). Q

(3-a) Reason for enacting S 507 (2), Cr. P. C., 1898.

“Various High Courts have held that depositions taken under this chapter are only evidence in the Court from which the commission issued, and that if the evidence is required in another Court, a fresh commission must be issued. We have, therefore, provided that depositions may, subject to certain qualifications, be received at subsequent stages of the case.” See Select Committee's Report, 16th Feb., 1898, para. 73. R

(4) S. 370, Crim. Pro. Code, 1881, corresponding to S. 510, Cr. P.C., 1882.

(a) Under S. 370, Crim. Pro. Code, the original report of the Chemical Examiner, bearing his signature, and not a copy of the report, should be put in evidence. 15 W.R. (Cr.), 49. S

(b) Where a document purported to be a report under the hand of a person styling himself “Additional Chemical Examiner” on a matter upon which his analysis and report were required, *held*, it was of no more value as evidence than a piece of waste paper. (S. 510, Crim. Pro. Code, 1882). 10 C. 1026 (1027). T

(c) Ss. 509 and 510 of the Crim. Pro. Code, provide that the depositions of the Civil Surgeon, and the report of the Chemical Examiner, or Assistant Examiner, may be read at the trial, without in any way accounting for their absence. But they may be called if the Judge thinks proper; and they ought to be called in all important cases, in order that they may be cross-examined, and also that their opinion may be asked upon the questions which frequently arise, when the cause of death is being inquired into, and which could not have been foreseen at the time the report was drawn up. Mark Ev., p. 84. U

1.—“Evidence given by a witness in a judicial proceeding..states.”
--(Continued).

4.—DEPOSITIONS TAKEN ON COMMISSION.

(1) The deposition of a witness obtained by commission.

The deposition of a witness, obtained by a commission issued by the committing Magistrate and forming part of the record of his enquiry, is admissible, under S. 33 of the Evidence Act, provided that the requirements of that section are satisfied, notwithstanding chapter 40, Crim. Pro. Code, 1882. 19 B. 749 (756, 757 and 758). **Y**

(2) Return of commission—S. 507, Crim. Pro. Code, 1898.

(a) After any commission issued under S. 503 or S. 506 has been duly executed, it shall be returned, together with the deposition of the witness examined thereunder, to the Court out of which it issued; and the commission, the return thereto and the deposition, shall be open at all reasonable times to inspection of the parties, and may, subject to all just exceptions, be read in evidence in the case by either party, and shall form part of the record. **W**

(b) Any deposition so taken, if it satisfies the conditions prescribed by S. 33 of the Indian Evidence Act, 1872, may also be received in evidence at any subsequent stage of the case before another Court. **X**

(3) Admissibility of evidence taken on Magistrate's commission in High Court

In a criminal trial before the High Court, the evidence of a witness taken upon commission is not admissible, except where it can be shown that such evidence was so taken upon an order made by that Court, under S. 76 of Act X of 1875, or unless it is admissible under S. 33 of the Evidence Act. 6 C. 592. **Y**

(4) Case where S. 33 is not applicable.

The deposition of a complainant, taken before the committing Magistrate and read in the Sessions Court to prove the loss and identity of the articles found in the possession of the accused, who was charged with dishonestly receiving them, was held to be inadmissible, there being no evidence on the record, nor any taken, to permit the application of S. 33 of the Evidence Act. 2 A. 646 (647). **Z**

(5) Depositions taken on commission held inadmissible.

(a) The Nizam of Hyderabad was examined and cross-examined, under a commission issued by the Chief Presidency Magistrate, Calcutta, during an enquiry before him, under the terms of S. 507, Cr. P.C., 1882, and his deposition was tendered in evidence before the Sessions Court. The deposition was held to be inadmissible, as the Nizam was not dead, as it could not be said either that he could not be found, or that he was kept out of the way, as there was no suggestion of delay, and, as the allegations regarding the expense of obtaining his presence were absurd. 19 C. 113 (121). **A**

(b) Where a Commissioner took the evidence of witnesses, when the last return day of the commission had expired, held that the depositions of the witnesses were not admissible in evidence in the cause. 14 W.R. (A.O. C.J.), 17. **B**

1.—“Evidence given by a witness in a judicial proceeding..states.”
 —(Continued).

5.—RECORD OF DEPOSITIONS, STATUTORY PROVISIONS, ETC.

(1) Record of depositions.

The Codes of Civil and Criminal Procedure direct all judicial officers to make record of the evidence given before them; and S. 80 of the Evidence Act provides that a document purporting to be a record of evidence shall be presumed to be genuine, that statements made as to the circumstances under which it was taken shall be presumed to be true, and the evidence to have been duly taken. The result of these sections taken together is that when proof of evidence given on previous occasions is admissible, it may be proved by the production of the record or a certified copy. (See S. 76) Steph. Introd., p. 141. **C**

(2) Evidence to be legally recorded and taken in proper form.

(a) The evidence given in the previous proceeding must have been recorded in the manner proscribed by law. See Crim. Pro. Code, Ss. 353-365, 503, 509, 512, 263, 264 and Civ. Pro. Code, Ss. 178, 181-193, and Ros. Cr. Ev., 13th Ed., p. 61. **D**

(b) “To render a deposition of any kind admissible in evidence in any case, it must be proved to have been formally taken. The requirements of the statute (11 and 12 Vic. C. 42, S. 17) must be proved, by the party tendering the evidence, to have been complied with; though the usual presumptions in favour of the proceedings having been regular, will be made, if the depositions are in form correct.” Ros. Cr. Ev., 13th Ed., p. 61. **E**

(c) “Depositions, before they will be available as secondary evidence and as a substitute for a *vera voce* testimony, must be proved to have been regularly taken under legal proceedings duly pending, or on some other occasion sanctioned by law.” Tay. Ev., 10th Ed., Ss. 1754-5, p. 1268. **F**

(3) Ss. 80 and 91, Evidence Act

“When the statement given by a witness is by law required to be in writing, S. 91 of the Act applies and oral evidence of the statement is excluded. To depositions thus recorded in accordance with law, S. 80 applies. There is a presumption in favour of the genuineness of the document.” Cun. Ev., 11th Ed., p. 98. **G**

(4) Failure to comply with provisions of Civ. Pro. Code—Effect.

Where the requirements of Ss. 182 and 183, Civ. Pro. Code, 1877, were not complied with in a judicial proceeding, it was held that the informalities which took place in recording the deposition of the accused rendered the record of his evidence inadmissible, and that S. 91 of the Evidence Act rendered no other evidence of his deposition admissible. 6 C. 762 (763). **H**

(5) Depositions, informally taken, admissible for some purposes.

“Depositions, though informally taken, are admissible, like any other admissions, against the deponent, whenever he is a party; or, they may be used to contradict and impeach him, when he is afterwards examined as a witness.” Tay. Ev., 10th Ed., Ss. 1754-5, p. 1268. **I**

1.—“Evidence given by a witness in a judicial proceeding..states.”

—(Continued).

5.—RECORD OF DEPOSITIONS, STATUTORY PROVISIONS, ETC.—(Continued).

(6) Presumptions regarding depositions.

The Court may presume that the judicial and official acts have been regularly performed, and, therefore, a presumption that the proceedings and depositions have been regular will be made, until and unless the contrary is shown. See S. 114, *infra*, ill. (e). J

(7) Documents not on the record before Sessions Judge, but sent by Magistrate—Admissibility.

Documents which were on the record sent up by the Magistrate, but which were not put in evidence before the Sessions Judge, were looked at, because they told in favour of the prisoner. 10 B.L.R. 332. K

(8) Memorandum of depositions.

A memorandum by a Judge that certain witnesses had deposed the same as the former witnesses was held to be not in accordance with the requirements of S. 195, Crim. Pro. Code, 1861. W.R. (1864), 18 (Cr.) L

(9) Written reports of depositions—Crim. Pro. Code, 1861, S. 369, corresponding to S. 33, Evidence Act.

Written reports of depositions are not evidence, except in the case provided for by S. 369 of the Code of Criminal Procedure, 1861. 6 W.R. (Cr.), 92. M

(10) Depositions taken under S. 369, Cr. P.C., 1861—Conditions of admissibility to be recorded.

When a deposition is received in evidence under S. 369 of the Crim. Pro. Code, 1861, at a trial before a Sessions Judge, there ought to be on the record distinct proof of the existence of such a state of things as makes the deposition legal evidence. 7 W.R. (Cr.), 78. N

(11) Mode of recording deposition, evidence of—Sufficiency.

The evidence of a writer in the Judicial Commissioner's office, to the effect that “the document shown to him is a deposition taken before the Assistant Commissioner; it appears to have been taken in due form upon solemn affirmation and is attested by the signature of the Assistant Commissioner,” is not sufficient evidence of the prisoner having duly deposed. 3 B.L.R. (Cr.), 36=12 W.R. (Cr.), 81. O

(12) Depositions of witnesses taken by Magistrate—Evidence on appeal.

Before depositions of witnesses taken before a Magistrate can be used on appeal, it should be shown either in the depositions or elsewhere that the evidence was read over or interpreted to the respective witnesses. 14 W.R. (Cr.), 13. P

(13) Depositions not conforming to S. 360, Cr. P.C., 1882.

Where a Sessions Judge, after hearing a general statement made by a mooktear engaged in the case, came to the conclusion that the depositions of certain witnesses taken in the Magistrate's Court did not comply with the requirements of S. 360 of the Code of Crim. Procedure, 1882, he refused to admit the depositions as evidence

1.—Evidence given by a witness in a judicial proceeding..states."**—(Concluded).****5.—RECORD OF DEPOSITIONS, STATUTORY PROVISIONS, ETC.—(Concluded).**

and also refused to allow oral evidence to be given as to the statements made by these witnesses. No objection was taken to the admission of these depositions on behalf of the Crown; the accused were eventually convicted and sentenced to rigorous imprisonment. *Held*, on appeal, that the conviction and sentence must be set aside. 13 C. 121. **Q**

(14) Records of former trial—Depositions in former case.

The power granted to the Civil Courts of calling for and inspecting the records of a previous trial is one that ought to be exercised with the greatest caution, and does not extend to criminal proceedings. 12 W.R. (Cr.), 73. **R**

(15) For statutory provisions on the subject-matter of the present section, see the following:—

(a) Act X of 1873 (Indian Oaths Act), Ss. 5, 13; **S**

(b) Crim. Pro. Code, 1898, Ss. 263, 264, 288, 353-365, 503, 509, 512 and 503 to 508; **T**

(c) Civ. Pro. Code, 1882, S. 178 corresponding to O. XVI, r. 21 of Act V of 1908; Ss. 181 to 193 of Act of 1882 corresponding to O. XVIII, rr. 4 to 6, 8 and 9, 7, and 10 to 17, of Act V of 1908; **U**

(d) On evidence given by affidavit, see Ss. 194-197, C.P.C., 1882. **V**

(16) Depositions to perpetuate testimony.

"Whenever it appears to the satisfaction of any justice of the peace that any person, dangerously ill, and in the opinion of some registered medical practitioner, not likely to recover from such illness, is able and willing to give material information relating to any indictable offence, or relating to any person accused of any such offence, the English Law provides for the taking down of such deposition. See 30 and 31, Vic. C. 95, S. 6; The Criminal Law Amendment Act," cited in Phip. Ev., 4th Ed., p. 447. **W**

(17) Depositions before examiners.

"Under the English law, the Court or a Judge may, in any cause or matter where it may be necessary for the purposes of justice, make any order for the examination upon oath before the Court or Judge or any officer of the Court or any other person (or for the cross-examination of an affidavit witness, *De Mora v. Coacha*, 32 Ch. D. 133), and may empower any party to such cause or matter to give such deposition in evidence therein on such terms, if any, as the Court or a Judge may direct." Phip. Ev., 4th Ed., pp. 495-6. **X**

2.—“ *When the witness is dead.*”(1) **Former depositions admissible on death of witness.**

Evidence given by a witness in a previous judicial proceeding is relevant for the purpose of proving the matter stated in a subsequent judicial proceeding, or in a later stage of the same, when the witness is *dead*. *Mayor of Doncaster v. Day*, 3 Taunt. 262; Steph. Dig., 7th Ed., Art. 32, p. 45. **Y**

(2) **Deposition of dead witness—Death to be strictly proved.**

When it is proposed to read as evidence the deposition of a witness alleged to be dead, the death of the witness should first be strictly proved, unless it is admitted on the other side and the reading of the deposition not objected to. 4 B.L.R. Ap. 50—12 W.R. (Cr.), 80. **Z**

(3) **Presumption regarding death.**

A person's deposition had been taken before 60 years. *Held*, there was no presumption of his death, and such deposition was inadmissible in evidence, in the absence of any proof of search having been made for the deponent, or any account of him. *Tay. Ev.*, 10th Ed., S. 199, p. 193, referring to *Benson v. Olive*, 2 Str. 919 and *Manby v. Curtis*, 1 Price 225. See, also, *Wigm. Ev.*, 1905 Ed., S. 1311, p. 1600. **A**

(4) **Depositions held admissible and inadmissible.**

(a) Where a person sued as the heir of another to recover certain lands from a third person, the deposition of a deceased witness taken in a previous action, against the third person, for a different subject-matter was held to be admissible in evidence. *Doe v. Derby*, 1 A. and E. 791 n. See *Phip. Ev.*, 4th Ed., p. 410. See, also, *Tay. Ev.*, 10th Ed., S. 467, p. 356. **B**

(b) Certain customary tenants, on their behalf and the other tenants of a manor, brought an action against the lord in 1870 to establish a right to the minerals under their tenements. The depositions of old persons, since deceased, taken *de bene esse* under a commission in a former suit by certain former tenants on the same question, were held to be admissible, though the plaintiffs in the later suit did not claim through the former plaintiffs, and though the former lord, who joined in the commission, did not in fact cross-examine the deponents. *Llanover v. Honfrian*, 19 Ch. D. 224. *Phip. Ev.*, 4th Ed., p. 410. See, also, *Tay. Ev.*, 10th Ed., S. 467, p. 356, and Steph. Dig., 7th Ed., Art. 32, p. 45. **C**

(c) In an action for the possession of a house, the evidence of a witness, who was examined in support of a charge of trespass in respect of the same house brought by the plaintiff against the defendant, is admissible, when it is shown that the witness is dead. 23 C. 441 (442). **D**

(d) Where A sued B, the deposition of a deceased witness, in a prior proceeding, where the same question was involved, instituted by A, B and C jointly against D, was held to be admissible. *Wright v. Tatham*, 1 A. and E. 3. See *Phip. Ev.*, 4th Ed., p. 410; *Tay. Ev.*, 10th Ed., S. 467, p. 356 and *Wigm. Ev.*, 1905 Ed., S. 1388, p. 1734. **E**

(e) Depositions of witnesses in a former suit are not admissible in evidence, when those witnesses are living and their evidence is procurable. 2 B.L.R. Ap. 4. **F**

2.—“When the witness is dead.”—(Concluded).

- (e-4) For a case where, a witness having become blind after a Chancery examination, his depositions were ordered to be read at the trial, see *Lynn v. Robertson*, 1 L.J.Ch. 89; Tay. Ev., 10th Ed., ss. 472-8, p. 360. **G**
- (f) A copy of a deposition is inadmissible in evidence, under the section, unless the deponent is dead or cannot be found, or is incapable of giving evidence, or his presence cannot be obtained without an unreasonable amount of delay or expense, and even then, only when the proceedings are between the same parties or their representatives in interest and the adverse party in the first proceeding had the right and opportunity to cross-examine and the questions in issue were substantially the same in the first as in the second proceeding. 2 A.L.J. 91. **H**

3.—“Or cannot be found.”

(1) Former deposition admissible when witness cannot be found.

- (a) Where a witness cannot be found, his evidence given in a former judicial proceeding will be relevant in subsequent judicial proceedings. Steph. Dig., 7th Ed., Art. 32, p. 46, referring to *R. v. Scaife*, 17 Q.B. 238 (243). **I**
- (b) Where, in a case of grievous hurt, in consequence of which death also ensued, committed to the Sessions, it was shown that a person examined before the Magistrate suddenly disappeared and that it was found impossible to serve him with summons, held that, under these circumstances, his deposition was properly unable, under S. 33, before the Sessions Court. 7 C 42 (45). **J**
- (c) A Sessions Judge, finding that the witnesses, who had been summoned to give evidence for the prosecution, did not appear on the date fixed, adjourned the case for eighteen days and ordered fresh summons to be issued. On the adjourned date, the witnesses were again absent. Thereupon, the Sessions Judge made use of the evidence, which those witnesses had given before the committing Magistrate, purporting to do so under this section. Held, that the evidence could not be so used; but the Sessions Judge ought to have directed warrants to issue to enforce the attendance of the prosecution-witnesses and compelled their attendance in the Court. A.W.N. (1905), 202=2 A.L.J. 599=2 Cr. L.J. 518 **K**

(2) Depositions of absent witness, when admissible.

- (a) Under the old law as well as under the Evidence Act, depositions of an absent witness are only admissible when the prisoner has had the right and the opportunity to cross-examine. 21 W.R. (Cr.), 12; and see, also, 24 W.R. (Cr.), 18 (20). **L**
- (b) The issue of a commission for the examination of an absent witness, without notice to the opposite party, even if not illegal, is objectionable. 3 W.R. 147. **M**
- (c) Proof of a diligent, though unsuccessful, search will probably also admit the depositions. See *Falconer v. Hanson*, 1 Camp. 171; *Wiedemann v. Walpole*, Times, June 15, 1891. See *Phil. Ev.*, 4th Ed., p. 409 and Tay. Ev., S. 473. **N**
- (d) The evidence of a witness for the prosecution upon whose evidence the conviction depended was held to be inadmissible, because there was nothing to show that this witness could not have been found, if reasonable exertion had been made to find him. 24 W.R. 18 (19) (Cr.). **O**

3.—“*Or cannot be found.*”—(Concluded).

(3) S. 512, Crim. Pro. Code—Effect on S. 33, Evidence Act.

“As regards criminal proceedings, S. 33 is in some cases superseded by S. 512, Cr. Pro. Code, 1882, which, in the case of absconding persons, renders the evidence admissible, although it was not taken in the presence of the accused.” Mark Ev., p. 93. P

(1) Answers to inquiries respecting witnesses.

(a) “Where the question is simply whether a diligent and unsuccessful search has been made for the witness, it would seem, both on principle and authority, that the answers should be received as forming a prominent part of the very point to be ascertained.” *Wyatt v. Bateman*, 7 C. and P. 586; *Hurt v. Walker*, 4 B. and Ald. 697; *Austin v. Rumsey*, 2 C. and Kir. 736. See Tay. Ev., 10th Ed., Ss. 472-8, p. 359. Q

(b) The declarations of a witness as to where he lived were held to be inadmissible in proof of the fact that enquiries had been duly made at his house. *Doe v. Powell*, 7 C. and P. 617; Tay. Ev., 10th Ed., Ss. 472-8, p. 359. R

(5) Procedure—Evidence given in a former trial—Corroboration—S. 31, Act II of 1855.

The irregularity and injustice of using against a prisoner, in a subsequent trial, the deposition of witnesses given in a previous case, commented on, and the proper course which should be followed in corroborating evidence, under S 31, Act II of 1855, pointed out. 12 W.R. 3 (Cr.). S

4.—“*Or is incapable of giving evidence.*”

(1) “Incapable of giving evidence” implies permanent incapacity.

The words “incapable of giving evidence” in S. 33, denote an incapacity of a permanent character, and not of a momentary or temporary character. The word “incapable” naturally carries this meaning with it. 4 C.L.R. 504 (506). *Per* Norris, J. T

(2) Reasons for this view.

(a) The allocation in the section of the words with the other conditions of an absolute and permanent character, viz., that the witness is dead or cannot be found, or is kept out of the way by the adverse party, confirms this view, and a still further confirmation is found in the fact that the last clause of the section seems expressly intended to meet the case of temporary incapacity, it being left to the discretion of the Court to determine whether the delay and the expense consequent upon an adjournment for the purpose of procuring the presence of a witness are likely to be so great that it would be unreasonable to incur them. 4 C.L.R. 504 (506). *Per* Norris, J. U

(b) The words “incapable of giving evidence,” in S. 33 of the Evidence Act, are the same as the Legislature has previously used in the 32nd section of the Act and mean, incapable from some cause, which the evidence shows to be of a permanent character. 4 C.L.R. 504 (508). *Per* White, J. V

4.—“Or is incapable of giving evidence.”—(Continued).

(c) That this is the true interpretation is shown by two considerations :—*First*, if it were intended that the words “incapable of giving evidence” should embrace cases where casual or temporary illness prevented the production of the witness, there would have been no occasion for the words at the end of the first clause of the section, “If his presence . . . unreasonable.” 4 C.L.R. 504 (508). *Per* White, J. **W**

(d) *Secondly*, the Court has no discretion under S. 33 as to admitting a deposition when the witness is proved to be incapable of giving evidence. Such a witness is in the same category as one who is dead or cannot be found, or is kept out of the way by the adverse party, and his deposition is declared by S. 33 to be relevant, and must, therefore, be admitted. 4 C.L.R. 504 (508). *Per* White, J. **X**

(e) The Legislature could hardly have intended that the Court should exercise no discretion in admitting the deposition of witnesses, who could not be produced at the time of the trial owing to a temporary cause, and yet such would be the result of construing the words “incapable of giving evidence,” as including casual illness. 4 C.L.R. 504 (508). *Per* White, J. **Y**

(f) With reference to certain English authorities cited upon the meaning of the words “so ill as not to be able to travel,” found in 11 and 12 Vic. C. 42, S. 17, it was held that these words were so different from those under consideration—“incapable of giving evidence”—that the authorities cited were of little or no assistance upon the question before the Court. 4 C.L.R. 504 (508-9). **Z**

(g) In support of the view that permanent, and not casual or temporary, sickness is meant by the section, the Court, referring to Taylor on Evidence, 6th Ed., p. 60, Vol. I (now see Ss. 472-8, p. 358, Vol. I, 10th Ed.), observed, “In enumerating the cases in which the common law regards a witness as incapable of being called, and his depositions as admissible in consequence, that text-writer mentions the case where the witness is permanently sick, but not the case where he is temporarily sick.” 4 C.L.R. 504 (508). *Per* White, J. **A**

(3) Incapable of giving evidence implies something short of permanent incapacity.

On the construction of the entire section and from a reference also to S. 32 which precedes it, it was held that the incapacity contemplated by the section is not necessarily a permanent one and that something short of permanent incapacity might satisfy the words of the section, “incapable of giving evidence.” 6 C. 774 (776)=8 C.L.R. 124 (125); (4 C.L.R. 504, *doubted*). **N.B.**—(But this *dictum* is an *obiter* as it was not necessary for the decision of the case). **B**

(4) English Common Law as to what is incapacity.

(a) The common law regards a witness as incapable of being called—in which case only is his evidence on oath in a prior suit between the same parties admissible—

(i) when reasonable evidence is tendered to show that he is dead; *Pyle v. Crouch*, 1 Ld. Raym. 780; **C**

4.—“*Or is incapable of giving evidence.*”—(Continued).

- (ii) when he is out of the jurisdiction of the Court, or possibly, when he cannot be found after diligent enquiry, a fact which will be clear on proof that the witness is actually residing in some place beyond the jurisdiction of the Court; see *Fry v. Wood*, 1 Atk. 445; **D**
- (iii) when he is either insane, or seriously sick; and **E**
- (iv) when it is proved to the satisfaction of the Court that he is kept out of the way by the contrivances of the opposite party. See Tay. Ev., 10th Ed., Ss. 472-8, pp. 358, 359 and 360, and Phip. Ev., 4th Ed., pp. 408-9. **F**

(b) But, in criminal cases, none of the above reasons will let in the depositions. *R. v. Scarfe*, 17 Q.B. 238; *R. v. Austin*, 7 Cox. 55; *R. v. Hagan*, 8 C. and P. 167. See Phip. Ev., 4th Ed., p. 409. **G**

(5) **Dead witness deemed incapable of being called, but death must be proved.**

A witness will be deemed to be incapable of being called when he is *dead*; the death must be proved, or it must be shown that enquiries, though unsuccessful, were made, or evidence must be given of lapse of time sufficient to raise such a presumption. Phip. Ev., 4th Ed., p. 408, referring to Tay. Ev., S. 472. **H**

(6) **Court will not presume death.**

A Court will not, unless some account be given of the death of a witness, or at least some evidence furnished showing that proper enquiries have been made, and that no news can be heard of him, presume his death, so as to admit his deposition, though it might have been taken fifty years ago. *Benson v. Olwe*, 2 Str. 919; Tay. Ev., 10th Ed., Ss. 472-8, p. 358. **I**

(7) **Insanity is an incapacity of being called.**

When a witness is shown to be *insane*, his evidence, given in a former judicial proceeding, is relevant in a subsequent judicial proceeding, or in subsequent stages of the same proceeding, as though he were dead. *R. v. Erswell*, 3 T.R. 720; Steph. Dig., 7th Ed., Art. 32, p. 45; Tay. Ev., 10th Ed., Ss. 472-8, p. 359. **J**

(8) **Insanity, shortly before trial.**

Where the depositions were taken shortly before the second trial, the fact that the witness was *sane* when they were taken, need not be shown. *R. v. Wall*, cited 3 Russ. Cr., 6th Ed., 563, 572. See Phip. Ev., 4th Ed., p. 408. **K**

(9) **Precise evidence of illness should be given.**

(a) To bring a case within S. 33 of the Evidence Act, in order to admit a deposition of a witness alleged to be unable to attend by reason of illness, it is not sufficient that such witness should be stated to be ill and confined to the house, but precise evidence should be required by the Court as to the nature of the illness and the incapacity to attend. 8 C.L.R. 124 (125)=6 C. 774. **L**

(b) It is not sufficient to give simple proof that the witness was confined to his bed some days before. *R. v. Riley*, 3 C. and K. 116 and *R. v. Williams*, 4 F. and F. 515; Tay. Ev., 10th Ed., S. 488, p. 367. **M**

4.—“*Or is incapable of giving evidence.*”—(Concluded).

(10) **Prudent course under such circumstances.**

As a general rule, it will be prudent to have the testimony of a medical man on the matter—*R. v. Riley*, 3 C. and J. 116; *R. v. Wellon*, 9 Cox. C.C. 297, and *R. v. Williams*, 4 F. and F. 515—though it is not absolutely necessary—*R. v. Stephenson*, 31 L.J.M.C. 147 and *R. v. Croucher*, 3 F. and F. 285. See Tay. Ev., 10th Ed., S. 488, p. 368. **N**

(11) **Procedure where indisposition only temporary.**

Where the indisposition of a witness is only temporary, the proper procedure is not to admit the evidence, but to postpone the trial. *Harrison v. Blades*, 3 Camp. 457; Phip. Ev., 4th Ed., p. 408. **O**

(12) **Depositions held admissible and inadmissible.**

(a) A Government servant had bound himself over by a recognisance to appear and give evidence for the prosecution at a criminal trial before the Bombay High Court. He was subsequently transferred to a distant place and could not, in the public interests, return to Bombay in time for the trial. Held that his evidence might be taken by commission before he left Bombay, under S. 76 of the High Court Crim. Pro. Act (X of 1875). 6 B. 285 (287). **P**

(b) On an indictment for uttering a forged note, the depositions of witnesses, since unable to travel, taken before a Magistrate upon a former charge against the accused, arising out of the same transaction, of obtaining money by false pretences, were held to be admissible. *R. v. Williams*, 12 Cox. 101; Phip. Ev., 4th Ed., p. 411. **Q**

(c) The depositions of a woman, who was about to be confined, were held to be inadmissible. *R. v. Savage*, 5 C. and P. 143; Phip. Ev., 4th Ed., p. 408. **R**

(d) A prosecution attorney, summoned to prove the inability of the witness to attend, deposed that the residence of the witness was 23 miles away, and that he had seen the witness that morning in bed with his head shaved; it was held that nothing short of the evidence of a medical man was admissible and the deposition was rejected. *R. v. Phillips*, 1 F. and F. 105. See A. and A.W. 4th Edition, p. 230. **S**

(e) “When a witness is able to travel without risk, her old age, nervousness and inability to stand a cross-examination will not justify the reading of her deposition.” *R. v. Farrell*, L.R. 2 C.C.R. 116 and *R. v. Thompson*, 13 Cox. 181; Tay. Ev., 10th Ed., S. 480, p. 362. **T**

5.—“*Or is kept out of the way by the adverse party.*”

(1) **Former depositions of witness kept out of way by adversary admissible.**

Where a witness is kept out of the way by the adverse party, the evidence given by him in a former judicial proceeding will be admissible in a later stage of the same judicial proceeding, or a subsequent judicial proceeding. *R. v. Seafie*, 17 Q.B. 288 (243); Steph. Dig., 7th Ed., Art. 32, p. 45. **U**

5.—“Or is kept out of the way by the adverse party.”—(Concluded).

(2) Principle.

- (a) The proposition that, if a witness be kept out of the way by the adverse party, his former statements on oath will be admissible, rests on the authority of several decisions, both in the Civil and Criminal Courts. Tay. Ev., 10th Ed., Ss. 472-8, p. 360, referring to *R. v. Harrison*, 12 How. St. Tr. 851 and *R. v. Scaife*, 20 L.J.M.C. 229, etc.; see, also, Phip. Ev., 4th Ed., p. 408. Y
- (b) The admissibility of the former statements on oath of a witness, who is kept out of the way by the adversary, rests partly also on the analogies furnished by one or two statutes. Tay. Ev., 10th Ed., Ss. 472-8, p. 360, referring to 50 G. 3, c. 102, S. 5; and 56 G. 3, c. 87, S. 3. See, also, Phip. Ev., 4th Ed., p. 208. W
- (c) The admissibility of such statements also depends upon the broad principle of justice, which will not permit a party to take advantage of his own wrong. Tay. Ev., 10th Ed., Ss. 472-8, p. 360 and Phip. Ev., 4th Ed., p. 408. X

(3) Example.

Where three prisoners were tried for felony, and a witness for the prosecution was proved to have been absent through the procurement of one of them, it was held that his deposition might be read in evidence as against the prisoner who had kept him out of the way, but that it was not admissible against the rest. *R. v. Scaife*, 20 L.J.M.C. 229; Tay. Ev., 10th Ed., Ss. 472-8, p. 360. Y

6.—“Or if his presence cannot be obtained..unreasonable.”

(1) Provisions regarding emergency to be sparingly applied.

Though S. 33 makes a statement given by a witness in a judicial proceeding relevant for the purpose of proving, in a subsequent judicial proceeding, the truth of the facts it states under certain emergencies therein enumerated, it was intended that the provisions regarding the emergency, when his presence cannot be obtained without unreasonable expense or delay, were only to be sparingly applied, and certainly not in a case where the witness was alive and his evidence reasonably procurable. 2 A. 646 (648). Z

(2) When personal attendance of witness can be dispensed with under section.

It is only in extreme cases of expense or delay that the personal attendance of a witness should be dispensed with, and where there is an entire absence of anything to establish those grounds for applying S. 33, Evidence Act, the reading of the deposition of a complainant before the Court of Session, that deposition having been given by him in the Court of the committing Magistrate, is irregular and improper. 2 A. 646 (648). A

3) Conditions of admissibility under S. 33.

Before a Sessions Judge can, under S. 33, admit the depositions of witnesses given in a former judicial proceeding as evidence before him, instead of, and in place of, the oral depositions of the witnesses themselves, it ought to appear that the presence of the witnesses could not be obtained without an amount of delay or expense, which the Court considers unreasonable; and if there is nothing of a special nature to stand in the way, the case should be adjourned to the next Sessions to procure the attendance of the witnesses. 21 W.R. 56 (Cr.). B

6.—“Or if his presence cannot be obtained..unreasonable.”—(Continued).

(4) Inconvenience to witnesses — Validity of ground.

- (a) Inconvenience to witnesses is no ground allowed under S. 33 of the Evidence Act. 6 A. 224 (227). **C**
- (b) The word “inconvenience” in S. 330, Crim. Pro. Code, 1872, empowers the Court to allow examination by commission in criminal cases, where a witness, according to the customs and manners of the country, ought not to appear in public. 5 A. 92 (93). **D**
- (c) In criminal cases, purdanashin women are not, of right, exempted from personal attendance at Court. 5 A. 92 (93), *dissenting from* 4 C. 20. **E**
- (d) The taking of evidence on commission in criminal cases should be most sparingly resorted to, and ought not to be adopted, save in extreme cases of delay, expense or inconvenience 5 A. 92 (94). **F**
- (e) It cannot be generally laid down that purdanashin ladies, whose evidence is required in criminal cases, are to be allowed to compel the Court to examine them at some other place than the Court-house itself. 12 A. 69 (73), *referring to* 5 A. 92 and 16 C. 775. **G**
- (f) Although there is no provision in the Criminal Procedure Code which protects purdanashin ladies from appearing in a Court of justice and very rightly so, all necessary safeguards to protect their privacy that are reasonable being adopted, nevertheless it is very undesirable to compel the attendance of such persons. 12 A. 69 (72). **H**
- (g) Where a complainant, in a charge of defamation, claimed to be examined by commission on the ground that she was a purdanashin, *held* that the fact that she was a complainant, and not merely a witness, materially altered her position as regards her claim, and that, under the circumstances of the case, she ought not to be so examined, but ought to attend in person to be examined in Court. 5 A. 92 (93). **I**

(5) “Reasonable” — Test.

- (a) Where a prisoner—in a case of murder, for instance—has a right to expect that the witnesses should be brought to give their testimony *viva voce* before the Sessions Court, any expense or delay that might be necessary for that purpose must, in the absence of special facts, be taken as “reasonable,” rather than unreasonable. 21 W.R. (Cr.), 56 (57). **J**
- (b) Where the question was whether the deposition of a witness made before a committing Magistrate was properly admitted in evidence at the Sessions trial, *held* that the delay and expense of obtaining the presence of that witness were not unreasonable under the circumstances, that the Judge should have postponed the trial for his attendance, and that he ought not to have admitted his deposition. 4 C.L.R. 504 (510); *per* White, J. **K**
- (c) In a case under S. 411, I.P.C., the Sessions Judge purporting to act under S. 33, Evidence Act, admitted the evidence of certain important witnesses taken by commission at the preliminary enquiry, on the ground that the presence of the witnesses could not be obtained without an amount of expense, which, under the circumstances of the

6.—“Or if his presence cannot be obtained...unreasonable.”—(Continued).

case, was unreasonable. *Held* that the amount of expense, put at Rs. 500 by the Judge, was not unreasonable under the circumstances of the case, considering that the entire case rested on the evidence of those witnesses and that the accused had not cross-examined them, nor, looking to his position, could he arrange for their cross-examination. 6 A. 224 (228). **L**

(6) Kind of expense contemplated by section—*Quære*.

As to whether the expense referred to in the section means the expense of obtaining the attendance of a witness, or whether it includes the expense which would be incurred by the alternative course of adjourning the trial, see 4 C.L.R. 504 (509), per *White, J.*, and 21 W.R. (Cr.), 56 (57). **M**

(7) Circumstances of the case.

Of the circumstances of the case, one of the chief, which the Judge has and ought to weigh, is the nature and the importance of the statements contained in the deposition. It would be unreasonable to incur much delay and expense, where the facts spoken to in the deposition are of the nature of formal evidence for the prosecution, or supply some link in the case for the prosecution as to which little or no dispute exists, or are facts to which other witnesses speak besides the deponent, and which witnesses are produced at the trial. 4 C.L.R. 504 (509-10), per *White, J.* **N**

(8) Record must show that presence of witness could not be reasonably obtained.

(a) A District Magistrate directed a preliminary enquiry to be held before a Deputy Magistrate in a case of dacoity. The Deputy Magistrate did so and also recorded the statements of the accused, but did not certify the record as required by law. The committing Magistrate, to remedy this defect, examined the Deputy Magistrate and took down the deposition. The Sessions Court admitted the deposition under S. 93 of the Evidence Act. *Held* that the deposition was improperly admitted under S. 93, there being nothing on the record to show that the presence of the recording Magistrate could not have been obtained without an amount of delay or expense which was unreasonable. 5 C. 958 (960). **O**

(b) Where there might be reasons why a Court of Session thinks fit to dispense with the attendance of a witness, whose deposition before the committing Magistrate, is read before the Sessions Court and circumstances might be disclosed showing that his presence could not be obtained without an unreasonable amount of expense and delay, the evidence to supply such reasons and to prove such circumstances should be formally and regularly taken and recorded. 2 A. 646 (648). **P**

(9) Previous deposition inadmissible, where witness examined in subsequent proceeding.

(a) The deposition of a witness in a former case is not evidence in a subsequent case in which he is examined, except when put in to contradict him. 8 W.R. (Cr.), 87. **Q**

(b) The depositions of gosha ladies, examined before the committing Magistrate in the presence of the accused, are not admissible in evidence, on the trial before the Sessions Court, under S. 369 of the Code of Criminal Procedure, 1861. 4 M.H.C. Ap. XV. **R**

6.—“Or if his presence cannot be obtained...unreasonable.”—(Continued).

(10) Depositions of witnesses going abroad.

(a) “Depositions are sometimes taken by consent in prosecutions for misdemeanours, when the witness is about to leave the country, such depositions being admissible only where the witness is abroad at the time of the trial.” Phip. Ev., 4th Ed., p. 450, referring to *Ros. Cr. Ev.* R1

(b) A statement by a witness in his deposition itself, that he is about to go abroad, will not dispense with the proof of the fact that he had put his purpose into execution. *Proctor v. Lanson*, 7 C. and P. 631; *Tay. Ev.*, 10th Ed., ss. 472-8, p. 359. S

(11) Depositions of witnesses beyond jurisdiction.

(a) Where a witness is so ill that he will probably never be able to travel, evidence given by him in a former judicial proceeding is relevant, for the purpose of proving the matter stated, in a subsequent judicial proceeding, or in a later stage of the same. *R. v. Hogg*, 6 C. and P. 176; *Steph. Dig.*, 7th Ed., Art. 32, p. 45. T

(b) Where the illness of the witness is such as to prevent his attendance within a reasonable time, his deposition will be admissible. Phip. Ev., 4th Ed., p. 408, (referring to *Beaufort v. Craeshtay*, L.R. 1 C.P. 699, deciding that the words “permanent sickness or infirmity,” in 1 and 2 Will. IV. c. 22, were to be thus construed.) U

(c) If a witness is out of the jurisdiction of the Court, then, the evidence given by him in a former judicial proceeding will be relevant in the later stages of the same proceeding or in a subsequent judicial proceeding; but it seems that this rule is applicable in civil, and not in criminal, cases. *Fry v. Wood*, 1 Ark. 444 and *R. v. Seafie*, 17 Q.B. 238 (243). *Steph. Dig.*, 7th Ed., Art. 32, p. 46. Y

(12) Depositions held admissible

(a) Where a District Magistrate was satisfied that the witnesses were at a considerable distance from the place of trial and their attendance was not easily procurable, their depositions were held to be admissible in evidence. 3 M. 48 (49 and 51). W

(b) A prisoner being charged with having committed murder at Zanzibar, the British Consul there held a preliminary enquiry and sent the prisoner for trial before the Bombay High Court. The Consul, having no power to require the witnesses to attend to give evidence at Bombay, transmitted the depositions taken by him during the enquiry. Objections were raised, *inter alia*, that the depositions were inadmissible, as the Consul had no power to take them in case of murder. Held that the Consul was authorised by law to take the depositions of witnesses in this case, and that they were admissible in evidence, at the trial, under S. 93. 3 B. 334 (339). X

(c) Where a witness was on board a ship ready to sail, but was prevented by adverse winds, he was considered beyond the jurisdiction, so as to render his former depositions relevant. *Ponsick v. Agar*, 6 Esp. 92; *Ward v. Wells*, 1 Taunt 461 and *Varicas v. French*, 2 C. and K. 100; Phip. Ev., 4th Ed., p. 409. Y

6.—“Or if his presence cannot be obtained..unreasonable.”—(Concluded).

- (d) In an action for damages for a collision, the deposition of a witness, taken before the coroner on an enquiry into the death of the plaintiff's son by the collision, was admitted on behalf of the defendant, the witness being abroad. *Sills v. Brown*, 9 C. and P 601; Phip. Ev., 4th Ed., p. 410. **Z**

(13) Depositions held inadmissible.

- (a) Evidence taken under commission issued by a Presidency Magistrate, during the course of an enquiry before him, cannot, on the trial of the same case at the High Court Sessions, be admitted under S. 507 of the Code. Nor would it be admissible, under S. 33 of the Evidence Act, in a case where the only objection to obtaining the witnesses' presence was on the ground of expense of attendance, the evidence regarding which was considered by the Judge to be absurd. 19 C. 113 (121). **A**
- (b) The material evidence in a case under S. 411, I.P.C., consisted of that of three witnesses, the evidence of two of whom was taken by commission in the course of the preliminary enquiry, and of the third in person. The Sessions Judge, acting under S. 33, Evidence Act, admitted the evidence thus taken at the trial, instead of requiring their attendance and himself taking their depositions, and he issued a supplementary commission for the examination of the first witness. Held that he acted improperly, the question of identification being a most material one in the case and the evidence of these witnesses of the utmost moment, the whole case resting on it. 6 A. 224 (227-8). **B**
- (c) On similar grounds, a Judge is not justified under S. 503 of the Criminal Procedure Code, 1882, in issuing a commission. 6 A. 224 (228). **C**
- (d) Where it appeared that the delay that would have been occasioned by waiting for a witness was about a fortnight, and the witness lived or was staying away within a short distance of the Court, his deposition was held to be inadmissible. 4 C.L.R. 504 (509). **D**
- (e) Answers to inquiries respecting a witness will be held to be inadmissible as hearsay, if tendered in proof of the facts that the witness is abroad. *Robinson v. Marks*, 2 M. and Rob. 375 and *Doe v. Powell*, 7 C. and P. 617; Tay. Ev., 10th Ed., ss. 472-8, p. 359. **E**

7.—“Provided that..representatives in interest.”

(1) Proceedings must be between same parties for admissibility of former depositions.

- (a) In order to satisfy the requirements of S. 33 of the Evidence Act, the two suits must be brought by, or against, the same parties, or their representatives in interest, at the time when the suits are proceeding and the evidence is given. 12 C. 627. **F**
- (b) The interest, in regard to which one of the parties to the pending suit is representative, must clearly be an interest possessed by the person from whom that party derived his title, at the time when the former suit was pending and the deposition taken in it. 12 C. 627. **G**

7.—“*Provided that..representatives in interest.*”—(Continued).]

- (c) An important condition of the admissibility of former depositions in later judicial proceedings is, that the proceeding, if civil, must be between the same parties, or their representatives in interest. *Doe v. Tatham*, 1 A. and E. 3, 19. See, also, *Doe v. Derby*, 1 A. and E. 783, and see, also, *Llanover v. Homfray*, 19 Ch. D. 224; Steph. Dig., 7th Ed., Art. 32, p. 46. H
- (d) “As that was the trial between different parties, having different rights and with whom the plaintiff had no privity, and as he had no opportunity to examine or to cross-examine the witness, it would be contrary to the first principles of justice to bind or in any way affect his interests by the evidence given on that occasion.” *Lane v. Brainerd*, 30 Conn. 579; Wigm. Ev., 1905 Ed., S. 1386, p. 1757. I
- (e) “The main reason for the exclusion of hearsay evidence is to be found in the want of the sanction of an oath, of legal authority requiring the statement, and an opportunity for cross-examination. Where these important tests of truth are not wanting, and the testimony of the statements of the deceased witness is offered on a subsequent trial between the same parties, touching the same subject-matter, and open to all the means of impeachment and objection to incompetency which might be taken if the deceased person could be present as a witness, there would not appear to be any sound and satisfactory ground for its exclusion.” *Summons v. State*, 5 Oh. St. 343; Wigm. Ev., 1905 Ed., S. 1386, p. 1727. J
- (f) “We do not understand that the admissibility of such evidence depends so much upon the particular character of the tribunal as upon other matters. If the testimony be given under oath in a judicial proceeding, in which the adverse litigant was a party and where he had a right to cross-examine and was legally called upon to do so, the great and ordinary tests of truth being no longer wanting, the testimony so given is admitted in any subsequent suit between the same parties. It seems to depend rather upon the right to cross-examine than upon the precise nominal identity of the parties.” *Bailey v. Woods*, 17 N.H. 372; Wigm. Ev., 1905 Ed., S. 1386, p. 1727. K
- (g) “A deposition cannot be given in evidence against any person that was not a party to the suit, and the reason is, because he had not liberty to cross-examine the witness, and it is against natural justice that a man should be concluded by proofs in a cause to which he was not a party.” *Trials at Nisi Prius*, 239. Per Buller, J; Wigm. Ev., 1905 Ed., S. 1386, p. 1727. L
- (h) “When you give in evidence any matter sworn at a former trial, it must be between the same parties, because otherwise you dispossess your adversary of the liberty to cross-examine.” Gilbert Ev. 68; Wigm. Ev., 1905 Ed., S. 1386, p. 1727. M
- (i) Former testimony may be taken advantage of by, or affect, privies in the same way as a judgment in a former trial, (*Morgan v. Nicholl*, L.R. 2 C.P. 117), if the title of the privy has accrued subsequently to the former trial, (*Doe v. Derby*, 1 A. and E. 790, and *Re De Burgho's Estate*, 1 I.R. 274). See Phip. Ev., 4th Ed., p. 407. N

7.—“*Provided that..representatives in interest.*”—(Continued).

(j) For a former deposition to be relevant in a subsequent judicial proceeding, one of the conditions is that, in criminal cases, the same person is accused upon the same facts. *Beeston's Case*, 1854, Dears. 405; Steph. Dig., 7th Ed., Art. 32, p. 46. **O**

(k) S. 33 provides that, in order to make a deposition admissible, the proceeding in which the evidence has been given by the witness must be between the same parties or their representatives in interest. 23 W.R. 42. **P**

(2) **Where parties are same, difference in their relative positions does not matter.**

Where the parties to be affected are the same in both the proceedings, it is no objection that their relative positions were different, or that there were also others joined with either. *Wright v. Tatham*, 1 A. and E. 3; Phip. Ev., 4th Ed., p. 407. **Q**

(3) **Case where section does not apply.**

S. 33 of the Evidence Act does not apply to the deposition of a witness, in a former suit, which is sought to be used against him as an admission, in a subsequent suit in which he is a defendant. 21 W.R. 414=14 B.L.R. App. 3.

(4) **Depositions held admissible.**

(a) S prosecuted the defendant at the instance, and on behalf, of the plaintiff for criminal trespass in respect of a certain house and for assault and insult on his own behalf. S gave evidence, supporting the charges, at the trial. The plaintiff subsequently filed a civil suit against the defendant under S. 9, Specific Relief Act, for possession of the same house. S died before the institution of the civil suit, during the trial of which the deposition of S was tendered on behalf of the plaintiff. Held that, S being dead and the proceedings being between the same parties, the deposition was admissible. 23 C. 441 (442). **S**

(b) Where several successive remainders were limited in the same deed, a judgment for one remainderman was held to be evidence for the next in succession. *Pyke v. Crouch*, 1 Ld. Raym. 730; Tay. Ev., 10th Ed., S. 1689, p. 1219. **T**

(c) The general rule is, a judgment *inter partes* binds only the parties, and persons deriving title from them subsequent to the date of the judgment. *Doe v. Earl of Derby*, 1 A. and E. 783; cited in 22 C. 364 (371). **U**

(5) **Depositions held inadmissible.**

(a) The prisoners were convicted, under S. 154 of the Penal Code, upon evidence taken in another case to which the prisoners were not parties. The conviction was set aside. 6 B.L.R. App. 83=15 W.R. (Cr.), 6. **Y**

(b) For a case where evidence taken on the trial of one prisoner was held to be wrongly admitted as evidence on the trial of another, see 8 B.L.R. App. 21=16 W.R. (Cr.), 36. **W**

(c) A deposition of a person, in a suit to which he was not a party, is, in a subsequent suit in which he is a defendant, evidence against him and against those who claim under or purchase from him, not under S. 33, but under the sections relating to “admissions” although he is alive and has not been called as a witness, and although the facts were different from the former case. 14 B.L.R. App. 3. **X**

7.—“Provided that..representatives in interest.”—(Concluded).

- (d) Where a later suit is not between the representatives in interest of the parties in the former suit, a deposition made in the former suit is not admissible in the later. 23 W.R. 42=15 B.L.R. 5. **Y**
- (e) R accused A with breach of trust, and S deposed in favour of R. After A was tried and acquitted, R was prosecuted for making a false charge and S for perjury. *Held* that, as S was merely a witness—not a party in the breach-of-trust case—the evidence taken in the former proceedings was not admissible in the case against him. 3 M. 48 (51)Z.
- (f) Where several persons were charged with murder, one of them absconded during the trial of the rest, who were eventually convicted. The absconder was subsequently apprehended, and, during his trial, the depositions of the former witnesses before the Magistrate and the Sessions Court—all of whom but one were dead—were admitted in evidence before the Sessions Court. *Held* that the depositions of the witnesses, who were examined before the Magistrate and who were proved to have died, were not admissible under S. 33, Evidence Act. 8 A. 672 (675). **A**
- (g) Where a company sued a share-holder for calls and the defence was misrepresentation, depositions taken in a prior action by the company against another share-holder for calls, to which he had also pleaded misrepresentation, were held to be inadmissible against the company, either at common law, or under O. 37, R. 3. *Printing and Co. v. Drucker*, 2 Q.B. 801; Phip. Ev., 4th Ed., p. 410.
- (h) A decree by a co-share landlord is inadmissible as evidence regarding the rate of rent in a suit brought by another co-sharer. 10 C.W.N. 1084. (This may come under S. 13, *supra*). **C**
- (i) Case of conviction of several persons for offences under Ss. 467 and 471, Penal Code. A statement by the deceased Nazir of a District Court, in a miscellaneous petition, was tendered in evidence by the prosecution, for the purpose of proving an admission or confession alleged to have been made by the 1st accused to the Nazir and was admitted by the Sessions Court, under S. 33, and as an extra-judicial confession. But the High Court pointed out, with reference to the first proviso to the section, not noticed by the Sessions Judge, that neither the Crown, nor the Nazir, now prosecuting the accused, were parties to the miscellaneous application in which the Nazir made the statement. 5 Bom. L.R. 599 (601). **D**

8.—“That the adverse party..opportunity to cross-examine.”

1.—GENERAL PRINCIPLES AND CONDITIONS OF ADMISSIBILITY.

(1) Deposition of absent witness, admissible after cross-examination.

- (a) Under S. 33 of the Evidence Act, the depositions of an absent witness are only admissible, when the prisoner has had the opportunity to cross-examine him. 21 W.R. 12 (Cr.). **E**
- (b) For a former deposition to be relevant in subsequent judicial proceedings, one essential condition is that the person against whom the evidence is to be given had the right and opportunity to cross-examine the declarant, when he was examined as a witness. *Doe v. Tatham*, 1 A. and E. 3, 19; Steph. Dig., 7th Ed., Art. 32, p. 46. **F**

8.—“*That the adverse party..opportunity to cross-examine.*”—(Contd.).1.—GENERAL PRINCIPLES AND CONDITIONS OF
ADMISSIBILITY—(Continued).

- (c) “The admissibility of this secondary proof of oral testimony seems to turn rather on the right to cross-examine than upon the precise identity, either (if the opponent be substantially the same) of the parties or of the points in issue in the two proceedings.” *Tay. Ev.*, 10th Ed., S. 467, p. 356. **G**
- (d) Evidence given, when a party never had the opportunity, either to examine or to cross-examine the witnesses, or to rebut their testimony by fresh evidence, is not legally admissible for or against him, unless he consents that it should be so used. 9 W.R. 587. **H**
- (e) “Examinations upon oath except in the excepted cases are of no avail, unless they are made in a cause or proceeding, depending between the parties to be affected by them, where each has an opportunity of cross-examining the witness.” *R. v. Russell*, 3 T.R. 707; *Wigm. Ev.*, 1905 Ed., S. 1377, p. 1716. **I**
- (f) “If the witness be examined *de bono esse* and before the coming in of the answer, the defendant not being in contempt, the witness die, yet his deposition shall not be read, because the opposite party had not the power of cross-examination, and the rule of the Common Law is strict in this, that no evidence shall be admitted but what is or might have been under examination of both parties.” *Trials at Nisi Prius*, 240; *Wigm. Ev.*, 1905 Ed., S. 1377, p. 1716. **J**
- (g) “The rule of the Common Law is that no evidence shall be admitted but what is, or might be under examination of both parties. But if the adverse party has had liberty to cross-examine and has not chosen to exercise it, the case is then the same in effect as if he had cross-examined. Here then the question is whether the defendant had an opportunity of cross-examining.” *Cazenove v. Vaughan*, 1 M. and S. 6; *Wigm. Ev.*, 1905 Ed., S. 1371, p. 1710. **K**
- (h) It is certainly the right of every litigant, unless he waives it, to have the opportunity of cross-examining witnesses whose testimony is to be used against him, and even, when circumstances require, to adduce evidence on his own behalf to meet the evidence which such cross-examination may have brought forward. 9 W.R. 587 (588). **L**
- (i) It is one of the fundamental principles in the administration of justice that every man should have an opportunity of cross-examining witnesses whose evidence is to be used against him. 14 W.R. (A.O.C.J), 17 (19). **M**
- (j) A litigant is also entitled to examine the witnesses who can give evidence in support of his case, in order that he may bring out the necessary information as fully as he thinks possible and in the form which he considers most favourable to himself. 9 W.R. 587 (588). **N**
- (k) The mere reading over to the accused of a deposition already taken is not enough. *R. v. Day*, 6 Cox. Cr. 55; *Wigm. Ev.*, 1905 Ed., S. 1393, p. 1748. **O**

8.—“*That the adverse party..opportunity to cross-examine.*”—(Contd.).1.—GENERAL PRINCIPLES AND CONDITIONS OF
ADMISSIBILITY—(Continued).

(i) Although a Court of Sessions may admit in evidence the statements made by a witness before a committing Magistrate, the Sessions Court would not be acting properly to convict the accused on that evidence alone.
21 A. 111 (112)=18 A.W.N. 196, referring to 12 B.L.R. Ap. 15, 12 M. 123 and 7 A. 862. P

(iii) An accused person was tried for a murder, which took place in 1861; the statements of certain persons, since dead, recorded, in 1861, by a Magistrate, as well as the evidence now given of two witnesses whose statements were also recorded in 1861, were tendered in evidence. Held that the statements could not be used as evidence, under the provisions of S. 83, Evidence Act, all the deponents not having been examined on oath or affirmation, and the accused not having had the opportunity of cross-examining the witnesses. 26 P.R. 1885 (Cr.). Q

(2) Without cross-examination, deposition only partial representation of facts.

“A deposition is considered a partial representation of facts, as to all persons who have no opportunity of bringing out the whole truth by cross-examination.” *Berkeley Peerage Case*, 4 Camp. 412; Wigm. Ev., 1905 Ed., S. 1377, p. 1716. R

(3) Serious danger of not giving opportunity for cross-examination.

Where a deposition was *ex parte*, obtained at the instance of overseers whose parish was to benefit by it, and behind the backs of the parish against whom it was adduced, without having an opportunity of knowing what was going on or attending to have the benefit of cross-examination, the question became one of the last importance and put in danger the law of evidence in which every man in the kingdom is deeply concerned. *R. v. Eriswell*, 3 T.R. 707; Wigm. Ev., 1905 Ed., S. 1377, p. 1716. S

(4) “Opportunity to cross-examine”—Meaning.

The words “opportunity to cross-examine” include the method of cross-interrogatories, which, for many years, was the chief mode of cross-examination in the Courts of Equity and the Admiralty Courts of England, and for which provision is made in the Common Law Procedure Acts. 19 B. 749 (759). T

(5) Right, without opportunity, to cross-examine.

There may be circumstances where, although a prisoner has the right, he has not the opportunity, *e.g.*, where the witness is at a great distance and the prisoner cannot go to the place and is too poor to employ a pleader, or too unfamiliar with the ways of the place to get legal help there. *Per Jardine, J.*; 19 B. 749 (757-8). U

6) Section means “complete and not partial” cross-examination.

(a) S. 83 of the Evidence Act, which empowers the Court to read evidence taken on commission and provides that the adverse party in the first proceeding must have had the right and opportunity to cross-examine, contemplates an *effectual* cross-examination, *complete and not partial*. 5 C.W.N. ccxxx. Y

8.—“*That the adverse party . . opportunity to cross-examine.*”—(Contd.).1.—GENERAL PRINCIPLES AND CONDITIONS OF
ADMISSIBILITY—(Continued).

- (b) If that was not so, a witness might, after a few preliminary questions, decline to appear upon a subsequent date. 5 C.W.N. cxxx. **W**
- (c) Where the issues in the former and in the subsequent judicial proceedings are so dissimilar that cross-examination as to one would only partially embrace the other, the deposition will be inadmissible. *R. v. Beeston*, 21 L.J.M.C. 5. See Phip. Ev., 4th Ed., p. 408. **X**
- (d) A prisoner, whose trial is supplemental to that of others, is entitled to as full and complete an investigation of all the facts of the occurrences upon which the charge depends, as if no previous trial of other persons for participation in these occurrences had ever taken place. 23 W.R. 38 (Cr.). **Y**

(7) **Right of cross-examination need not have been exercised—Opportunity enough.**

- (a) It is not necessary that the opponent should have exercised his right of cross-examination, for the depositions will be relevant if he deliberately forebore from, or waived the absence of an opportunity for, cross-examination. *Lawrence v. Maule*, 4 Drew. 472, and *McCombie v. Anton*, 6 M. and G. 27. See Phip. Ev., 4th Ed., p. 408, and Tay. Ev., 10th Ed., S. 466, p. 355. **Z**
- (b) A party against whom former depositions are tendered in evidence must have had an opportunity of being present at the examination and of cross-examining the witness.—*A.-G. v. Davison*, M'Cl. and Y. 60. But it is not necessary that he should have exercised that power Tay. Ev., 10th Ed., S. 466, p. 355. **A**
- (c) The deposition of a witness, who died before the trial, was held to be admissible, under S. 33 of the Evidence Act, as, though he was not cross-examined before the Magistrate, the accused persons had the right and opportunity of cross-examining him, notwithstanding the omission of their pleader to avail himself of that right. 2 Bom. L.R. 761 (763)—25 B. 168. **B**
- (d) Case where two parties were accused and convicted of rioting. In the trial of the first party, a number of witnesses were examined for the prosecution. In the trial of the second party, which was subsequently held, the Magistrate, instead of examining the witnesses, had the copies of the examination-in-chief of the witnesses, recorded in the former trial, produced in the later trial and the accused cross-examined the witnesses; when the witnesses were produced, and their depositions in the former trial were read out, and verified, no objection was taken to the procedure on behalf of the accused who cross-examined the witnesses on those depositions. Held that the points thus elicited in cross-examination were sufficient to sustain the conviction and that the irregularity was cured by S. 537, Cr. Pro. Code. 9 A. 609 (610). **C**
- (e) It was observed that, though the Act did not mention the presence of the prisoner, the rulings had however established the point that the prisoner ought to be present that he might cross-examine. But where he has the advantage offered him and omits to use it, the depositions are admissible. *R. v. Smith*, Holt. N.P. 615; Wigm. Ev., 1905 Ed., S. 1375, p. 1714. **D**

3.—“*That the adverse party..opportunity to cross-examine.*”—(Contd.).

1.—GENERAL PRINCIPLES AND CONDITIONS OF
ADMISSIBILITY—(Continued).

- (f) “Examinations upon oath, except in the excepted cases, are of no avail unless they are made in a cause or proceeding depending between the parties to be affected by them, and where each has an opportunity of cross-examining the witness.” *Per* Kenyon, L.C.J. *R. v. Ferryfrystone*, 2 East, 54; Wigm. Ev., 1905 Ed., S. 1375, p. 1713. **E**

(8) Opportunity for cross-examination when presumed.

- (a) Proof of the prisoner's presence will raise a presumption of full opportunity of cross-examination, though the presumption may be rebutted. *R. v. Pecoock*, 12 Cox. 21; Phip. Ev., 4th Ed., p. 441. **F**
- (b) Where it was contended that depositions taken before a committing Magistrate ought not to have been used as evidence by the Court of Sessions, as the Magistrate had refused to allow the pleaders of the accused to appear and cross-examine the witnesses who made the depositions, *held*, they were admissible. 6 C.L.R. 53 (57). **G**

(9) Illness will rebut presumption as to opportunity for cross-examination.

The presumption of the accused having had an opportunity for cross-examination may be rebutted by showing that the deponent was so ill as to be unfit for further cross-examination, unless the cross-examiner was putting questions vexatiously or frivolously with the object of inducing the Magistrate to stop the examination. *R. v. Mitchell*, 17 Cox. 503; *R. v. Hyde*, 3 Cox. 90; Phip. Ev., 4th Ed., p. 443. **H**

(10) Ignorance of language will rebut presumption as to opportunity for cross-examination.

- (a) The presumption that will be made regarding the opportunity for cross-examination, when a deposition is taken in the presence of the accused, may be disproved by showing that the accused did not understand the language. Phip. Ev., 4th Ed., p. 443, *referring to R. v. Jones*, 49 J.P. 728. **I**
- (b) In a case where both the deponent and the prisoner understand the language but partially, and the prisoner refuses an interpreter's aid, and the Magistrate's clerk advises that he would only injure his case by further questions, the depositions are admissible. *R. v. Jones*, 49 J.P. 728; Phip. Ev., 4th Ed., p. 443. **J**

(11) Opportunity for cross-examination must be given, when new matter is elicited.

Where new matter is elicited after cross-examination, as to which the accused had no opportunity of cross-examination, the deposition will be rejected. *R. v. Prestridge*, 72 L.T. Jo. 93; Phip. Ev., 4th Ed., p. 443. **K**

(12) Evidence of opportunity for cross-examination.

- (a) In order to make a deposition admissible under S. 33, there must be evidence that the accused person did, in fact, have an opportunity of cross-examining. 20 W.R. (Cr.), 69 (70). **L**

8.—“*That the adverse party..opportunity to cross-examine.*”—(Contd.).

1.—GENERAL PRINCIPLES AND CONDITIONS OF ADMISSIBILITY.—(Continued).

(b) Where the evidence of a prosecution witness before the Deputy Magistrate was admitted in the Sessions Court, under S. 33 of the Evidence Act, on the ground that much delay would be involved in searching for him, the High Court quashed the conviction, as there was nothing to show that this witness could not have been found, if reasonable exertion had been made to find him and, as by accepting his statement, the prisoner had no opportunity of cross-examining an admittedly important witness. 24 W.R. 18 (19 and 20) (Cr.) **M**

(c) The fact that an accused person had full opportunity of cross-examining, if not admitted, must be proved, before evidence can be admitted under S. 33. 19 B. 749 (759), referring to 20 W.R. 69 (Cr.) **N**

(13) Cross-examined statements not an exception to the hearsay rule.

(a) “The hearsay rule excludes testimonial statements not subjected to cross-examination. When, therefore, a statement has already been subjected to cross-examination and is therefore admitted—as in the case of a deposition or testimony at a former trial,—it comes in because the rule is satisfied, not because an exception to the rule is allowed.” The statement may have been made before the present trial, but if it has been already subjected to proper cross-examination, it has satisfied the rule and needs no exception in its favour. This is worth clear appreciation, because it involves the whole theory of the rule.” Wigm. Ev., 1905 Ed., S. 1370, p. 1710. **O**

(b) The Court, declaring that the testimony of a deceased subscribing witness at a former trial is equivalent to calling him now and thus obviates the necessity of calling another and living subscribing witness, observed, “The examination of B at the former trial is evidence as direct to the point in issue and as precise in its nature and quality, as that of P when called to the stand. The evidence resulting from the written examination of the deceased witness, in the former suit between the same parties, is of as high a nature, and as direct and immediate, as the *vide voce* examination of one of the witnesses remaining alive and actually examined in the cause.” *Wright v. Tatham*, 3 A. and E. 3, 22; Wigm. Ev., 1905 Ed., S. 1370, p. 1710. **P**

(c) “The admission of the testimony of a witness on a former trial is frequently inaccurately spoken of as an exception to the rule against the admission of hearsay evidence. The chief objections to hearsay evidence are the want of the sanction of an oath and of any opportunity to cross-examine; neither of which applies to testimony given on a former trial.” *Minneapolis Mill Co. v. R. Co.*, 51 Minn. 304, 315, 53 N.W. 639; Wigm. Ev., 1905 Ed., S. 1370, p. 1710. See, *supra*, under “Grounds of admissibility under section.” **Q**

14) Prisoner undefended—Duty of Magistrate.

Should a prisoner be undefended, a Magistrate ought to invite him to cross-examine the witnesses at the close of each examination, and not merely at the close of all the examinations, and should allow the prisoner sufficient time to consider his questions. *R. v. Day*, 6 Cox. 55 and *R. v. Watts*, 9 Cox. 395; Phip. Ev., 4th Ed., p. 443. See, also, 19 B. 749 (758). **R**

8.—“That the adverse party..opportunity to cross-examine.”—(Contd.).

**1.—GENERAL PRINCIPLES AND CONDITIONS OF
ADMISSIBILITY—(Concluded).**

(15) Insanity or death before cross-examination.

Where a witness dies or becomes insane before cross-examination in the former judicial proceeding, the depositions will be admissible. *Williams v. Williams*, 12 W.R. 663 and *R. v. Doolin*, 1 Jebb, C.C. 123; *Phip. Ev.*, 4th Ed., p. 408. **S**

(16) Former charge technically different from later one—Cross-examination on material points enough.

“Where a former charge is technically different from the later one, the depositions will be admissible, provided that the accused had full opportunity of cross-examination upon all points material to both.” *Phip. Ev.*, 4th Ed., p. 443. **T**

(17) Deposition taken without objection in chambers, where no practice to cross-examine.

As to the admissibility of depositions taken, without objection, in chambers, where the practice was not to cross-examine, see *Laurence v. Maul*, 4 Drew. 472, cited *supra*. **U**

(18) Affidavit in interlocutory proceeding without opportunity of cross-examination.

“The ordinary affidavit, which is used in an interlocutory proceeding and on which no cross-examination has been allowed, is not evidence. It becomes evidence only when, after opportunity for cross-examination has been given, it is not contradicted.” *Cun. Ev.*, 11th Ed., p. 98. **Y**

(19) Time and place of previous examination not notified to opponent.

Where a party, against whom the evidence of former depositions is subsequently adduced, had not due notice of the time or place of the previous examination, the evidence will be inadmissible. *Fitzgerald v. Fitzgerald*, 3 S. and T. 397; *Phip. Ev.*, 4th Ed., p. 408. **W**

(20) Supersession of evidence given in the presence of accused.

S. 33 of the Evidence Act does not justify the use of evidence, taken in a preceding criminal trial, in supersession of evidence given in the presence of the accused. 22 W.R. 36 (37) (Cr.) **X**

(21) Bare opportunity to cross-examination not enough.

(a) Although a party might have had the right of cross-examining a witness, he will yet be liable to have that witness's statement used against him in a subsequent proceeding, only if his opponent is substantially the same in both the proceedings. *Morgan v. Nicholl*, L.R. 2 C.P. 117; *Tay. Ev.*, 10th Ed., S. 469, p. 357. **Y**

(b) For, otherwise, the adversary in the second suit has had no power to offer evidence in his own favour. *Doe v. Darby*, 1 A. and E. 790; *Tay. Ev.*, 10th Ed., S. 469, p. 357. **Z**

(22) Want of cross-examination will not affect deposition otherwise admissible.

“A deposition, otherwise admissible, is not excluded, merely because the deponent was not in fact cross-examined.” *Cun. Ev.*, 11th Ed., p. 98. **A**

8.—“*That the adverse party..opportunity to cross-examine.*”—(Contd.).

2.—PRESENCE OF ACCUSED DURING THE TAKING OF DEPOSITIONS.

(1) Evidence to be recorded in presence of accused.

- (a) It is irregular and illegal to base a conviction on evidence, not recorded in the presence of the accused, but taken previously and merely read over to him on another day. 25 W.R. (Cr) 14. B
- (b) The depositions must be taken in presence of the accused, and a defect in this respect cannot be cured by reading over and re-swearing them in his presence; for such a method obviously allows a very imperfect opportunity for cross-examination. Phip. Ev., 4th Ed., p. 412, referring to *R. v. Christopher*, 14 J.P. 83; *R. v. Day*, 6 Cox. 55; and *R. v. Watts*, 9 Cox. 395. C
- (c) “It was the opinion of both the Courts, King’s Bench and Common Pleas, that the deposition should not be given in evidence, the defendant not being present when they were taken before the Mayor and so had lost the benefit of a cross-examination.” *R. v. Paine*, 5 Mod. 165; Wigm. Ev., 1905 Ed., S. 1375, p. 1714. D
- (d) “If the accused is present and has an opportunity of cross-examining the witness, the depositions, according to the rule, are admissible. A cross-examination is very essential to elicit the whole truth from even a willing witness; and to admit such evidence, without the means of applying the ordinary tests, would put in jeopardy the dearest interests of the community.” *State v. Hill*, 2 Hill. S.C. 609; Wigm. Ev., 1905 Ed., S. 1375, p. 1714. E
- (e) “As to offering a deposition or an answer in evidence against a person not a party to the original suit, that cannot be done for this reason, because such person has it not in his power to cross-examine.” *Goodright v. Moss*, Cowp. 592; Wigm. Ev., 1905 Ed., S. 1377, p. 1716. F
- (f) A deposition was held to be inadmissible on the ground that no opportunity was afforded to the accused of cross-examining the deponent, the Court remarking that a prisoner “could not have a full opportunity of cross-examining the witness, within the meaning of the statute, 11 and 12 Vic. C. 42, S. 17, unless the deposition was taken down in his presence and in the presence of the Magistrate, and unless he was warned by the Magistrate at the close of the examination that he might put any questions he liked to the witness, with reference to the statement which had been made.” *R. v. Day*, 6 Cox. C.C. 55, Tay. Ev., 10th Ed., S. 486, p. 366. G
- (g) The practice of admitting a deposition taken in the absence of a prisoner on proof that it was afterwards read over to the witness in his presence has been strongly condemned. See *R. v. Johnson*, 2 C. and K. 394; Tay. Ev., 10th Ed., S. 486, p. 366, and the cases there cited. H
- (h) Held that evidence given by witnesses, since deceased, on occasions, when neither the accused was present and had an opportunity to cross-examine nor was it proved to the satisfaction of the Court that the accused absconded and that there was no immediate prospect of arresting him, could not be used against the person subsequently put on his trial for participation in the offence, in respect of which such witnesses had given evidence. 16 A.W.N. 182, referring to 8 A. 672 and A.W.N. (1890), p. 100. I

8.—“*That the adverse party..opportunity to cross-examine.*”—(Contd.).

2.—PRESENCE OF ACCUSED DURING THE TAKING OF DEPOSITIONS.—(Continued).

(i) The Magistrate took the depositions, by reading over to the witnesses depositions made by them in another case, at the hearing of which the prisoner was not present, and procuring them to affirm the truth of the same. *Held* that the depositions were illegally taken and therefore could not sustain a charge. 1 B.L.R.O. (Cr.), 36. **J**

(j) Depositions before coroners have been held to be inadmissible in criminal cases, when taken in the absence of the accused. *R. v. Rigg*, 4 F. and F. 1085; *State v. Campbell*, 1 Rich. 124. See Phip.Ev., 4th Ed., p. 449. **K**

(k) Previous statements of witnesses may be used, under S. 145 of the Evidence Act, for the purpose of contradicting statements afterwards made by them at the trial of an accused person; but, where they are made behind the back of the accused, they cannot be treated as independent evidence of his guilt or innocence : S. 288, Crim. Pro. Code, cannot sanction such a purpose. 23 C. 361. **L**

(l) “The requirement of a right and opportunity to cross-examine excludes depositions taken behind the back of, or without notice given to, the person against whom they are going to be used.” *Cun. Ev.*, 11th Ed., p. 98. **M**

(2) Reason.

One important reason, why a deposition, not taken in the presence of a person sought to be affected by it, is inadmissible, is, that such person had no opportunity of cross-examining the witness. But, where all the accused were afforded this opportunity, but did not avail themselves of it, only one accused doing so, the deposition was held admissible. 8 C. 739 (746) - 12 C.L.R. 233. **N**

(3) Presumption when deposition taken before accused.

Where a deposition is shown to have been taken in the presence of the accused, the presumption will be that he had full opportunity to cross-examine. *R. v. Peacock*, 12 Cox. 21 : *Phip. Ev.*, 4th Ed., p. 443. **O**

(4) Rebutting of presumption.

The presumption, that the accused had full opportunity for cross-examination, that will be made when a deposition is taken in the presence of the accused may be rebutted by proof that the accused was insane. *R. v. Peacock*, 12 Cox. 21 ; *Phip. Ev.*, 4th Ed., p. 443. **P**

(5) Depositions in absence of prisoner—Effect of admitting them by afterwards reading them over to him.

(a) “By admitting a deposition, originally written down in the absence of the prisoner, on proof that it had afterwards been read over in his presence to the witness, who had then assented on oath to its contents, a fair opportunity is not afforded to the accused of cross-examining the deponent.” *Tay. Ev.*, 10th Ed., S. 486, p. 366. **Q**

8.—“*That the adverse party...opportunity to cross-examine.*”—(Contd.).

2.—PRESENCE OF ACCUSED DURING THE TAKING OF DEPOSITIONS—(Continued).

- (b) Where the evidence of witnesses, taken in the absence of the prisoner at a former trial, was read out to them, and put in on their assenting to it as a true record of the facts, *held* that the proceeding was irregular and prejudicial to the prisoner; and such witnesses should have been subjected to a fresh oral examination; and that *then* the former depositions might have been put in, not to add to their testimony, but to corroborate it. A new trial was ordered. 3 B.L.R. (Cr.), 20—12 W.R. (Cr.), 3. R

(6) Procedure in recording evidence against absconding accused.

- (a) Where it is intended to record evidence against an accused person, who has absconded, in his absence, under S. 512 of the Code of Criminal Procedure, the fact that the accused absconded should be alleged, tried, and established, before the deposition is recorded. 10 C. 1097. S
- (b) In an enquiry before a committing Magistrate, one of the accused persons absconded, as recorded by the Magistrate. In their examination before that officer, the witnesses deposed to the absconder having been one of the participators in the crime. The Sessions Judge did not record the absconding of one of the accused, and the evidence was recorded against the prisoners then under trial only. In a subsequent trial of the absconding accused, *held*, that the former depositions, either before the Magistrate or the Sessions Judge, were inadmissible in evidence, under S. 33 of the Evidence Act, and the former were admissible under S. 512, Crim. Pro. Code, 1882. 8 A. 672 (677)—6 A.W.N. 257. T

(7) Presence of accused necessary for admissibility of deposition of medical witness.

- (a) For a deposition of a medical witness, taken by a committing Magistrate under S. 509, Crim. Pro. Code, 1882, to be admissible before the Sessions Court, it must appear, from the Magistrate's record or be proved by witnesses, to have been recorded and attested in the presence of the accused, and this fact should not simply be presumed under S. 80 or S. 114, ill. (e) of the Evidence Act. 9 A. 720 (721). U
- (b) The condition of the admissibility, under S. 509, Crim. Pro. Code, 1882, of the deposition of a medical witness taken by a committing Magistrate before the Court of Session, is that either the Magistrate's record, or the evidence of witnesses, must show it to have been taken and attested by the Magistrate in the presence of the accused; the Court is neither bound to presume under S. 80, nor ought it to presume under either S. 80 or S. 114, ill. (e), of the Evidence Act, that the deposition was so taken and attested. 18 C. 129. (9 A. 720 and 10 A. 174, *appx.*) Y
- (c) The deposition of a medical witness cannot, under S. 80, Evidence Act, be *presumed* to have been taken and attested in the presence of the accused by the committing Magistrate, so as to make such deposition admissible in evidence at the Sessions trial, under S. 509, Crim. Pro. Code, 1882. 10 A. 174 (178), *referring to* 9 A. 720. W

8.—“*That the adverse party...opportunity to cross-examine.*”—(Contd.).

2.—PRESENCE OF ACCUSED DURING THE TAKING OF DEPOSITIONS—(Concluded).

(d) In order that the examination of a Civil Surgeon or other medical witness may be admissible, under S. 323, Crim. Pro. Code, 1872, against any accused person, the Magistrate must take it in his presence. 12 C.L.R. 233 = 8 C. 739. X

(8) Attestation of depositions by Magistrate before accused, whether necessary.

Though all depositions of witnesses in criminal cases should be taken and attested by the Magistrate in the presence of the accused, there are no provisions in the law which make the attestation of the depositions, by the Magistrate in the presence of the accused, obligatory. 10 A. 174 (178). Y

(9) Presence of cross-examining party, proof of.

The deposition of a witness obtained by a commission issued by a committing Magistrate, adduced in evidence at the Sessions trial, is admissible without making it necessary to give proof of the presence, before the Commissioner, of the cross-examining party or his agent. To do so would be to put a strain on the words of S. 33 and lead to inconvenience, and much difficulty would be found in getting evidence under this enabling section, where a party is in custody. 19 B. 749 (758-9). Z

(10) Depositions in absence of questions from prisoner.

As to whether a deposition is admissible in a case where the prisoner has abstained from asking any questions in consequence of the witness being too ill to bear further examination, see *Tay. Ev.*, 10th Ed., S. 490, p. 366, referring to *R. v. Johnson*, 2 C. and K. 355. A

3.—DEPOSITIONS BEFORE SUNDRY TRIBUNALS.

(1) General principles—Sundry tribunals.

(a) “In general the principle is clearly accepted that testimony taken before a tribunal not employing cross-examination as a part of its procedure is inadmissible; and, conversely, the kind of tribunal is immaterial and the testimony is admissible, if, in fact, cross-examination was practised under its procedure.” *Wigm. Ev.*, 1905 Ed., S. 1373, p. 1711. B

(b) “It is said that this rule ought not to be extended to testimony taken before certain Commissioners to try land titles. Opportunity was given for cross-examining witnesses; and it appears that the title now in question was actually litigated before the Commissioners.” *Jackson v. Bailey*, 2 Johns. 20; *Wigm. Ev.*, 1905 Ed., S. 1373, p. 1712. C

(c) “The barrack Commissioners were not required to summon the party for the purpose of examining the witnesses; and they proceeded to examine the witnesses and to make their report without giving notice to the other side; and consequently as the party had no opportunity of attending or cross-examining the witness, this cannot be legal evidence.” *A.-G. v. Davison*, McCl. and Y. 167; *Wigm. Ev.*, 1905 Ed., S. 1373, p. 1712. D

8.—“That the adverse party...opportunity to cross-examine.”—(Contd.).

3.—DEPOSITIONS BEFORE SUNDRY TRIBUNALS—(Ctd.)

- (d) “In order to affect any party by oral or written testimony, an opportunity should be allowed to him of checking or correcting it by cross-examination.” *A.-G. v. Davison*, McCl. and Y. 167; Wigm. Ev., 1905 Ed., S. 1373, p. 1712. **E**
- (e) “Neither is it necessary that the former testimony should have been given on the trial of a cause in the exact technical shape of an action. It is sufficient if the point was investigated in a judicial proceeding of any kind, wherein the party to be affected by such testimony had the right of cross-examination.” *Orr v. Hadley*, 36 N.H. 580; Wigm. Ev., 1905 Ed., S. 1373, p. 1712. **F, G**
- (f) “Testimony has been received or rejected, because an opportunity for cross-examination was or was not a part of the procedure when given before,
- (i) bankruptcy-commissioners; *Made v. Livquod*, 1 Atk. 203 and, *Cor v. Pearce*; 7 John 298; **H**
- (ii) pilot-commissioners; *Com. v. Rickelton*, 7 John 298; **I**
- (iii) marine hull-inspectors; *Louisville Ins. Co. v. Monarch*, 99 Ky. 578; **J**
- (iv) barrack-commissioners; *A.-G. v. Davison*, McCl. and Y. 167; **K**
- (v) land-commissioners; *Jackson v. Bailey*, 2 John 20 and *Montgomery v. Snodgrass*, 2 Yeates 230; **L**
- (vi) county-boards; *Duncl. v. Milwaukee Co.*, 79 N.W. 412; **M**
- (vii) registers; *Payne v. Long*, 25 So. 780, and **N**
- (viii) arbitrators; *Orr v. Hadley*, 36 N.H. 580.” Wigm. Ev., 1905 Ed., S. 1373, p. 1712. **O**
- (2) **Depositions before coroners.**
- (a) Coroners’ depositions are treated upon the same footing as depositions before Magistrate. *R. v. Butcher*, 64 J.P. 808; Phip. Ev., 4th Ed., p. 449. **P**
- (b) A deposition not proved to have been sworn or signed by the witness has been held inadmissible. *R. v. Roberts*, 98 Sess. Pap. C.C.C. 691; Phip. Ev., 4th Ed., p. 449. **Q**
- (c) But depositions neither signed by, nor read over to, the witness have been held to be admissible, where it was not the practice to observe these formalities. *R. v. Nicholls*, 128 Sess. Pap. C.C.C. 489 and *R. v. Holloway*, 65 J.P. 712; Phip. Ev., 4th Ed., p. 449. **R**
- (3) **Deposition in bankruptcy and winding up.**
- (a) “In case of the death of the debtor, or his wife, or of a witness whose evidence has been received in any Court in any proceeding in bankruptcy, the deposition of the person so deceased purporting to be sealed with the seal of the Court, or a copy thereof purporting to be so sealed, shall be admitted as evidence of the matters therein deposed to.” Bankruptcy Act, 1883, S. 136. Phip. Ev., 4th Ed., pp. 489-440. **S**

8.—“*That the adverse party..opportunity to cross-examine.*”—(Contd.).

3.—DEPOSITIONS BEFORE SUNDRY TRIBUNALS—(Ctd.).

(b) “By rule 27 of the Winding-up Rules, 1892, the verified notes of procedure under S. 8 of the Winding-up Act, 1890, are, subject to the direction of the Court and to all just exceptions as to their admissibility against particular persons, receivable against any of the persons, who, under that section, and the order for public examination, was present or had the opportunity of being present and taking part in such examination, provided fifteen days’ notice and a copy of the notes or part to be used, are given to all but the actual deponent (*Re* London and General Bank, 13 R. 137).” Phip. Ev., 4th Ed., p. 440. **T**

(c) “Answers given by a bankrupt in his public examination in bankruptcy must always be admissible against himself, either in subsequent stages of the bankruptcy proceedings or in other proceedings. Against other persons, e.g., creditors, such answers clearly could not be admitted under the present section, unless the person to be affected had had an opportunity to cross-examine.” Cun. Ev., 11th Ed., p. 98. **U**

(d) “The terms of the proviso are such that it is difficult to apply the section to depositions taken in bankruptcy proceedings.” (*Ibid.*) **Y**

4.—LOCAL INVESTIGATIONS, AMEENS’ REPORTS, ETC.

(1) Local investigation by Courts.

(a) Where the presiding officer of a Court makes a local investigation in a suit, the result of the investigation ought to be put on the record in order that the parties could see what the Court considers to have been established by it. 12 C.L.R. 490 = 9 C. 363. **W**

(b) The result of such investigation, though not evidence within the meaning of the Evidence Act, must be taken into consideration, and on appeal a Court ought not to disregard it. 12 C.L.R. 490 = 9 C. 363. **X**

(2) When Ameens to be asked to make local investigations.

An Ameen should be appointed to hold a local investigation only when it is necessary to inspect the land which is the subject of dispute, to make maps of localities, to obtain information with regard to the physical features of the place, to identify the land in maps with parcels which are the subject of the suit, and to identify the maps with one another with the aid of objects to be found in the land; and for these and similar purposes an Ameen may examine witnesses, when the evidence which they have to give is of such a nature that it ought to be taken by him on the spot. Where, however, any fact can be proved by evidence taken otherwise than on the spot, that evidence ought to be taken by the Court itself in a regular manner and not by an Ameen. 17 W.R. 282. **Y**

(3) Report of Sherishtadar—Civil Court Ameen.

The report of a Sherishtadar after local investigation cannot be legal evidence, unless it is shown that no Civil Court Ameen was available for the duty in the district. 12 W.R. 209. **Z**

8.—“*That the adverse party..opportunity to cross-examine.*”—(Contd.).

4.—LOCAL INVESTIGATIONS, AMEENS' REPORTS, ETC. —(Continued).

(4) Ameen—Local investigation—Special appeal.

The deputation of an Ameen to ascertain the respective liability of several judgment-debtors is not an improper course for a Court to pursue and at all events is not a ground for interfering in special appeal with the concurrent judgments of two lower Courts. 22 W.R. 183. **A**

(5) Local investigation by Civil Ameens.

It was not the intention of the Legislature to allow witnesses to be examined out of Court by Ameens, except with reference to points for the determination of which local inspection is required. 9 W.R. 83. **B**

(6) Ameen's duties.

(a) All that a Civil Court can charge the Ameen with is to obtain such information with regard to the physical features of the place in dispute, the identification of land depicted in maps with the parcels which are the subject of the suit, the identification of maps with one another by the aid of objects to be found on the land, and other matters of this kind, which may be of use in, and auxiliary to, the proper trial of the suit by the Court before which it is pending. 21 W.R. 281. **C**

(b) A Civil Court is not warranted in deputing its functions to an Ameen, who is bound not to go beyond the points referred to him for enquiry. 21 W.R. 280. **D**

(c) In a suit in which the Court considers it necessary to order an enquiry by a Civil Ameen into the existence and value of moveable properties, such enquiry cannot be left to be made after decree but must be made before the final decree is drawn up. 23 W.R. 422. **E**

(6-A) Nature of Ameen's report in partition proceedings.

The report of an Ameen in a proceeding to make a partition which is a judicial proceeding, under S. 180, Act VIII of 1859, must be treated in the same way as the report of an Ameen in an ordinary suit. The report and depositions are to be taken as evidence in the suit and to form part of the record. The Court is not bound by the report, but ought to enquire further into the matter if there is any necessity for so doing, and to examine the witnesses *bona fide* tendered for examination. 17 W.R. 270. **F**

(7) Report of Ameen held inadmissible.

(a) In a suit for rent for fuelies 1283-4-5 and 6 upon a *jungleboori* lease, which provided that the area of jungle lands brought under cultivation should be ascertained by measurement, the only evidence of measurement was a report of an Ameen made in a previous suit in 1879, the accuracy of which report was not proved in the present suit. *Held* that the report itself was not admissible in evidence. 12 C.L.R. 50. **G**

(b) An Ameen's report based on a copy of a *kabuliyat* is little or no evidence of title. 17 W.R. 473, *Foot-note*. **H**

8.—“*That the adverse party..opportunity to cross-examine.*”—(Contd).

4.—LOCAL INVESTIGATIONS, AMEENS' REPORTS, ETC. —(Concluded).

(c) *Held* that the Ameen's enquiry ought not to have been ordered in this case, where the question to be decided was one of disputed boundary, which turned chiefly on possession before the date of suit, and that the Subordinate Judge would have been justified in disregarding the Ameen's report and trying the appeal on the recorded evidence. 17 W.R. 473. I

(d) A *talookdar*, who had purchased in execution-sale the under-tenure of one of his tenants, sued him to obtain possession of the land contained in the purchased holding from some of which he said he had been dispossessed, and in regard to the remainder of which his title was disputed. *Held* that the deputation of an Ameen was improper and that the *onus* lay on the plaintiff to prove his case. 14 W.R. 190. J.

(e) A Court has no power to delegate to an Ameen the trial of one of the most important issues of fact in a case. 23 W.R. 286. K

(f) Where a Principal Sudder Ameen had deputed a Civil Ameen to enquire into the fact of possession instead of hearing the evidence on the point himself, *held* that, even if his order was improper, the deputation of the Ameen was legal and the evidence taken by the Ameen was legal evidence to be considered on its own merits. 9 W.R. 494. L.

(g) As to whether, where an Ameen has, in fact, been, though improperly, deputed and has examined witnesses, that evidence ought to be totally rejected, see 17 W.R. 282. M

(8) Ameen's report held admissible.

(a) Where an Ameen had been deputed by a Civil Court to enquire into a question of possession, his report and the evidence taken by him are admissible under S. 180, Act VIII of 1859. 9 W.R. 601. N

(b) The report of an Ameen and evidence recorded on a local enquiry are evidence in the suit, and there is no legal objection to the parties to the suit agreeing that the evidence should be taken before the Ameen, and that the matters in dispute should be referred to him for enquiry. 2 B.L.R. Ap. 3. O.

(c) An Ameen had been deputed to make a local investigation and had examined certain witnesses, but could not examine the rest, or complete his investigation and draw his report owing to the plaintiff not paying the necessary expenses. *Held* that the depositions of the witnesses, without the Ameen's report, were not admissible in evidence. 6 B.L.R. Ap. 70. P.

5.—EVIDENCE TAKEN ON COMMISSION—PURDANASHIN WOMEN.

(1) Evidence taken on commission, when evidence in suit.

Evidence taken on commission does not become evidence in the suit, until the same has been tendered and read as evidence in the suit by the party in whose behalf it has been taken. 9 C.W.N. 794, referring to 8 B.L.R. Ap. 102; dissenting from 3 C.W.N. cccxxix, and following 7 C.W.N. 786. Q

8.—“*That the adverse party..opportunity to cross-examine.*”—(Contd.).

5.—EVIDENCE TAKEN ON COMMISSION—PURDANASHIN WOMEN.—(Continued).

(2) Use by one party of evidence under commission issued by another party.

The evidence of a defendant, taken under a commission, may be read on behalf of the plaintiff, without the deposition being put in as part of his case. Having been put in, the deposition, under S. 179 (Act VIII of 1859) became part of the record. 8 B.L.R.Ap. 102. **R**

(3) Examination under commission, nature of.

The examination of witnesses under a commission is of the same nature as an examination in open Court; and there is no reason why attorneys should be allowed to examine in the one case more than in the other. As a matter of practice, moreover, attorneys never have been in the habit of examining such witnesses, save under very exceptional circumstances. There must be something on the face of the return to show that the Commissioner is bound to administer the oath to himself as well as to the interpreter. 8 B.L.R. Ap. 101. **S**

(4) Right of cross-examination of parties not joining in a commission.

A party who has not joined in a commission is entitled to cross-examine the witnesses who are examined under the commission. 14 W.R (A.O.C.J.) 17. **T**

(5) Evidence taken on commission without full cross-examination held inadmissible.

Evidence taken upon commission of a witness for the plaintiff, without a full opportunity being given for cross-examination, is inadmissible. 5 C.W.N. cccxx. **U**

(6) Cross-interrogatories under a commission, whether covered by “opportunity to cross-examine.”

As to whether the words “opportunity to cross-examine” include the opportunity to administer cross-interrogatories under a commission, within the meaning of the proviso to S. 33, so as to render the evidence elicited by the cross-interrogatories relevant, see 19 B. 749 (759). **Y**

(7) Commission—Notice for cross-examination—Admissible.

- (a) “Where a notice has been given to a party of the time and place of an examination on commission, and he neither intimates a wish to cross-examine, nor applies to the Court to enlarge the time for that purpose, the presumption will be that he acted deliberately and the depositions will be admitted in evidence.” Tay. Ev., 10th Ed., S. 466, p. 355. **W**
- (b) Examinations taken under an order issuing a commission, notwithstanding that the defendant had not received any notice of the time and place of taking them, were held to be admissible in evidence. *Ozenove v. Vaughan*, 1 M. and Selw. 4; Tay. Ev., 10th Ed., S. 466, p. 355. **X**
- (c) Where a defendant, after joining a plaintiff in obtaining a commission to examine witnesses upon interrogatories, gave notice that he declined to proceed with the examination, upon which the plaintiff sent him word that he should apply for a commission *ex parte*, and had done so and obtained one, the examination was held to be admissible. *McCombie v. Auton*, 6 M. and Gr. 27; Tay. Ev., 10th Ed., S. 466, p. 355. **Y**

3.—“*That the adverse party..opportunity to cross-examine.*”—(Contd.).

5.—EVIDENCE TAKEN ON COMMISSION—PURDANASHIN WOMEN—(Continued).

(d) Where, a commission is executed without any notice, or without a sufficient notice (see *Fitzgerald v. Fitzgerald*, 83 L.J.P. and M. 39) being given to the opposite party, to enable him, if he pleases, to put cross-interrogatories, the depositions will be rejected. *Steinheller v. Newton*, Scott, N.R. 148; Tay. Ev., 10th Ed., S. 466, p. 355. See also 14 W.R. (A.O.C.J.) 17 (18-9). Z

(8) Commission in criminal cases.

(a) The issue of a commission in a criminal case would be a most unsatisfactory course of proceeding, and one dangerous to the interests of the prisoner. 8 C. 896 (897). A

(b) Evidence taken upon commission, by an order of the Presidency Magistrate that committed the case to the High Court, would not be admissible in the trial before the High Court; for such to be admissible, it must be shown that it was so taken upon an order by the High Court itself, or that it is admissible under S. 33 of the Evidence Act. 6 C. 532, referred to in 19 C. 113. B

(9) Purdanashin women—Examination by commission.

(a) The examination by commission of a purdanashin woman is not necessary, where she can be examined in Court in a *pallie*, or otherwise on a proper identification. 18 W.R. 230. C

(b) Privileges of purdanashin ladies when attending Court in palanquins as witnesses considered. The general rule is that the lady should be admitted into Court in her palanquin, and give her evidence in it, after being properly identified. 1 B.L.R.S.N. 5. D

(c) A commission had issued at the instance of the plaintiff for the examination of a female witness. Upon the examination before the Commissioner, Counsel appeared for the plaintiff and the defendants were represented by their attorneys. After the witness had been examined she was cross-examined by the defendants' attorneys; but the return did not show that any objection had been made at the time to such cross-examination nor did it show that the Commissioner had taken the usual oath before entering upon his duties. At the hearing of the case Counsel for the plaintiff, proposed to read the evidence taken under the commission; but before doing so, he called the attention of the Court to the fact that the defendants were represented before the Commissioner by their attorneys. This, he contended, was not merely irregular, but also illegal (*Hoffmann v. Framjee*, Car. 7). He should treat the deposition as if there had been no cross-examination. For the defence it was contended that the deposition must be read *in toto*, or not at all. *Held* that it was not competent to the defendants' attorneys to conduct the cross-examination before the Commissioner. 8 B.L.R. Ap. 101. E

8.—“*That the adverse party..opportunity to cross-examine.*”—(Concl.).

5.—EVIDENCE TAKEN ON COMMISSION—PURDANASHIN WOMEN.—(Concluded).

(d) Where a purdanashin lady is cited as a witness in a criminal case, held, she was entitled to be examined on commission and to be exempted from personal attendance in Court. 4 C. 20 (21). **F**

(e) Case where a Brahmin purdanashin lady's application, under S. 503, Crim. Pro. Code, 1882, for her examination by commission and exemption from appearance in Court was granted. 15 C. 775. See, also, 24 C. 551 (555), 9 A.W.N. 202=12 A. 69 (72), 2 Weir 659 and 16 J P.L.R. 1903-19 P.R. 1903. **G**

9.—“*That the questions in issue..second proceeding.*”

(1) Conditions of admissibility, under third proviso.

(a) One of the conditions of the admissibility of a former deposition in later judicial proceedings is that the questions in issue were substantially the same in the first as in the second proceeding. *Doe v. Tatham*, 1 A. and E. 3, 19 and *Doe v. Derby*, 1 A. and E. 783, 785, 789; Steph. Dig., 7th Ed., Art. 92, p. 46. **H**

(b) “The issue on the occasion when the former testimony or deposition was given must have been substantially the same, for otherwise it cannot be supposed that the former statement was sufficiently tested by cross-examination upon the point now in issue.” Wigm. Ev., 1905 Ed., S. 1387, p. 1728. **I**

(c) “Conversely, it is sufficient if the issue was the same, or substantially so with reference to the likelihood of adequate cross-examination, because the opponent has thus already had the full benefit of the security intended by the law.” Wigm. Ev., 1905 Ed., S. 1387, p. 1728. **J**

(2) Applicability of proviso third.

The question whether the proviso to S. 33 is applicable, that is, whether the questions at issue are substantially the same, depends upon whether the same evidence is applicable, although different consequences may follow from the same Act. 7 C. 42 (44). **K**

(3) “Questions,” meaning of.

(a) This does not mean “all the questions.” 3 M. 48 (52).

(b) By the question in issue in S. 33 being required to be substantially the same, it is not intended that, in a case where the prisoner injured dies subsequently to the enquiry before the Magistrate, his evidence is not to be used before the Sessions Court, because, in consequence of his death, other charges are framed against the accused. 7 C. 42 (44). **L**

(4) Intention of Legislature.

Although the Act, in using the word “questions” in the plural, seems to imply that it is essential that all the questions shall be the same in both proceedings to render the evidence admissible, that is not the intention of the law. 3 M. 48 (52). **M**

9.—“*That the questions in issue..second proceeding.*”—(Continued).

(5) Principle of requiring identity of matter.

(a) The principle involved in requiring identity of the matter in issue is to secure that in the former proceedings the parties were not without the opportunity of examining and cross-examining to the very point, upon which their evidence is adduced in the subsequent proceedings. 3 M. 48 (52). **N**

“(b) And, though separate proceedings may involve issues, of which some only are common to both, the evidence to those common issues given in the former proceeding may (on the conditions mentioned in S. 33 arising) be given in the subsequent proceeding. 3 M. 48 (52). **O**

(c) Thus, “if, in a dispute respecting lands, any fact comes directly in issue, the testimony given to that fact is admissible to prove the same point in another action between the same parties or their privies, though the last suit relates to other lands.” (Tay. Ev., 4th Ed., S. 436). 3 M. 48 (52). **P**

(d) “The requirement of identity of parties is after all only an incident or corollary of the requirement as to identity of issue. It ought, then, to be sufficient to inquire whether the former testimony was given upon such an issue that the party opponent in that case had the same interest and motive in his cross-examination that the present opponent has; and the decision of this question should be entirely for the judge.” Wigm. Ev., 1905 Ed., S. 1388, p. 1733. **Q**

(e) “The question really is whether the deposition was taken under such circumstances that the accused had full opportunity of cross-examination.” *Per* Alderson, B. R. v. *Beeston*, 4 Cox. Cr. 425; Wigm. Ev., 1905 Ed., S. 1387, p. 1728. **R**

(6) Deposition not offered as such.

(a) “A deposition or former testimony, not offered as such is not subject to this rule requiring identity of issues. Where the other testimony is offered, not as evidence of the truth of the facts asserted in it, but merely as an utterance having an indirect bearing, it is not hearsay and the ruling requiring cross-examination and identical issues does not apply.” Wigm. Ev., 1905 Ed., S. 1387, p. 1733. **S**

(b) “Thus, testimony in another cause may be proved in a trial for perjury so far as it indicates the materiality in that cause of testimony now charged to be perjured,” because “all that was sought to be proven here was the mere fact that certain testimony had been given.” Wigm. Ev., 1905 Ed., S. 1387, p. 1733, referring to *People v. Lem You*, 97 Cal. 224, 226. **T**

(c) “In an action for malicious prosecution, the testimony on the original prosecution is not admissible from that point of view, because it could not have served as “probable cause” before it was delivered; yet it would be admissible in the ordinary way as testimony at a former trial, provided that the witness is deceased or otherwise unavailable, and this principle, so long as parties were disqualified in their own behalf, would always admit the defendant's own testimony given at the original trial.” Wigm. Ev., 1905 Ed., S. 1387, p. 1733. **U**

9.—“*That the questions in issue..second proceeding.*”—(Continued).

- (d) “Where the deposition or testimony embodies an admission by the opponent, it is not subject to the present rule requiring identity of issues, etc.” Wigm. Ev., 1905 Ed., S. 1387, p. 1733, referring to *Williams v. Cheney*, 3 Gray, 215, 217, 220. **Y**

(7) **Different transactions—Effect.**

Where the same question is substantially¹ in issue in both the proceedings, it does not matter that they relate to different transactions or property. *Doe v. Foster*, 1 A. and E. 791n; *Llanover v. Hemfray*, 19 Ch. D. 224; Phip. Ev., 4th Ed., p. 408. **W**

(8) **Different transactions—Criminal cases—Effect.**

Where a deposition is given in a case of stabbing assault, and robbery, or grievous hurt, it will be admissible on a trial for murder arising out of the same transaction. *R. v. Smith*, Rus. and Ry. 339; *R. v. Lee*, 4 F. and F. 63; *R. v. Beeston*, 24 L.J.M.C. 5; *R. v. Dilmore*, 6 Cox. 52 and *R. v. Williams*, 12 Cox. 101. See Phip. Ev., 4th Ed., p. 408. **X**

(8-A) **Reason.**

For, if this were not the law, the depositions of the deceased would, in many cases of homicide, be most improperly excluded. 2 Stark. R. 212; Tay. Ev., 10th Ed., S. 467, p. 356. **Y**

(8-B) **Example.**

“Thus, where a prisoner, who had been summarily convicted of an assault, was, in consequence of the death of the party struck, subsequently indicted for murder, the convicting Magistrate was permitted to state what the deceased had sworn in the prisoner’s presence, the examination not having been reduced into writing.” *R. v. Edmunds*, 6 C. and P. 164; Tay. Ev., 10th Ed., S. 467, p. 356. **Z**

(9) **Nominal parties.**

Former testimony is admissible “if the difference of parties consists merely in a difference of nominal parties only, or in an addition or subtraction on either side of parties not now concerned with the testimony.” Wigm. Ev., 1905 Ed., S. 1388, p. 1734, referring to *Wright v. Tatham*, 1 A. and E. 3. **A**

(10) **Same property-interest**

Former testimony is admissible, if the then party opponent, though a different person, had the same property-interest that the present opponent has. Wigm. Ev., 1905 Ed., S. 1388, p. 1734.* **B**

(11) **Judge to determine fullness of opportunity to cross-examine.**

The presiding Judge must determine in each case whether the prisoner has had full opportunity of cross-examination; and if the charges were entirely different, he would not decide that there had been that opportunity; but where it is the same case, and only some technical difference in the charge, the accused has had full opportunity of cross-examination. *Per Jervis, C.J. R. v. Beeston* 6 Cox. Cr. 425; Wigm. Ev., 1905 Ed., S. 1387, p. 1728. **C**

9.—“That the questions in issue..second proceeding.”—(Continued).

(12) Admissible depositions.

- (a) Where an action of ejectment was brought for one piece of land, and then for another, but the issue in both was the same, *vis.*, who was the heir of a certain person, evidence given in the first proceeding was held to be admissible in the second. *Doe v. Foster*, 1 A. and E. 791, *note*. Per Alderson, B. Wigm. Ev., 1905 Ed., S. 1387, p. 1728; Tay. Ev., 10th Ed., S. 467, p. 356 and 3 M. 48. **D**
- (b) The evidence given on a charge of felonious wounding was held to be admissible on a charge of manslaughter for the same act. *R. v. Dilmore*, 6 Cox. Cr. 52; Wigm. Ev., 1905 Ed., S. 1387, p. 1728. **E**
- (c) The deposition taken on a charge of felonious wounding with intent to do bodily harm was held to be admissible on a trial for murder, where the act was the same. *R. v. Beeston*, 6 Cox. Cr. 425; Wigm. Ev., 1905 Ed., S. 1387, p. 1728. **F**
- (d) R accused A with breach of trust, and S deposed in favour of R. After A was tried and acquitted, R was prosecuted for making a false charge and S for perjury. In the case against R, there was the further question whether he knew, or had reason to believe, that the charge was false, and in that against S whether he supported the false charge knowing it to be such. *Held*, that the evidence to the fact to which these witnesses spoke in the former proceeding, was admissible in the subsequent trial against R. 3 M. 48 (51-2). **G**
- (e) The deposition of a complainant, on a charge of grievous hurt, having been taken before a Magistrate, the complainant died. Owing to his death, charges of murder and culpable homicide, not amounting to murder, were added before the Sessions Court. *Held* that the deposition of the complainant before the Magistrate was admissible before the Sessions Court, either under S. 32, cl. 1 or under S. 33, despite the additional charges. 8 C.L.R. 273=7 C. 42. **H**
- (f) Where the act was the stroke of a sword, which, though it did not immediately cause the death of the deceased person, yet conduced to bring about that result subsequently, and, in consequence of the death, the gravity of the offence increased, but the evidence to prove the act charged against the accused remained the same; held it was properly admitted under S. 33. 8 C.L.R. 273 (274-5)=7 C. 42. **I**
- (g) S prosecuted the defendant at the instance and on behalf of the plaintiff for criminal trespass in respect of a certain house and for assault and insult on his own behalf. S gave evidence supporting the charges at the trial. The plaintiff subsequently filed a civil suit against the defendant, under S. 9, Specific Relief Act, for possession of the same house. S died before the institution of the civil suit, during which the deposition of S was tendered on behalf of the plaintiff. *Held* that, as S was dead, and as the issues in both proceedings were the same almost, the deposition was admissible. 23 C. 441 (442). **J**
- (h) When there are two or more charges arising out of the same allegations made by an accused, the testimony, of a deceased witness in a previous proceeding against the accused, is admissible in evidence in a subsequent proceeding against the same accused. *Rat. Unrep. Crim. Cases*, p. 347. **K**

9.—“That the questions in issue...second proceeding.”—(Continued).

(i) A revenue official, charged with attempting to receive a bribe from certain raiyats, who supported the charge, was convicted. He subsequently prosecuted the raiyats for having conspired to bribe him. In their trial, their depositions in the previous case were adduced in evidence for the prosecution. *Held*, the depositions must have been admitted in evidence. 15 M. 63. **L**

(j) “The evidence of a witness, who had testified in a suit, wherein A and several others were plaintiffs and B defendant, was, after his death, held admissible in a subsequent action relating to the same matter, brought by B against A alone.” *Wright v. Doe*, 1 A. and E. 3; Tay. Ev., 10th Ed., S. 467, p. 356. **M**

(k) In criminal cases, a deposition taken on a charge either of assault and robbery, or of stabbing, or of doing grievous bodily harm, can, after the death of the witness, be read upon a trial for murder, where the two charges relate to the same transaction. *R. v. Smith*, R. and R. 339; Tay. Ev., 10th Ed., S. 467, p. 356; Wigm. Ev., 1905 Ed., S. 1387, p. 1728. **N**

(l) A sues B, C and D and also in another action C, D and E. The facts in both actions are the same, but the relief claimed is different. *Held*, that A might, on notice, read in the second action the affidavits and depositions, taken in the first, against such defendants as were common to both. *Brown v. White*, 24 W.R. 456; Phip. Ev., 4th Ed., p. 410. **O**

(m) For an instance where evidence given in a civil case was admitted at the trial of the then claimant for perjury at the previous trial, see *R. v. Castro* (Tichborne Case), Charge of Cockburn, C.J., II, 305; Wigm. Ev., 1905 Ed., S. 1387, p. 1728. **P**

(n) Evidence given on a charge of robbery was held to be admissible on a charge of murder, where the assault was the same. *R. v. Lee*, 4 F. and F. 63; Wigm. Ev., 1905 Ed., S. 1387, p. 1728. **Q**

(13) Inadmissible depositions.

(a) In a case in which the accused was bound down to keep the peace, the Assistant Magistrate admitted as evidence the depositions of witnesses in certain cases in which the accused was tried on charges of being a member of an unlawful assembly and of rioting, and was acquitted. *Held* that the Assistant Magistrate ought not to have admitted this evidence. 24 W.R. (Cr.), 4. **R**

(b) A deposition made by a person in a former proceeding was held to be inadmissible in a subsequent proceeding, because, though that person was a defendant in the second suit and might have tendered himself for examination, and, if he had been examined and had given evidence inconsistent with his previous evidence, might have been confronted in cross-examination with his former deposition, he was not so examined. 2 A.L.J. 91 (96). **S**

(c) Where evidence was given on a charge of assault, it was held to be inadmissible on a trial for felonious wounding, the act being the same. *R. v. Ledbetter*, 3 C. and K. 108. (Prof. Wigmore observes that the ruling is in effect repudiated by later cases). Wigm. Ev., 1905 Ed., S. 1387, p. 1728. **T**

9.—“*That the questions in issue..second proceeding.*”—(Concluded).

(d) One R preferred a charge of breach of trust against A, and S gave evidence in support of it. A was acquitted and R was charged for making a false charge and S for giving false evidence against the person accused on the trial of that charge. *Held* that under the explanation to S. 33, the parties were the same to the proceedings in the breach of trust case and the proceedings against R, that S was merely a witness—not a party in the breach of trust case—and that the evidence so admitted was inadmissible in the charge against him. 3 M. 48 (51). U

10.—“*Explanation.*”

(1) **Object of explanation.**

The explanation seems intended to do away with the objection that, in criminal cases, the Crown is the prosecutor. This section does not apply to the deposition of a witness in a former suit, when the witness is himself a defendant in the subsequent suit, and the deposition is sought to be used against him, not as evidence given between the parties, one of whom called him as a witness, but as a statement made by him, which would be evidence against him, whether he made it as a witness or on any other occasion. 14 B.L.R. Ap. 5; *per* Couch, C.J. Y

(2) **Effect of the explanation.**

The effect of the explanation would appear to be that a deposition, taken in criminal proceedings, may be used in a civil suit, and conversely, provided that the conditions of the section are observed. See Field Ev., 6th Ed., p. 148, and 23 C. 441, (where a deposition taken in a criminal proceeding was tendered in evidence in a civil suit and admitted). W

(3) **Difficulty in application of section to criminal cases.**

“S. 33 is subject to certain conditions which can be easily enough applied to civil cases, but cannot easily be applied to criminal cases. The section says that the prosecutor and the accused are the parties to a criminal proceeding. But in India there is no person who is a prosecutor in the sense that he is a party to the proceeding and sometimes there is not even a complainant. In the Court of Session, there is a person called the Public Prosecutor, who conducts the case before the Judge, and he appears to be the person here meant.” Mark. Ev., p. 33. X

(4) **English and Indian Law.**

(a) According to English Law, in criminal cases, a former deposition of a witness is not admissible on mere proof that he cannot be found after diligent search, nor even if it be shown that, being a foreigner, he has left the country, without any intention to defeat justice. See Phip. Ev., 4th Ed., p. 409. Y

(b) Under S. 33, Evidence Act, this is relaxed, and his former deposition is admissible, if he cannot be found or produced without unreasonable delay or expense. See A.A. and W. Ev., 4th Ed., p. 228. Z

5) **Circumstances rendering depositions admissible to be proved.**

Evidence of an absent witness taken in the Magistrate's Court cannot be received in the Sessions Court under S. 33 without proof of the circumstances rendering it admissible. L.B.R. (1872-1892), p. 184. A

10.—“*Explanation.*”—(Concluded).(6) **Depositions held admissible.**

- (a) Depositions made, during a preliminary enquiry under the Indian Merchant Shipping Act (V of 1883) into a case of collision, by the officers of the defendant's vessel were held to be admissible on the grounds, that the failure of the defendant's solicitor at the enquiry to challenge the accuracy of the statements of the deponents raised a strong presumption that the imputations against the company were correct, that the attendance of the deponents could not be procured without much delay and expense and that their statements were against their interest under S. 32 (3). 35 C. 751. **B.**
- (b) Where there are two charges arising out of the same allegations made by an accused, the testimony of a deceased witness in a previous proceeding against the accused is admissible in evidence in a subsequent proceeding against the same accused. Bom.H.C. Cr. Rg. 38 of 1887. **C**
- (c) When the parties to a suit in order to save delay or expense or any other reason refrain from calling persons who are alive and agree or do not object to the admission of evidence given by them in some former proceeding, the evidence is not strictly admissible but if the Court of first instance allows this to be done, the Court of appeal must accept the evidence and it is too late for it to take any objection to the procedure. 2 Bom. L.R. 386 (388) = 24 B. 591. **D**

Statements made under Special Circumstances.

34. Entries in books of account, regularly kept in the course of business, are relevant¹ whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence,² to charge any person with liability.

Entries in books
of account when
relevant.

Illustration.

A sues B for Rs. 1,000, and shows entries in his account-books showing B to be indebted to him to this amount. The entries are relevant, but are not sufficient, without other evidence, to prove the debt.

(Notes).

1.—“*Entries in books of account, regularly kept.....are relevant.*”(1) **Principle of the section.**

(a) The reasons on which this principle is based are :—

- (1) The habit and system of making such books with regularity, ensures their accuracy.
- (2) The influence of habit prevents casual inaccuracy, and counteracts the casual temptation to mis-statements.
- (3) As such books record a regular process of business transactions, an error is almost certain to be detected and rectified.
- (4) In such books mis-statements cannot be made, except by a systematic and comprehensive plan of falsification.

1.—“Entries in books of account, regularly kept....are relevant.”—(Contd.).

- (5) In some cases the entrant may make the record under a duty to an employer, in which case there is the additional risk of censure from the employer, in case of the entrant committing any mistake. See *Wigm. Ev.*, 1905 Ed., S. 1522, p. 1889. See A.A. and W., 4th Ed., pp. 236, 237. **E**
- (b) It is easier to state what is true than what is false; the process of invention implies trouble. *Per Tindal, C.J., in Poole v. Dicus*, 1 Bing. N.C. 649; *Wigm. Ev.*, 1905 Ed., S. 1522, p. 1889. **F**
- (c) “The credit to which such a book is entitled as matter of evidence is derived from the presumption that though a man in the warmth of controversy or the heat of passion, might be disposed to raise up false charges against his adversaries, yet that no one is so abandoned as, in his cooler moments, without such excitement, and in the course of his daily business, deliberately to contrive and meditate a fraud against his neighbour.” *Per Kirkpatrick, C.J., in Wilson v. Wilson*, 1 Halst. 98; *Wigm. Ev.*, 1905 Ed., S. 1547, p. 1905. **G**
- (d) The clerk has no interest to make a false entry; if he has any interest, it is rather to make a true entry; a false entry would be likely to bring him into disgrace with his employer. Again the book in which the entry was made may be open to all the clerks in the office, so that an entry, if false, would be exposed to speedy discovery. *Per Tindal, C.J., in Poole v. Dicus*, 1 Bing. N.C. 649; *Wigm. Ev.*, 1905 Ed., S. 1522, p. 1890. **H**
- (e) The rule rests upon the consideration that the entry, or other writing was within the writer's business. In all such entries the writer has full knowledge, no motive to falsehood, and there is the strongest improbability of untruth. Safer sanctions rarely surround the testimony of a witness examined under oath. *Per Swayne, J., in Femmerstein's Champagne*, 3 Wall. 149; *Wigm. Ev.*, 1905 Ed., S. 1522, p. 1890. **I**

(2) English Law on the subject.

- (a) The evidence contemplated by this section is not admissible according to the English common law. See *Cunningham's Ev. Act*, 11th Ed., p. 99; *Field Ev.*, 6th Ed., p. 154; *Best Ev.*, 9th Ed., S. 503, p. 418; *Wigm. Ev.*, 1905 Ed., S. 1524, p. 1891. **J**
- (b) But even in English Law such books may be used by a tradesman as memoranda to refresh his memory in respect to the goods supplied by him; and also such books are valuable as “indicative evidence,” i.e., evidence not in itself receivable, but which is indicative of better. See *Best Ev.*, 9th Ed., S. 503, p. 418. **K**
- (c) Again in English Law, if a party has got access to certain documents, and if such access be coupled with an opportunity of testing the accuracy of such document, such facts may raise a presumption of knowledge and non-objection of the party, and thereby affect the party with an implied admission of their correctness. See *Tay. Ev.*, 10th Ed., S. 812; *Phip. Ev.*, 4th Ed., p. 237. **L**
- (d) Thus, the rules or account-books of a club recorded by a proper officer, and kept openly in the club room, so as to be accessible to all the members, may be received in evidence against the members, *Raggell v. Musgrave*, 3 C. and P. 556; *Alderson v. Clay*, 1 Stark 405; *Ashpitel v. Sercombe*, 5 Ex. 147; *Wiltzie v. Adamson*, 1 Phil. and Arm. Ev., 10th Ed., p. 839; *Phip. Ev.*, 4th Ed., p. 237. **M**

1.—“*Entries in books of account, regularly kept....are relevant.*”—(Contd.)

(e) So, also, account-books between master and servant, trader or shopmen, may, on certain circumstances, be admitted in evidence. *Symonds v. Gaslight Co.*, 11 Beav. 238; Tay. Ev., 10th Ed., S. 812; Phip. Ev., 4th Ed., p. 237. **N**

(f) Thus, also, Partnership Books, if accessible to all the partners and if kept under their personal supervision may be received as *prima facie* evidence among them. *Gething v. Keighley*, 9 Ch. D. 547, 551; Lindley, Partnership, 7th Ed., p. 556; Phip. Ev., 4th Ed., p. 237. **O**

(g) But if the entries can be proved to have been fraudulently made, they cannot be admitted in evidence. *Lodge v. Prichard*, 3 De. G.M. and G. 906; Phip. Ev., 4th Ed., p. 237. **P**

(h) Nor can they be admitted in evidence, if it be proved that such entries were made without the knowledge of a particular partner. In such a case, they will not be evidence against such partner. *Hutcheson v. Smith*, 5 Ir. Eq., 117; *Stewart's Case*, 1 Ch. App. p. 587; Phip. Ev., 4th Ed., p. 237. **Q**

(i) The civil law and the laws of some of the countries in the continent of Europe receive such books as evidence to prove the debt against a customer. See Best Ev., 9th Ed., S. 503, p. 418. **R**

(3) Reason of the English rule.

The exclusion of such evidence under the English common law is based on the principle, that to admit such evidence is a violation of the rule that no man shall be allowed to manufacture evidence in favour of himself. See Best Ev., 9th Ed., S. 503, p. 418. **S**

(4) Difference between English and Indian Law.

(a) In England, to make entries in the course of business admissible, they must be shown to have been made contemporaneously with the acts which they relate. See Tay. Ev., 10th Ed., S. 704; Wigm. Ev., 1905 Ed., S. 1524, p. 1891. Whitley Stokes' Anglo-Indian Codes, Vol. II, p. 828. **T**

(N.B.)—This Act contains no such restriction.

(b) Also, in England such entries are evidence only of those things which according to the course of business it was the duty of the person to enter, and are no evidence of independent collateral matters. There is no such restriction under the Indian Act. *Chambers v. Bernasconi*, 1 C. M. and R. 368; Tay. Ev., 10th Ed., S. 695; Wigm. Ev., 1905 Ed., S. 1524, p. 1891. Whitley Stokes' Anglo-Indian Codes, Vol. II, p. 828; see also 25 A. 90 (103, 104) = 22 A.W.N. 207. **U**

(5) Books of account—In what other ways relevant.

(a) Such books may be relevant under S. 32 (2) as statements made by a person in the ordinary course of business, or entries made by him in books kept in the ordinary course of business or in the discharge of professional duty, &c. See S. 32 (2), *supra*. **V**

(b) Such books may also be relevant under S. 159 of the Act to refresh his memory by referring to such books, if they were made by himself at the time of the transaction concerning which he was giving evidence. See S. 159, *infra*. **W**

1.—“*Entries in books of account, regularly kept...are relevant.*”—(Contd.)(6) **Relevant—Meaning of.**

Relevant in this Act means admissible. *Per* Lord Hobhouse, J., in 3 C.W.N. cclxviii (cclxix). X

(7) **Form of entry.**

There is no fixed rule as to the form or language in which the entries are to be made. *North Bank v. Abbot*, 13 Pick 471; see Wigm. Ev., 05 Ed., S. 1531, p. 1898. Y

(8) **Kind of business contemplated.**

(a) No definite rules can be fixed as to the kind of business, the regular books of which may be admitted under the section. See Wigm. Ev., 05 Ed., S. 1547, p. 1905; see also 45 P.R. 1899. Z

(b) Any occupation which makes it necessary for books to be kept as the record of its transactions, the monuments of its daily business,—as factories, foundries, forges, gas-works, banks, factorage, no matter what,—if books are required *ex necessitate rei* to be kept, those books are to be let in under the law for the same purpose and to the same extent that a merchant's or shop-keeper's books are received in evidence. *Per* Lumpkin, J., in *Ganahl v. Shore*, 24 Ga. 17; Wigm. Ev., 05 Ed., S. 1547, p. 1905. A

(9) **Kind of account book contemplated by law.**

(a) Similarly there is no limitation as to the kind of book to be kept; a ledger or day book or any other form of book, if it satisfies the requirements of the section, would be admitted. Wigm. Ev., 05 Ed., S. 1548, p. 1906. B

(b) But a mere individual memorandum is not admissible. Wigm. Ev., 05 Ed., S. 1548, p. 1906. C

(10) **Kinds of entries contemplated by law.**

It is absolutely necessary that the entries must have been made as part of a regular series of entries. Thus, a casual sale of an article not regularly dealt in, nor a casual entry at the beginning of a blank book or at the end of a book already finished and laid aside is not admissible. *Beach v. Mills*, 5 Conn. 496; *Davis v. Sanford*, 9 All. 216; Wigm. Ev., 05 Ed., S. 1549, p. 1907. D

(11) **Entries when to be made.**

(a) The entry need not be made exactly at the time of the occurrence; it suffices if it be within a reasonable time, so that it may appear to have taken place while the memory of the fact was recent, or the source from which a knowledge of it was derived unimpaired. The law fixes no precise instant when the entry should be made. *Per* Sergeant, J., in *Jones v. Long*, 3 Watts 326; Wigm. Ev., 05 Ed., S. 1550, p. 1908; see also 4 C.W.N. 147 (151) (P.C.) = 27 C. 118; 9 C.W.N. 421 (432). E

(b) The rule does not fix any precise time within which they must be made. There is no inflexible rule requiring them to be made on the same day. In this particular, every case must be made to depend upon its own peculiar circumstances, having regard to the situation of the parties, the kind of business, the mode of conducting it, and the time and manner of making the entries. Upon questions of this sort much must be left to the judgment and discretion of the Judge who presides at the trial. *Per* Biglow, J., in *Barker v. Haskell*, 9 Cush. 221; Wigm. Ev., 05 Ed., S. 1550, p. 1908. F

1.—“Entries in books of account, regularly kept....are relevant.”—(Contd.)

(c) A was employed by B at intervals of a week or fortnight, to write up the latter's account books, the latter furnishing him with the necessary information from loose memoranda or orally. *Held* such books cannot be received as evidence under this section. 4 B. 576 (583). But see 4 C.W.N. 147 (151) (P.C.) = 27 C. 118. **G**

(d) Such a book does not come within the designation of books of account regularly kept in the course of business. 4 B. 576 (583). **H**

(e) Such a book is B's private account book entered up casually once a week or fortnight, and with none of the claims to confidence that attach to books entered up from day to day or (as in banks) from hour to hour as transactions take place. 4 B. 576 (583). But see 4 C.W.N. 147 (151) (P.C.) = 27 C. 118. **I**

(f) The latter only are “regularly kept in the course of business.” See Pothier by Evans, I, 463; II, 189, *cited* in 4 B. 576 (583). But see 4 C.W.N. 147 (151) (P.C.) = 27 C. 118. **J**

(g) It would be giving a too limited meaning to this section if it be held that “books of account regularly kept in the course of business” mean books entered up from day to day or from hour to hour as transactions take place. 4 C.W.N. 147 (151) (P.C.) = 27 C. 118. But see 4 B. 576. **K**

(h) The time of making the entries may affect their value, but would not, by the mere fact of the entries not being made from day to day or from hour to hour, make them entirely irrelevant. 4 C.W.N. 147 (151) (P.C.) = 27 C. 118; 9 C.W.N. 421 (432). **L**

(12) Entries, where to be made.

(a) Where all the entries were found on the last page of a book having many pages blank and many torn out, they were held “insufficient” for proof. *Guthrieless v. Ripley*, 98 Ia. 290; 67 N.W. 109; *Cogswell v. Deluce*, 2 Mass. 221; *Mathes v. Robinson*, 8 Mete. 270; *Pratt v. White*, 132 Mass. 477; *Robinson v. Hoyt*, 39 Mich. 405; Wigm. Ev., 05 Ed., S. 1551, p. 1908; 10 W.R. 291. **M**

(b) Unfastened portions of a book, with leaves mutilated or missing, were excluded in evidence. *Robinson v. Dibble's Adm'r*, 17 Fla. 462; *Harrold v. Smith*, 107 Ga. 849, 33 S.E. 640; Wigm. Ev., 05 Ed., S. 1551, p. 1908; 10 W.R. 291. **N**

(c) A set of jama-wasil-haki papers merely fastened together cannot be dealt with as a book; nor can they be described as “kept in the regular course of business.” *Per* Jackson, J. 10 W.R. 291. **O**

(13) Appearance of books.

(a) It is important that the appearance of books in which the entries were made must be honest (*i.e.*, no suspicion of false dealing must be visible on such books. *Caldwell v. McDermitt*, 17 Cal. 466; *Robinson v. Dibble's Adm'r*, 17 Fla. 462; *Harrold v. Smith*, 107 Ga. 849; Wigm. Ev., 05 Ed., S. 1551, p. 1908. **P**

(b) But a mere error would not exclude such books. *Schettler v. Jones*, 20 Wis. 412; Wigm. Ev., 05 Ed., S. 1551, p. 1909. **Q**

(c) Such entries may be excluded when suspicious circumstances exist upon the face of the entries, and these circumstances are not explained by disinterested persons. *Caldwell v. McDermitt*, 17 Cal. 466; Wigm. Ev., 05 Ed., S. 1551, p. 1908. **R**

I.—“*Entries in books of account, regularly kept....are relevant.*”—(Contd.)(14) **Absence of entry in account book.**

- (a) Although this section makes an entry in a book of account relevant, such book is not, by itself, relevant to disprove an alleged transaction by the absence of any entry concerning it. 10 C. 1024. (*N.B.*—The English Law on the point is different. See cases noted below). **S**
- (b) The —, where an entry may naturally be expected to have been made if the transaction had occurred, would raise a presumption that no such transaction occurred. *Bridgewater v. Roxbury*, 54 Conn. 217, 6 Atl. 415; Wigm. Ev., 05 Ed., S. 1531, p. 1898; but see 10 C. 1024; 7 C.J. R. 356; 25 A. 90. **T**
- (c) Thus a book of depositors was admitted to show that a certain person was not a depositor. *State v. McCormick*, 57 Conn. 440; 46 Pac. 777; Wigm. Ev., 05 Ed., S. 1531, p. 1898. **U**
- (d) Thus also a bank's deposit-entries were held evidence that no other sums than those recorded had been received by it. *Bastrop State Bank v. Levy*, 106 La. 586, 31 So. 164; Wigm. Ev., 05 Ed., S. 1531, p. 1898. **Y**
- (e) But an absence of entry in a risk-book, though kept regularly, was held inadmissible to show that the contract was not made. *Sanborn v. Ins and Co.*, 16 Gray 448, 452, 455; Wigm. Ev., 05 Ed., S. 1531, p. 1899. **W**

(15) **Personal knowledge of person making accounts, if necessary.**

- (a) This section simply requires that entries in accounts should, in order to be relevant, be regularly kept in the course of business. 1 B. 610 (616). **X**
- (b) Although it may be important to show that the person making or dictating the entries had, or had not, a personal knowledge of the facts stated, this is a question which, according to the Indian rule of evidence, affects the value, not the admissibility, of the entries. 1 B. 610 (616). **Y**
- (c) When a clerk sitting in a Bombay office keeps in the course of business regular accounts of transactions effected elsewhere, he must necessarily make the entries, not from his personal knowledge, but from information supplied to him by some other person. And such books are not inadmissible on account of the want of the personal knowledge. 1 B. 610 (616). **Z**

(16) **Account books—Practice.**

- (a) Account books tendered to the lower Court and refused to be admitted cannot be referred to in appeal. 3 M.I.A. 1. **A**
- (b) If one party uses the statement of another against him the whole of the statement must be put in evidence. 11 W.R. 525. **B**
- (c) But the Judge is not bound to believe the whole of it. 11 W.R. 525. **C**
- (d) Thus, if the Judge upon the evidence really believes that the payments credited in a plaintiff's books were made, although he disbelieves the entry as to the amount of the debits, there is nothing inequitable in his giving the defendant the benefit of the payments. 11 W.R. 525 (527). **D**
- (e) The Judge is bound to look at the whole of the entries giving credit to such as he believes to be true, and discrediting those which he believes to be false. 11 W.R. 525 (527). **E**

1.—“*Entries in books of account, regularly kept....are relevant.*”—(Contd.).

(f) Where the facts of payments by a firm is distinctly in issue, the firm's account books can only be at best corroborative evidence. 23 W.R. 390. **F**

(g) In such a case the mere statement of the tradesman that the books were regularly kept will not discharge the burden of proof that lies upon him, especially when he can produce better evidence. (*Ibid*). **G**

(h) Documents admissible as evidence under this section are sufficient to answer a claim set up to exemption from what would be the ordinary liability of a tenant. 22 W.R. 549. **H**

(i) Thus in a suit for enhancement of rent, such evidence would be admissible to rebut a presumption arising from uniform payment for 20 years. 22 W R. 549. **I**

(j) But such evidence would not alone be sufficient to charge any one with liability. (*Ibid*). **J**

(k) The Small Cause Court gave plaintiff a decree on his account books and evidence of his book-keeper, who deposed that the books were kept by him from memoranda supplied to him by plaintiff, the entries in the books being made on the days on which the memoranda were supplied. The plaintiff did not himself give evidence in support of his claim, nor was his absence from the witness-box accounted for. *Held* that plaintiff was not entitled to succeed. 63 P.R. 1897. **K**

(l) Under this section it is not a condition precedent to accepting entries in account-books as relevant that it should be proved how the accounts came to be written, and that they were regularly kept in the course of business, though it is necessary that there should be other evidence in support of the liability sought to be established thereby. 45 P.R. 1899. **L**

(m) Where a plaintiff rested his case upon a bond executed by the defendant and upon the recitals contained therein, and the defendant called for the plaintiff's books and sought to show from them that a portion of the moneys covered by the bond had not been advanced:—*Held*, that the books must be admitted *in toto*, and that those items which were in favour of the plaintiff could not be rejected for want of corroboration. 9 A. 718 ; 14 I.A. 142. **M**

(17) **Proof of books of account.**

(a) The regular—requires that the clerks who have kept those accounts, or some person competent to speak to the facts, should be called to prove that they have been regularly kept and to prove their general accuracy. 6 M.I.A. 88 (98). **N**

(b) But the necessity to call such witnesses may be removed by the admission of the other party. (*Ibid*). **O**

A.—EXAMPLES OF BOOKS ADMITTED UNDER THIS SECTION.**(1) Jama-wasil-baki papers—What are.**

—are yearly accounts showing the total rent demandable for the current year, the balance of previous years, the amount collected during the year and the balance due. Field Ev., 6th Ed., p. 156; A.A. and W. Ev., 4th Ed., p. 241. **P**

1. —“*Entries in books of account, regularly kept...are relevant.*”—(Ctd.).

A.—EXAMPLES OF BOOKS ADMITTED UNDER THIS SECTION—(Continued).

(2) **Jumma-wasil-baki papers—Their value as evidence.**

- (a)—do not belong to the class of documents described in S. 35 of the Act ; they only come under this section. 22 W.R. 549. **Q**
- (b) Series of collection accounts or—appearing to be regularly kept may be evidence, and entitled to credit on the same principle as other contemporaneous records made and kept by the party producing them in the ordinary course of his business. 7 W.R. 533. But see 8 W.R. 328 (329). **R**
- (c) Such papers, if proved to have been regularly kept in the course of business, might be put in as corroborative evidence or may be used by the writer to refresh his memory. 7 W.R. 533. **S**
- (d) But jumma-wasil-baki papers are not evidence by themselves ; the mere production of such papers is not enough. 8 C. 926 (931). **T**
- (e) But, coupled with other evidence, these papers often afford a very useful guide to the truth in many cases ; and it is only right that those who have been collecting rent with the assistance of such papers should produce them in Court. 8 C. 926 (931). But see 8 W.R. 328 (329). **U**
- (f) They are not independent evidence of any kind whatever. 8 W.R. 328 (329). **Y**
- (g) Those papers, if admitted at all, could only be admitted to corroborate the testimony of a witness who had knowledge of the facts, and who appeared in the case to prove those facts. 10 W.R. 291 ; but see 8 W.R. 328 (329). **W**
- (h) But such papers may be sufficient evidence against a tenant, if the zemindar files such papers at the citation of the tenant. 10 W.R. 193 ; see also 9 A. 718 = 14 I.A. 142. **X**
- (i) The terms of this section do not give such papers any weight beyond that of corroborative evidence. 10 C.L.R. 545 (546) ; but see 8 W.R. 328 (329). **Y**
- (j) Prior to the Evidence Act these papers would not have been admissible to prove any fact unless some other evidence tending to establish the same fact had also been given. 22 W.R. 549 ; 8 W.R. 280. **Z**
- (k) —are inadmissible as evidence of the amount of rent mentioned therein ; but they may be used to refresh the memory at the time of giving evidence as to the amount of rent payable. 10 C. 248. **A**
- (l) —are really of very little consequence or value, as it is a matter of perfect ease for either party in the suit to produce any number of such papers. 8 W.R. 328 (329). **B**
- (m) It is doubtful whether such papers would be admissible even as corroborative evidence strictly speaking. 8 W.R. 328 (329). But see 7 W.R. 533 ; 8 C. 926 ; 10 W.R. 291 ; 10 W.R. 193 ; 10 C.L.R. 545. **C**

(3) **Evidence of variation of rent—Jumma-wasil-baki papers.**

- (a) Zemindar's papers filed or attested by gomastahs are not conclusive proof of variation unless it can be shown, not merely that the jumma-wasil-baki and similar papers show a varying rate, but that the ryot has paid at a varying rate. 5 W.R. (Act X, Rulings), 83. **D**

1.—"Entries in books of account, regularly kept....are relevant."—(Ctd).

A.—EXAMPLES OF BOOKS ADMITTED UNDER THIS SECTION—(Continued).

- (b) Otherwise, every ryot would be at the mercy of a zemindar or his agents.
5 W.R. (Act X Rulings), 83 (84). E
- (c) The best evidence is required to prove a document so naturally open to suspicion as----. 5 W.R. 242. F
- (d) But if such papers are produced by the zemindar at the citation of the defendant himself, they are not merely corroborative but good and sufficient evidence as against the defendant. 10 W.R. 193. G

(4) Jumma-bandee papers—What are.

"—show the quantity of land held by each cultivator, its different qualities (i.e., what is grown upon it) the rate of rent for each kind of land, the total rent for all the land of that particular kind in each cultivator's possession, and lastly the grand total for all the land of every kind held by him." See Field on Ev., 6th Ed., p. 158; A.A. and W. Ev., 4th Ed., p. 243. H

(5) Jumma-bundee papers—Their value as evidence.

- (a) Jumma-bundee papers can only be used as corroborative evidence. 14 W.R. 474. I
- (b) They can never be treated as independent evidence of any contested fact. 9 W.R. 451. J
- (c) Such papers are valueless without the personal testimony of the *putwarree*. 22 W.R. 256. See also 20 W.R. 142. K
- (d) Where increased rent is imposed in the course of settlement proceedings, the Collector's jumma-bundee must show the consent of all the ryots before they can be held to be bound by it. 22 W.R. 540. L
- (e) But where the tenants voluntarily sign jumma-bundee papers signifying the amounts of rents payable by them, they may be bound by them. 23 W.R. 436. M
- (f) Jumma-bundee papers filed by a malik in butwarra-proceedings to which the tenant is not necessarily a party, cannot be used as evidence against such tenant in a suit for arrears of rent. 20 W.R. 171. N
- (g) An auction purchaser of a *Khas Mahal* cannot sue the tenant for enhanced rent upon a jumma-bundee to the terms of which the tenant has not consented. 20 W.R. 207. O
- (h) Jumma-bundee papers for the year in respect of which rent is claimed, made out by the officers of the person claiming rent, cannot be evidence of his right to that which they set forth. 20 W.R. 142. P
- (i) But the evidence of the batwari (as being the officer usually charged with the duty of collecting the rent) as to the amounts collected in previous years, corroborated by the jumma-bundees of those years, would be conclusive in respect of the claim. 20 W.R. 142. Q

1. "Entries in books of account, regularly kept....are relevant."—(Ctd.).

A.—EXAMPLES OF BOOKS ADMITTED UNDER THIS SECTION—(Continued).

(6) Canoongoe papers.

(a) As to how far and when—are admissible as evidence for the zemindar as to the rate of rent paid by the ryot. See 7 W.R. 533; 2 W.R. (Act X Rulings), 13; 8 W.R. 517. **R**

(b) Canoongoe papers and proceedings of settlement officers are good evidence in questions of pergunnah rates, standards of measurement, and other such like statistics. 2 W.R. (Act X Rulings), 13. **S**

(c) If canoongoe papers are shown to have been properly kept, and to have been brought from the proper quarter, they ought to be received, under certain circumstances, as evidence *quantum valeat*. 8 W.R. 517 (518). **T**

(d) But they cannot, in the absence of evidence to show what they are and that they came out of proper custody, be received in evidence. 8 W.R. 517. **U**

(e) Before such papers can be admitted as evidence against a party, it must be shown how they can be used against such party. 8 W.R. 517. **Y**

(7) Jalbakee papers.

—, brought from the plaintiff's own possession, cannot be used against the defendant without showing that he had in some way agreed to them. 9 W.R. 274. **W**

(8) Issumnuvissee papers.

(a) —, if properly supported and proved, are only *prima facie* evidence of the facts stated therein, until rebutted. 9 W.R. 158 (159). See also 8 B.L.R. 504 = 14 M.I.A. 259; 8 W.R. 292. **X**

(b) Such papers were rejected as insufficient of proof, in the absence of satisfactory evidence as to whence the information in those papers was derived. 8 W.R. 232. **Y**

(c) In a suit by a purchaser of a putni at a sale for arrears of rent for the enhancement of rent, issumnuvissee papers are not sufficient evidence to entitle the plaintiff to enhance the rent claimed by him, especially in the face of satisfactory oral evidence of long uninterrupted possession. 8 B.L.R. 504 (P.C.) = 14 M.I.A. 259. **Z**

(9) Behari and Awargha papers.

—are simply corroborative evidence, and cannot be used as independent proofs of any fact stated therein. 9 W.R. 239. **A**

(10) Hustabood.

A—filed under Reg. VIII of 1800 (B.C.), is no evidence against third parties. See 9 W.R. 105. **B**

(11) Hat-chitta book—Evidence against vendors.

A hat-chitta book is a document kept especially as a security for the vendor; and in the absence of fraud, it must be considered binding upon them. 1 Ind. Jur. (N.S.), 358. **C**

1.—“*Entries in books of account, regularly kept....are relevant.*”—(*Id.*).

A.—EXAMPLES OF BOOKS ADMITTED UNDER THIS SECTION—(*Continued.*)

(12) **Mashkabari and rokar books.**

—prepared on examination of khata books, admissibility of, in the absence of khata books. See 9 C.W.N. 421=32 C. 582. **D**

(13) **Banker's books.**

(a) The production of banker's books with the entries of the items constituting the demand, kept according to the established custom of *mahajans* in this country, is not of itself sufficient evidence to establish a claim. 5 M.I.A. 432. **E**

(b) In order to establish such a claim, strict proof of the debt is required. (*Ibid.*) **F**

(14) **Banker and Customer—Pass books, value of.**

(a) The pass-book operates as an admission against either the Banker or the Customer. *Gaden v. Newfoundland Bank*, 1899, A.C. 281 (286); Phip. Ev., 4th Ed., p. 349. **G**

(b) Such book is *prima facie* evidence against the banker of the state of the customer's account at the date on which the entry was made. (*Ibid.*) **H**

(c) But the Banker is not estopped from correcting mistakes therein. *Gordon v. Bank of Syria*, Times, Dec. 7, 1896; Phip. Ev., 4th Ed., p. 349. **I**

(d) But this right of the Banker to correct mistakes in the pass-book is subject to the condition that the customer has not been induced thereby to alter his position. *Brighton Empire v. Lond. Cy. Bank*, Times, Mar. 24, 1904; *Skyring v. Greenwood*, 4 B. and C. 281; Phip. Ev., 4th Ed., p. 349. **J**

(e) As against the customer also the pass-book is evidence, though not conclusive. *Williamson v. Williamson*, L.R., 7 Eq., 542; *Chatterton v. Lond. Cy. Bank*, 39 L. Jo. 168; Phip. Ev., 4th Ed., p. 349. **K**

(15) **The following books have been admitted as books kept in regular course of business.**

(a) A memorandum of delivery of copy of a bill by a clerk who usually made such a memorandum upon the copy kept. *Chamzneys v. Pech*, 1 Stark 326; Wigm. Ev., 1905 Ed., S. 1523, p. 1890. **L**

(b) An endorsement of service on an order of the aldermen, the writer's duty being to serve orders and endorse them when served. *R. v. Cope*, 7 C. and P. 726; Wigm. Ev., 05 Ed., S. 1523, p. 1890. **M**

(c) A physician's entries of services rendered. *Bridgewater v. Roxbury*, 54 Conn. 217, 6 Atl. 415; Wigm. Ev., 05 Ed., S. 1523, p. 1890. **N**

(d) A notary's entries. *Sassar v. Formers' Bank*, 4 Md. 418, Wigm. Ev., 05 Ed., S. 1523, p. 1890. **O**

(e) A certificate of a marine inspector as to a vessel's condition. *Perkins v. Augusta Co.*, 10 Gray 324; Wigm. Ev., 05 Ed., S. 1523, p. 1890. **P**

(f) A weather-record at an insane asylum. *De Armond v. Neasmith*, 32 Mich. 233; Wigm. Ev., 05 Ed., S. 1523, p. 1890. **Q**

“*Entries in books of account, regularly kept . . . are relevant.*”—(Cld.).

A.—EXAMPLES OF BOOKS ADMITTED UNDER THIS SECTION—(Concluded).

- (g) An insurance-agent's register of policies. *Roberts v. Rice*, 69 N.H. 472, 45 Atl. 237; Wigm. Ev., 05 Ed., S. 1523, p. 1891. **R**
- (h) A notary's record of protests. *Halliday v. Martinet*, 20 John 172; Wigm. Ev., 05 Ed., S. 1523, p. 1891. **S**
- (i) A cashier's notice of non-payment of note. *Nichols v. Goldsmith*, 7 Wend. 161; Wigm. Ev. 05 Ed., S. 1523, p. 1891. **T**
- (j) An entry in a lawyer's record book of the proceedings in a cause. *Leland v. Cameran*, 31 N.Y. 121; Wigm. Ev., 05 Ed., S. 1523, p. 1891. **U**
- (k) A receipt by a sheriff for money paid by a judgment debtor in redemption of land sold on execution. *Livingston v. Arnoux*, 56 N.Y. 518; Wigm. Ev., 05 Ed., S. 1523, p. 1891. **Y**
- (l) An attorney's books. *Evher v. Mayor*, 67 N.Y. 77; Wigm. Ev., 05 Ed., S. 1523, p. 1891. **W**

2.—“*But such statements shall not alone be sufficient evidence.*”

(1) Entries under this section and S. 32—Necessity for corroboration.

- (a) Entries in accounts relevant only under this section are not by themselves alone sufficient to charge any person with liability; corroboration is required. 6 Bom. L.R. 50 (51) = 28 B. 294; see also 22 W.R. 549; 5 M. L.A. 432; 1 A.W.N. 65; 18 A. 92; 2 Agra 308; 22 W.R. 390; 5 W.R. (P.C.), 29 1, M.L.A. 47; Marsh 219 = 1 Hay 569; 2 Agra 308. **X**
- (b) But, where accounts are relevant also under S. 32 (2) of the Act, they are in law sufficient evidence in themselves, and the law does not, as in the case of accounts admissible only under this section require corroboration. 6 Bom. L.R. 50 = 28 B. 294. **Y**
- (c) Entries in account may in the same suit be relevant under both the sections; and in that case the necessity for corroboration does not apply. 6 Bom. L.R. 50 = 28 B. 294. **Z**

(2) Effect of account books.

One party, by merely producing his own books of account, cannot bind the other. 5 W.R. 29 (P.C.) = 1 M L.A. 47. **A**

(3) Payment by banking firm distinctly in issue—Value of account books.

- (a) Where the facts of payments by a banking firm is distinctly put in issue, the books of the firm can at most be corroborative evidence. 23 W.R. 390. **B**
- (b) In such a case the more general statement of the banker to the effect that his books were correctly kept is not sufficient to discharge the burden of proof that lies upon him. 23 W.R. 390. **C**
- (c) It is particularly the case if he has the means of producing much better evidence. 23 W.R. 390. **D**

(4) Evidence of separation of family—Account books.

- (a) The evidence of members of the family would be the best evidence as to whether the parties were joint or separate. 10 W.R. 148. **E**
- (b) The account books would be simply corroborative. 10 W.R. 148. **F**

2. —“*But such statements shall not alone be sufficient evidence.*”—(Cld.)

(5) **Factory-books—Evidence.**

(a) Factory-books cannot be used as independent primary evidence of the payment to which the entries refer. 23 W.R. (Cr.) 27. **G**

(b) The books of a creditor are not admissible as evidence against his debtor to prove the debt, unless there is other evidence of the debt. Marsh 219—1 Hay 569. **H**

35. An entry in any public or other official book, register, or record¹, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty², or by any other person in performance of a duty, specially enjoined by the law of the country in which such book, register, or record is kept, is itself a relevant fact.

Relevancy of entry in public record, made in performance of duty.

(Notes).

1.—“*Entry in any public or other official book, register or record.*”

(1) **Principle of the section.**

(a) The reasons on which such books are received in evidence are .—

- (1) that the entries are made by the authorised agent of the public in the course of official duty,
- (2) that the facts recorded are of public interest or notoriety, and
- (3) that it would be almost impossible to prove facts of a public nature by means of actual witnesses examined upon oath. See Tay. Ev., 10th Ed., S. 1591; Best Ev., S. 219; Greenleaf Ev., S. 483; Phip. Ev., 309 and 313; Starkie Ev., 272, 273; A.A. and W., 4th Ed., p. 244. See also *Doc v. Andrews*, 15 Q.B. 756; *Sturla v. Fraccia*, 5 App. Cas. 623 (644); *Lyell v. Kennedy*, 56 L.J. 647. **I**

(v) The principle on which this section is based is the circumstance that such records have been made by authorised and accredited agents appointed for the purpose, and partly also the publicity of the subject-matter to which they relate. See Taylor Ev., S. 1429; Best Ev., 8th Ed., S. 219, cited in 23 O. 366 (370). **J**

(c) The law reposes such a confidence in public officers that it presumes they will discharge their several trusts with accuracy and fidelity; and therefore whatever acts they do in discharge of their public duty may be given in evidence and shall be taken to be true, under such a degree of caution as the nature and circumstances of each case may appear to require. *Per Curiam*, in *R. v. Aickles*, 1 Leach Cr. L., 3d Ed., 436; Wigm. Ev., 5th Ed., S. 1632, p. 1978. See also *per Parke B.* in *Irish Society v. Bishop of Derry*, 12 Cl. and F. 468. **K**

(i) It depends upon the public duty of the person who keeps the register to make such entries in it, after satisfying himself of their truth. *Per Earle, J* in *Doe v. France*, 15 Q.B. 758; *Irish Society v. Bishop of Derry*, 12 Cl. and F. 468; Wigm. Ev., 5th Ed., S. 1632, p. 1978. **L**

1.—“Entry in any public or other official book, register or record.”

—(Continued).

(e) “Such writings (those which the law requires to be kept for the public benefit) are admissible in evidence on account of their public nature, though their authenticity be not confirmed by the usual tests of truth, namely, the swearing and the cross-examination of the persons who prepared them. They are entitled to this extraordinary degree of confidence partly because they are required by law to be kept, partly because their contents are of public interest and notoriety, but principally because they are made under the sanction of an oath of office, or at least under that of official duty, by accredited agents appointed for that purpose. Moreover, as the facts stated in them are entries of a public nature it would often be difficult to prove them by means of sworn witnesses.” *Per* Wayne, J. in *Garner v. Kelt*, 12 How. 472; Wigm. Ev., 55 Ed., S. 1632, p. 1979. **M**

(f) “Official Registers, or books kept by persons in public office, in which they are required to write down particular transactions, or to enrol or record particular contracts or instruments, are generally admissible in evidence, notwithstanding their authenticity is not confirmed by those usual and ordinary tests of truth the obligation of an oath and the power of cross examining the persons on whose authority their truth and authenticity may depend. This has been said to be so because they are required by law to be kept, because the entries in them are of public interest and notoriety, and because they are made under the sanction of an oath of office or in the discharge of an official duty.” *Per* Fowler, J., in *Ferguson v. Clifford*, 37 N.H. 85 (95); Wigm. Ev., 55 Ed., S. 1632, p. 1979. **N**

(2) Conditions of admissibility under the section.

To render a document admissible under this section, three conditions must be satisfied. First of all, the entry that is relied upon must be one in any public or other official book, register, or record; secondly, it must be an entry stating a fact in issue or a relevant fact; and, thirdly, it must be made by a public servant in the discharge of his official duty, or any other person in performance of a duty specially enjoined by the law. 23 C. 366 (366); see also 18 C. 534. **O**

(3) English and Indian Law—Difference.

(a) In England, to render entries in public books or registers admissible, they must have been made promptly, or at least without such long delay as to impair their credibility and in the mode required by law, if any has been prescribed. This section contains no such rule. *Taylor Ev.*, 10th Ed., S. 1594; *Whitley Stokes' Anglo-Indian Codes*, Vol. II, p. 829. **P**

(b) The English Law speaks only of official registers or books. To render any document admissible in evidence as an official register it must be one which the law requires to be kept for public benefit. The Indian Act follows and somewhat extends this rule of English Law. The book or register might be either a public or an official one. See *Field Ev.*, 6th Ed., pp. 601—604; *A.A. and W. Ev.*, 4th Ed., p. 245; *Tay Ev.*, 10th Ed., S. 1592, p. 1145; *Phip. Ev.*, 4th Ed., p. 309. **Q**

1 -- "Entry in any public or other official book, register or record."

--(Continued).

(4) "Public or other official book"—Meaning.

(a) This Act does not contain any definition of a——. But reference may be made to S. 74 of the Act which states what are public documents. 23 C. 366 (369). **R**

(b) The word "public" is ambiguous. It may signify "open to all," "capable of being known or observed by all"; or it may signify "having an interest for persons in general"; or it may signify "made or done by an officer of the Government." These are decidedly different senses. So far as the term may indicate a general principle, it is obvious that the principle may result in different rules according to the sense in which the word "public" is to be interpreted. Wigm. Ev., 05 Ed., S. 1630, p. 1976. **S**

(c) "I understand a public document to mean a document that is made for the purpose of the public making use of it and being able to refer to it. I think the very object of it must be that it should be made for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards." *Per* Lord Blackburn, in *Sturla v. Freccia*, L.R. 5 App. Cas. 623; Wigm. Ev., 05 Ed., S. 1632, p. 1980. **T**

(d) The word "official" indicates the official character of the person making the entries as the reason for their admissibility. Wigm. Ev., 05 Ed., S. 1630, p. 1976. **U**

(5) Scope of section.

(a) This section relates to that class of cases where a public officer has to enter in a register or other book some actual fact, which is known to him; as, for instance, the fact of a death or a marriage. 9 C. 431 (434). But see 20 C. 940 (942); 7 L.A. 63 (P.C.)=5 C. 744=6 C.L.R. 593. **Y**

(b) The exceptional privilege given to public records by this section cannot be extended to entries which a public officer is not expected to, and is not permitted to make. 25 A. 90 (104); 21 B. 695 (698). But see also 7 L.A. 63 (P.C.)=5 C. 744=6 C.L.R. 593. **W**

(c) The presumption as to the truth and accuracy of public records cannot be extended to entries which were never intended to find a place in such records. 22 A.W.N. 207=25 A. 90 (103). 21 B. 695 (698). **X**

(d) The registers must be kept by the officer under a legal duty to keep them. Registers kept under private authority or for the information of private individuals do not come under this section. See *Henry v. Leigh*, 9 Camp. 499; *R v. Debenham*, 2 B. and Ald. 185; *Huntley v. Donovan*, 15 Q.B. 96; *Merrick v. Wakeley*, 8 A. and E. 170; Phip. Ev., 4th Ed., p. 313. **Y**

(e) Thus *parish registers*, which were kept under a legal duty were admitted in evidence, whereas *nonconformist* and other *non-parochial registers* which, until recently, were not kept under a legal duty, were not received in evidence unless admissible on other grounds. See Phip. Ev., 4th Ed., p. 313. **Z**

1.—“Entry in any public or other official book, register or record.”

—(Continued).

- (f) Entries of matters which it is not the duty of the officer to record, are not admissible in evidence. Thus entries in a parish register of baptisms, etc., performed in a neighbouring parish were rejected. *Lyell v. Kennedy*, 14 App. Cas. 437; *Farrell v. Maguire*, 3 Ir.L.R. 187; *Doe v. Bray*, 8 B. and C. 813; Phip. Ev., 4th Ed., p. 315; see also 25 A. 90 (104) = 22 A.W.N. 207; 21 B. 695 (698). **A**

(6) Entries, how to be made—English Law.

- (a) The entries must be made in the mode required by law, if any has been prescribed. *Doe v. Bray*, 8 B. and C. 813; *Walker v. Wingfield*, 18 Ves. 443; Tay. Ev., 10th Ed., S. 1594, p. 1146. **B**
- (b) Where it was the practice for a certain officer to sign the entries made in the official books, it was held that entries not signed by such officer were not admissible in evidence, although such entries were in the hand-writing of such officer. *Fox v. Bearlock*, 17 Ch. D. 429; *Lancum v. Lovell*, 6 C. and P. 437; Phip. Ev., 4th Ed., p. 314. **C**
- (c) Where the practice was not to sign the entries, unsigned entries are receivable in evidence. *Lauderdale Peerage*, 10 App. Cas. 692; Phip. Ev., 4th Ed., p. 326. **D**

(7) Entries, by whom to be made.

- (a) The entries contemplated by this section must be made by the person whose duty it is to make them, or under the direction of such person. *Doe v. Bray*, 8 B. and C. 813; Phip. Ev., 4th Ed., p. 314; Tay. Ev., 10th Ed., S. 1594, p. 1146. **E**
- (b) Thus entries in certain public books made indiscriminately by any of the clerks in the office, and not by some specified person in the discharge of a public duty, were held not receivable in evidence. *Henry v. Leigh*, 3 Camp. 499. See also *Doe v. Bray*, 8 B. and C. 813; Phip. Ev., 4th Ed., p. 314. **F**
- (c) Thus also a minister's entry of baptism, which took place before such minister had any connection with the parish, and of which he received information from the clerk, was held not admissible. Tay. Ev., 10th Ed., S. 1594, p. 1146. **G**

(8) Entries, whether originals are necessary.

It is not absolutely necessary that a register, in order to be admissible under this section, should be a strictly *original document*. Thus a *parish register* which was transcribed every three months from a day-book wherein the entries were made immediately after the events may be received. *Walker v. Wingfield*, 18 Ves. 443, *May v. May*, 2 Stra. 1073; *Lee v. Meacock*, 5 Esp. 177; Phip. Ev., 4th Ed., p. 315. **H**

9) Nature of entry contemplated by law.

- (a) A single document may be a public record within the meaning of this section, and a report made by an officer in the discharge of his duty as such officer is accordingly admissible as evidence 11 M.L.J. 315 (317). **I**
- (b) “To entitle a book to the character of an official register it is not necessary that it be required by an express statute to be kept, nor that the nature of the office should render the book indispensable; it is sufficient that it be directed by the proper authority to be kept.” *Per Terry, J* in *Kybury v. Perkins*, 6 Cal. 676; Wigm. Ev., 05 Ed., S. 1633, p. 1981. **J**

1.—“Entry in any public or other official book, register or record.”

—(Continued).

- (c) “To entitle them to admission it is not necessary that a statute requires them to be kept. It is sufficient that they are kept in the discharge of a public duty.” *Per* Strong, J., in *Evanson v. Gunn*, 99 U.S. 660; Wigm. Ev., 05 Ed., S. 1633, p. 1981. **K**

(10) Mode of preparation of entries—Presumption as to.

When documents are found to be recorded as being properly made up, and when they are found to be acted upon as authentic records, the rule of law is to presume that everything had been rightly done in their preparation, unless the contrary appears. 5 C. 744 (752) (P.C.)=7 I.A. 63=6 C.L.R. 593. **L**

(11) Entries, of what facts evidence.

- (a) A public register is evidence of the particular transaction which it was the duty of the officer to record. *Doe v. Andrews*, 15 Q.B. 756; Phip. Ev., 4th Ed., p. 315; see also 22 A.W.N. 207=25 A. 90 (103, 104). **M**
- (b) It is not necessary that the officer making the entries of any event must have personal knowledge of the occurrence of such event. (*Ibid.*) **N**
- (c) This section says in effect “Any entry in any official record stating a fact in issue or relevant fact made by a public servant in the discharge of his official duties is itself a relevant fact.” Thus, where the entry states a relevant fact, the entry itself becomes, by force of the section, a relevant fact, that is to say; it may be given in evidence as a relevant fact, because, being made by a public officer, it contains an entry of a fact which is relevant. 5 C. 744 (P.C.)=7 I.A. 63=6 C.L.R. 593. **O**

(12) Errors, erasures, alterations—Effect.

—, and such other minor irregularities may affect the weight of the evidence, but not the admissibility of such entries. *Lyell v. Kennedy*, 14 App. Cas. 437 (449); Phip. Ev., 4th Ed., p. 315. **P**

(13) Interest of the officer—Effect.

The fact that the entries are in the interest of the officer making the entry can only affect the weight, and not the admissibility, of such entries. See *Irish Society v. Derry*, 12 C. and F. 641; *Sturla v. Freccia*, 5 App. Cas. 623; Phip. Ev., 4th Ed., p. 315. **Q**

(14) Absence of entry—Effect.

- (a) This section does not make the public book evidence to show that a particular entry has not been made in it. 7 C.L.R. 356 (358); but see Wigm. Ev., 1905 Ed., S. 1633, p. 1982, noted *infra*. **R**
- (b) A public record is not, by itself, relevant to disprove an alleged transaction by the absence of any entry concerning it in such record. 10 C. 1024. See also 7 C.L.R. 356 (358); 22 A.W.N. 207=25 A. 90 (101). **S**
- (c) The record of rights, being a record of existing custom, is not admissible in evidence to show by its silence that a particular custom does not exist in a village. *Per* Stanley, C.J. 22 A.W.N. 207=25 A. 90 (101). See also 10 C. 1024. **T**
- (d) If a duty exists to record certain matters when they occur, and if no record of such matters is found, then the absence of any entry about them is evidence that they did not occur. Wigm. Ev., 05 Ed., S. 1633 (6), p. 1982. **U**

1.—“Entry in any public or other official book, register or record.”

—(Continued).

(e) The absence of a person's name in a Law List published by authority is *prima facie* evidence that such person was not duly qualified according to law. *R. v. Wenham*, 10 Cox. 222; Phip. Ev., 4th Ed., p. 325. **Y**

(f) The absence of the name of a person from a medical register may be evidence that such person was not a duly registered officer. See *Tay. Ev.*, 10th Ed., S. 1638, p. 1177. **W**

(15) Entry in a public register or record kept outside British India.

As to whether this section applies to an— —. See 23 M. 499 (503). **X**

(16) Colonial registers—English Law.

(a)—are receivable in evidence upon proof of the facts required for their admissibility *Abbott v. Abbott and Godoy*, 20 L.J.P. and M. 57; *Tay. Ev.*, 10th Ed., S. 1593, p. 1145. See also *Evans v. Ball*, 38 L.T. 141; Phip. Ev., 4th Ed., p. 314. **Y**

(b) Such registers may be admitted on proof that they are required to be maintained, either by the law of the country to which they belong, or by the law of this country. See *Tay. Ev.*, 10th Ed., S. 1593, p. 1146. **Z**

(17) Foreign registers—English Law.

(a) A similar rule obtains as regards foreign registers. See *Huet v. Le Mesurier*, 1 Cox. Ch. 275; Dufferin Peer, 1848, 2 H.L.C. 47; *Tay. Ev.*, 10th Ed., S. 1593, p. 1146; Phip. Ev., 4th Ed., p. 314. **A**

(b) An official register made by a foreign officer is admissible as well as a register made by a domestic officer. See *Condit v. Blackwell*, 21 N.J. Eq. 193; Wigm. Ev., 5th Ed., S. 1633, p. 1981. **B**

(c) There is no ground of distinction, supposing the register had been kept by order of a competent authority, between registers kept in a foreign country and those kept in this country. *Per* Dr. Lushington, in *Cooke v. Cooke*, 1 Curt 755; *Tay. Ev.*, 10th Ed., S. 1593, p. 1146. **C**

(18) Extracts from the above registers—English Law.

In the case of foreign and colonial registers, extracts from them are also admissible in cases in which the originals are receivable. See *Tay. Ev.*, 10th Ed., S. 1593, p. 1146. **D**

(19) Identity of parties—Necessary to be proved.

The—mentioned in the register or record must always be proved independently. *Sayer v. Glossop*, 2 Ex. 409; Phip. Ev., 4th Ed., p. 317; A. A. and W. 4th Ed., p. 251. **E**

(20) Mode of proving such identity.

(a) In the case of marriage, such identity may be proved by calling the minister, clerk, or attesting witness, or others present, or by proving their handwriting. See *Sayer v. Glossop*, 2 Ex. 409; Roscoe, N.P. Ev., 124; A. A. and W. 4th Ed., p. 251; Phip. Ev., 4th Ed., p. 317. **F**

(b) Photographs may also be used for the purpose of proving identity. *R. v. Tolson*, 4 F. and F. 103; Ros. N.P. 126; A.A. and W., Ev., 4th Ed., p. 251; Phip. Ev., 4th Ed., p. 317. 3 C.W.N. lxxvii. But see *Frith v. Frith*, L.R.P.D. 74. **G**

(c) Mere similarity of names has been held sufficient evidence of identity. *Hubbard v. Lees*, L.R. 1 Ex. 255. But see *Miller v. Wheatley*, 28 L.R. Ir. 144; Phip. Ev., 4th Ed., p. 317. **H**

1.—“Entry in any public or other official book, register or record.”

—(Continued).

A.—EXAMPLES OF ENTRIES IN PUBLIC BOOKS, ETC.

(1) Certain Acts have expressly declared that certain entries shall be evidence of certain particular facts stated in them.

- (a) A copy of an entry given under S. 9, of Act VI of 1886 (Births, deaths, and marriages) shall be admissible in evidence for the purpose of proving the birth, death or marriage to which the entry relates. See S. 9 of Act VI of 1886. **I**
- (b) So also a copy of an entry given under S. 35 of the same Act is admissible in evidence for the purpose of proving the birth, baptism, naming, dedication, death, burial, or marriage to which the entry relates. See S. 35 of Act VI of 1886. **J**
- (c) A certified copy of an entry in a marriage-register kept under the Indian Marriage Act will be received as evidence of the marriage purporting to be so entered. See S. 80 of Act XV of 1872 (Christian Marriage). **K**
- (d) The registers of marriages mentioned in S. 6 of the Parsi Marriages and Divorces Act shall be evidence of the truth of the statements contained in them. See S. 8 of Act XV of 1865 (Parsi Marriages and Divorces). **L**
- (e) The Marriage Certificate Book mentioned in S. 14 of the Special Marriage Act shall be admissible as evidence of the truth of the statements contained in such book. See S. 14 of Act III of 1872 (Special Marriage). **M**
- (f) A certificate under the common seal of the Company specifying any shares, or stock held by any member of a Company shall be *prima facie* evidence of the title of the member to the share or shares or stock therein specified. See S. 54 of Act VI of 1882 (Companies). **N**
- (g) A copy of the report of any Inspectors appointed under the Indian Companies Act, authenticated by the seal of the Company into whose affairs they have made inspection, shall be admissible in any legal proceeding as evidence of the opinion of the Inspectors in relation to any matter contained in such report. See S. 87 of Act VI of 1882 (Companies). **O**
- (h) Evidence of proceedings of General Meeting of Company—Admissibility. See S. 92 of Act VI of 1882 (Companies). **P**
- (i) Where any Company is being wound up, all books, accounts, and documents of the Company and of the liquidators shall, as between the contributories of the Company, be *prima facie* evidence of the truth of all matters purporting to be therein recorded. See S. 198 of Act VI of 1882 (Companies). **Q**
- (j) Copies of entries given under S. 57 of the Indian Registration Act is admissible for the purpose of proving the contents of the original documents. See S. 57 of Act III of 1877 (Registration). **R**
- (k) Certified copies given under S. 19 of Act XXI of 1860 (Registration of Literary, Scientific and Charitable Societies) are *prima facie* evidence of the matters therein contained in all legal proceedings whatever. See S. 19 of Act XXI of 1860 (Registration of Literary, Scientific and Charitable Societies). **S.**

1.—“Entry in any public or other official book, register or record.”

—(Continued).

A.—EXAMPLES OF ENTRIES IN PUBLIC BOOKS, ETC.

—(Continued).

(l) Certified copies of entries in a book of registry kept under S. 3 of Act XX of 1847 (Copyright) shall be *prima facie* proof of the proprietorship or assignment of copyright or license as therein expressed, but subject to be rebutted by other evidence. See S. 3 of Act XX of 1847 (Copyright) Cf. also The Copyright Act (1842) (5 and 6 Vic., Ch. 45), S. 11. T

(m) An office copy of a declaration under the Printing-presses and Books Act is *prima facie* evidence as against the person whose name shall be subscribed to such declaration, that the said person was printer or publisher of every portion of every periodical work whereof the title shall correspond with the title of the periodical work mentioned in the declaration. See S. 7 of Act XXV of 1867 (Printing-presses and Books). U

(n) Other registers, &c., directed to be kept by the Indian Legislature are:—

- (i) Register of British Ships. See Act X of 1841, S. 4.
- (ii) Records of Rights. See Act XVII of 1887; Act III of 1901 (N.W.P.).
- (iii) Settlement Record. See Reg. (Bengal) VII of 1822, Cl. 9, S. 9.
- (iv) Register of Tenures. See Act II of 1869 (B.C.).
- (v) Registers of Common and Special Registry. See Act XI of 1859.
- (vi) Log Books. See Act I of 1859; and 17 and 18, Vic. Ch. 104. Y

(2) *Wajib-ul-arz*—Admissibility of.

(a) On the question of the existence of a special custom the *wajib-ul-arz* or village administration papers, directed to be made by the Legislature and ascertaining and recording usages of the kind of custom in question, may be received in evidence under this section. In such a case it does not matter even if such papers had been prepared by the Settlement Officer's subordinates and not by the officer himself as required by the Legislature. 5 C. 744=6 C L.R. 593=7 I.A. 63; 9 C. 586; 3 C.L.J. 594=3 A.L.J. 415=8 Bom. L.R. 402=10 C.W.N. 730=28 A. 488 (P.C.); 2 A. 876 (F.B.); 20 C. 940; 1 O.C. 301 (306). But see 4 O.C. 71 (76); 12 A. 328 (335). W

(b) The term “*wajib-ul-arz*” is applied to what is considered to be the most important document contained in the official records relating to the village administration. 3 C.L.J. 594=3 A.L.J. 415=8 Bom. L.R. 402=10 C.W.N. 730=28 A. 488; 15 C. 20 (P.C.)=14 I.A. 127. X

(c) Entries in them properly made and authenticated by the signatures of the officers who made them, are admissible in evidence under this section, in order to prove a family custom of inheritance, or under S. 48 as the record of opinions as to the existence of such custom by persons likely to know of it. 3 C.L.J. 594=3 A.L.J. 415=8 Bom. L.R. 402=10 C.W.N. 730=28 A. 488 (P.C.); see also 8 O.C. 94 (102). Y

(d) But such evidence is open to be rebutted by any one disputing such custom. 2 A. 876 (F.B.) Z

1.—“Entry in any public or other official book, register or record.”

—(Continued).

A.—EXAMPLES OF ENTRIES IN PUBLIC BOOKS, ETC.

—(Continued).

(e) The *wajib-ul-arz* is to be regarded rather as an official record of usages or agreements than as a contract. N.W.P. (1866—67), p. 128; N.W.P. (1870), p. 395; 2 A. 876 (879). But see 1 A. 563; 1 A. 567; 5 C. 20 (P.C.) = 14 I.A. 127. A

(f) Hence such document is entitled to be received as evidence of custom although it does not contain the attestation or signature of the sharers. N.W.P. (1870), p. 395; 2 A. 876 (879); but see 1 A. 563; 1 A. 567. B

(g) A *wajib-ul-arz* is generally more valuable as a record of the opinion of persons presumably acquainted with the custom than as an official record of the custom. 8 O.C. 94 (102). C

(h) Although as an official village record it is always admissible in evidence, yet its weight may be very slight or considerable according to circumstances. 2 C.W.N. 737 (P.C.) = 26 C. 81 = 25 I.A. 161. D

(i) Entries in a *wajib-ul-arz*, however important they may be as evidence of a custom, are not conclusive evidence of such custom. 12 A. 328 (335) (F.B.); 4 O.C. 71 (76); (5 C 744 (P.C) = 6 C.L.R. 593 = 7 I.A. 63, D.) E

(3) *Wajib-ul-arz*—Presumption as to.

It may be presumed of a *wajib-ul-arz*, prepared under Reg. VII of 1822 or under the circular orders of the Chief Commissioner, until the contrary is shown, that it was regularly prepared and that it is a correct record of a local custom. 1 O.C. 301 (306). F

(4) *Wajib-ul-arz*—Custom of pre-emption.

(a) The *wajib-ul-arz* is a document of a public character, prepared with all publicity, and must be considered as *prima facie* evidence of the existence of any custom which it records. 8 A. 431 (437); 2 A. 876; 25 A. 90 (96) = 22 A.W.N. 207. See also 12 A. 234 (257) (F.B.); 5 C.W.N. 33 G

(b) Its record of the existence of a custom of pre-emption is sufficiently strong evidence so as to cast on those denying the custom the burden of proof. (*Ibid*). H

(5) Collector's books.

(a) The Collector's books are intended only for the purposes of revenue, and they are evidence neither of title nor of possession. See 10 B.H.C.R. 187; 13 B. 75; 6 Bom. L.R. 983 (987); 2 I.A. 154 (159). I

(b) Thus the fact of a person's name being entered in the Collector's book as occupant of land, does not, necessarily, of itself, establish that person's title, or defeat the title of any other person. 10 B.H.C. (A. C.), 187. See also 13 B. 75 (77). J

(c) It is perfectly well known to be a common practice in India where property is in the name of a man, although not the true owner, that all the proceedings as far as the Government is concerned take place in his name. See 2 I.A. 154 (159); 6 Bom. L.R. 983 (987). K

1.—“Entry in any public or other official book, register or record.”

—(Continued).

A.—EXAMPLES OF ENTRIES IN PUBLIC BOOKS, ETC.

—(Continued).

- (d) As a general rule, although there may be more persons than one entitled to land, it is the practice of Collectors, as a matter of convenience, to enter in their books only the name of one person as occupant of a field or a recognised share of a field. 10 B.H.C. (A.C.), 187 (189). **L**
- (6) Registration under Act VII of 1876 (B.C.)—Evidentiary value.
- (a) Registration of land under Bengal Act VII of 1876 is not only not conclusive proof, but no evidence at all upon the question of the title of the person so registered. 8 C. 858. But see 20 C. 940 (942), *contra*. **M**
- (b) Such registration does not relieve a person from the onus of proving his title to land claimed by him. (*Ibid*). **N**
- (c) The entry by the Collector in the register under Act VII of 1876 that any particular person is the proprietor of certain land, is not properly speaking the entry of the fact. It is a statement that the person is entitled to the property; it is the record of a *right*, not of a *fact*; and although for the purpose of making that entry the Collector is sometimes bound to enquire who is the party in possession, it often happens that he makes it without any such enquiry. Hence such entries are not admissible in evidence. 9 C. 431 (434); 8 C. 853 (855); 12 C.L.R. 12. But see 20 C. 940 (942). **O**
- (d) Entries in a register made by a Collector under Act VII of 1876 are admissible in evidence under this section. In 9 C. 431 which was before Garth, C.J., and Field, J., the learned Chief Justice held that such entries were not admissible; but that view was not acquiesced in by Mr. Justice Field, and it is also opposed to 7 I.A. 63 (P.C.). 20 C. 940 (942). See also 5 C. 744 (P.C.)=7 I.A. 63=6 C.L.R. 593. **P**
- (e) The Collector's register kept under Bengal Act VII of 1876 containing the name of the estate, its *towji* number, the names of the proprietors or managers, and other particulars regarding the estate, with a statement of their character and extent is admissible under this section. 20 C. 940 (942). See also 5 C. 744 (P.C.)=7 I.A. 63=6 C.L.R. 593. But see 9 C. 431. **Q**
- (f) As evidence of ownership their value may be very small, but it is impossible to say that they are not evidence. Suit 692 of 1901 Cal. H.C., 28 Now. 1902; see also A.A. and W. 4th Ed., p. 249. **R**
- (7) *Teikshana* paper kept by *patwaris* under S. 16 of Bengal Regulation XII of 1817.
- (a) The—is not a public register or record within the meaning of this section. 28 C. 966. See also *Merrick v. Wakley*, 8 A. and E. 117, cited in 28 C. 366 (371); 18 C. 534. **S**
- (b) And the *patwari* preparing such document is not a public servant within the meaning of this section. 18 C. 534. **T**

1.—“Entry in any public or other official book, register or record.”

—(Continued).

A.—EXAMPLES OF ENTRIES IN PUBLIC BOOKS, ETC.

—(Continued).

(8) Registers kept by patwaris—Their nature and admissibility.

(a) The patwari is an officer nominated and remunerated by the zemindar of the village in respect of which he is appointed, though the appointment rests with the Collector; and he is removeable from office by the zemindar with the sanction of the Collector. 23 C. 366 (369). U

(b) Though the Regulation requires that copies of registers kept by such patwaris should be sent by the patwari to the Collector, that fact does not alter their nature in any way or make them a public or other official book, register, or record within the meaning of this section. (*Ibid*). Y

(c) They are simply zemindari papers kept by an officer nominated and paid by the zemindar, though the Collector is vested with a control in the matter of the appointment and removal of that officer with a view to enable the Collector to keep himself informed of the internal management of zemindaries within his jurisdiction. Hence such books cannot be admitted in evidence. (*Ibid*). W

(9) Register of attendance.

A—kept by the medical officer of a Poor Law Union and laid before a Board of Guardians weekly for inspection, in obedience to the rules made by the Commissioners under Statute 4 and 5 W. 4, C. 76, S. 15, is not receivable in evidence for the party making it, as a public official book, notwithstanding that the entries were made by him in accordance with certain statutory rules. *Per* Lord Denman, C.J., in *Merrick v. Wakley*, 8 A. and E. 170, cited in 23 C. 366 (371). X

(10) Reports of Collectors under Madras Regulation VII of 1817.

Collectors acting under Madras Regulation VII of 1817 have no authority to decide upon private rights of parties. Reports made by them and expressing their opinion on such private rights have no judicial authority; but they may be entitled to consideration because they emanate from public officers acting under the law and supplying information regarding official proceedings and historical facts, in so far as they are necessary to explain the conduct and acts of parties and the proceedings of the Government founded on them. 1 I.A. 209. See also 1 M. 235 = 4 I.A. 76; 21 M. 179 (195). Y

(11) Statement made by the Survey officer.

A—that the name of this or that person was entered as occupant would be admissible if relevant, but it would not be admissible to prove the reasons for such an entry. 8 B. 547. Z

(12) Statements of facts made by a Settlement officer.

(a)—in the column of remarks in the *dharepatrak* are receivable in evidence as being entries in a public record, made by a public servant in the discharge of his duty. 21 B. 695. A

1.—“Entry in any public or other official book, register or record.”

—(Continued).

A.—EXAMPLES OF ENTRIES IN PUBLIC BOOKS, ETC.

—(Continued).

- (b) But the reasons which he assigns for making such statements are not recoverable in evidence, even though they consist of statements of collateral facts, but which it was no part of his duty to enquire into.
21 B. 695 (698); see also 25 A. 90 (103). **B.**

(13) Resumption or settlement chittas.

- (a) —are not admissible in evidence without the resumption proceedings.
1 C.W.N. 530. (See also 14 C. 120; 9 C. 741, *F.*) **C**

- (b) But an objection that a document which *per se* is not inadmissible in evidence has been improperly admitted in evidence, cannot be entertained for the first time in second appeal. 1 C.W.N. 530. **D**

(14) Measurement-papers prepared by Bhatwara Ameen.

—do not come within this section. 6 C.L.R. 139. **E.**

(15) Report of a Special Commissioner.

- A —was held to be inadmissible as evidence as it does not come within any provisions of the Evidence Act which would make it admissible.
22 W.R. 231. **F**

(16) Judgments and decrees.

- (a) —and copies of such judgments and decrees may be admitted in evidence under this section. 15 M. 19 (24); 18 M. 73 (77). See also 11 M. 116 (123). **G**

- (b) A decree prefaced with a resume of the pleadings in the suit is admissible in evidence, under this section on proof of the admissions contained in the written statement, it being the duty of the Court in 1818, to give, in the decree, an abstract of the pleadings. 9 C. 586. **H**

- (c) In a suit by a melkanomdar to redeem a kanom, the kanom document having been lost, a copy of a judgment in the previous suit containing a recital that the defendants admitted their positions as kanomdars was admitted in evidence. 15 M. 378. **I**

(17) Document purporting to be a certified copy of a will taken from the Protocol of record in Ceylon.

- A —is not admissible in evidence. 23 M. 499 (503). **J**

(18) Certificate of guardianship.

- A —is not evidence of minority when the question of minority is in issue; for it is neither a book nor a register kept by any officer in accordance with any law. 17 C. 849; 18 A. 478 = 16 A.W.N. 158. **K**

(19) Statement of a witness to a police officer.

- The —under the provisions of S. 162, Crim. Pro. Code, though reduced into writing, is not a public or official document under this section; and such writing cannot be used as evidence in any proceeding to prove that the statements contained therein were in fact made. 5 C.W.N. 65 (66) = 28 C. 348. **L**

1.—“Entry in any public or other official book, register or record.”
—(Continued).

A.—EXAMPLES OF ENTRIES IN PUBLIC BOOKS, ETC.
—(Concluded).

(20) Registration of Mahomedan marriages—Copy of entry in register.

A special condition (that a Mahomedan wife might divorce her husband under certain circumstances) is a matter which, under Bengal Act I of 1876, it is the duty of the Mahomedan Registrar (of marriages under the Act) to enter in the Register and, therefore, a copy of the entry therein is evidence of its contents. 10 C. 607 (609). M

**B.—EXAMPLES OF BOOKS ADMITTED OR REJECTED IN
ENGLISH AND OTHER COURTS.**

(1) Registers of birth.

(a) Registers of birth are admissible in evidence to prove both the fact of birth and the date of birth. See *Re Goodrich*, *Payne v. Bennett*, P. 138; *Wilton v. Phillips*, 19 T.L.R. 390; *R. v. Weaver*, L.R. 2 C.C.R. 85. But see *In re, White*, 9 Eq. 373; Tay. Ev., 10th Ed., S. 1775, p. 1281; Phip. Ev., 4th Ed., p. 316. N

(b) Such registers are also evidence of the place where such event occurred, provided an entry to such effect is added by the direction of the Registrar General. Tay. Ev., 10th Ed., S. 1775, p. 1281; Phip. Ev., 4th Ed., p. 316. O

(2) Registers of baptism.

(a) Registers of baptism are evidence of the date of baptism, and also of the place of baptism. Hubback, 493; Phip. Ev., 4th Ed., p. 316. P

(b) Such entries are not evidence of the date or place of the birth of the child. *R. v. Clapham*, 4 C. and P. 29; *Wihen v. Law*, 3 Stark 63; *Burghardt v. Ahgerstein*, 6 C. and P. 690; Phip. Ev., 4th Ed., p. 316. Q

(c) A register of baptism, even if it state the date of birth, is no proof of the age of the party, further than that the person to whom it relates was born at the date of the ceremony. *Ryan v. Ring*, 25 L.R.Ir. 184; *Glenister v. Harding*, *In re, Turner*, 29 Ch. D. 985; *R. v. Clapham*, 4 C. and P. 29; Tay. Ev., 10th Ed., S. 1774, p. 1280. R

(d) But such registers may be evidence of the illegitimacy of the child, if they contain a statement to that effect. In such a case it may be regarded as evidence of the reputation in the parish. *Cope v. Cope*, 5 C. and P. 604; Tay. Ev., 10th Ed., S. 1774, p. 1280. S

(3) Registers of marriage.

Registers of marriage are evidence not only of the fact of marriage but also of the date of marriage. *Doe v. Barnes*, 1 M. and Robb. 386; *R. v. Hawes*, 1 Den. O.C. 270; Tay. Ev., 10th Ed., S. 1774, p. 1280; Phip. Ev., 4th Ed., p. 316. T

1.—“Entry in any public or other official book, register or record.”

—(Continued).

B.—EXAMPLES OF BOOKS ADMITTED OR REJECTED IN ENGLISH AND OTHER COURTS—(Continued).

(4) Registers of death.

(a) Registers of death are evidence of the fact not only of the deaths to which they relate, but of the place where they occurred. *Re Goodrich, Payne v. Bennett*, P. 138; Phip. Ev., 4th Ed., p. 317; Tay. Ev., 10th Ed., S. 1775, p. 1281. U

(b) A certificate of death is sufficient evidence of a death without a certificate of burial also. *Re Valer's Trust*, W.N. 128; Tay. Ev., 10th Ed., S. 1775, p. 1281. Y

(5) Register of burial.

A register of burial is generally evidence of the facts of death and burial, but not of the date of death, nor the age of the deceased. Hubback, 184 (193); *Robinson v. Buccleuch*, 3 T.L.R. 472, C.A. = 31 S.J. 329; Steph. Dig., 7th Ed., Art. 34n, p. 48; Phip. Ev., 4th Ed., p. 317. W

(6) Indian Registers—Admissibility in English Courts.

(a) Indian registers of baptism have been admitted as evidence in English Courts. *Queen's Proctor v. Fry*, 4 P.D. 230; Phip. Ev., 4th Ed., p. 319. X

(b) Indian registers of marriages and deaths kept under the authority of the East India Company have been admitted in English Courts. *Ratcliffe v. Ratcliffe*, 1 S. and T. 467; Phip. Ev., 4th Ed., p. 319. Y

(c) Registers of marriages compiled by the Secretary of State for India from periodical reports transmitted to him by the various religious denominations in India have also been admitted in the English Courts. *Regan v. Regan*, 69 L.T. 720; *Westmacott v. Westmacott*, P. 183; Phip. Ev., 4th Ed., p. 319. Z

(7) Foreign registers—Admissibility in English Courts.

Foreign registers of births, marriages, and deaths abroad kept under local authorities have also been admitted. *Lyell v. Kennedy*, 14 App. Cas. 431; Phip. Ev., 4th Ed., p. 320. A

(8) Colonial registers—Admissibility in English Courts.

Also colonial registers of births, marriages, and deaths kept under local laws, are admissible in evidence. *Coode v. Coode*, 1 Curt. 755; Phip. Ev., 4th Ed., p. 319. B

(9) Manor books.

(a) Manor books are “public documents in the sense that they concern all persons interested in the manor.” *Per* Lord Blackburn in *Sterla v. Freccia*, 5 App. Cas. 623; Phip. Ev., 4th Ed., p. 326. C

(b) Manor books are evidence of manorial customs and other public matters recorded in them. *Heath v. Deane*, 2 Ch. 86 (91); Phip. Ev., 4th Ed., p. 326. D

(10) Monastic registers.

Monastic registers may be admitted as evidence of a lost grant or endowment. *Bullen v. Michel*, 2 Price, 399; *Williams v. Wilcox*, 8 A. and E. 314; Phip. Ev., 4th Ed., p. 320; Reg. N.P. 14, 217. E

I.—“Entry in any public or other official book, register or record.”

—(Continued).

B.—EXAMPLES OF BOOKS ADMITTED OR REJECTED IN ENGLISH AND OTHER COURTS—(Continued).

(11) Vestry books.

Vestry books may be received in evidence in proof of the election of an officer of the parish, and of the regularity of such election. *R. v. Martin*, 2 Camp. 100; *Hartley v. Cook*, 5 C. and P. 441; Phip. Ev., 4th Ed., p. 320. F

(12) Parish books.

(a) Ancient parish books preserved by church wardens in the parish church have been admitted to prove as to who was the surveyor of a certain highway in the parish a century and a half before. *R. v. Pembroke*, Car. and M. 157; Phip. Ev., 4th Ed., p. 320. G

(b) An entry made in 1678 in a church book of parish as to an action affecting the parish decided in 498 years previously was admitted as an entry relating to an historical fact in which the parish was interested. *Bidder v. Bridges*, 34 W.R. 514; W.N. (1896), 146; Phip. Ev., 4th Ed., p. 321. H

(13) Bank of England books.

In proof of the transfer of certain stocks, Bank of England books were admitted. *Mortimer v. M'Callan*, 6 M. and W. 58; *Breton v. Cope*, Pea. R. 307; *Marsh v. Collnett*, 2 Esp. 665; Phip. Ev., 4th Ed., p. 321. I

(14) Books maintained at public prisons.

(a) Books maintained at public prisons are evidence of the date, commitment, and discharge of a prisoner. *Salte v. Thomas*, 3 Bos. and P. 188; Phip. Ev., 4th Ed., p. 321. But see *Merrick v. Wakley*, 8 Ad. and E. 170; *Stark. Ev.*, 4th Ed., p. 308. J

(b) But such books are not evidence of the cause of the detention of such prisoners. (*Ibid.*) K

(15) Register and muster books of Navy Office.

The register and muster books of the Navy Office kept by a public officer under the authority of the admiralty are evidence of the ship to which a particular sailor belonged, and of the amount of the wages due to him. *R. v. Fitzgerald*, 1 Lea. 20; *R. v. Rhodes*, 1 Lea. 24; Phip. Ev., 4th Ed., p. 323. L

(16) Log book of a man-of-war.

(a) The log-book of a man-of-war is evidence of the time of sailing and the motions of the fleet. *Disraeli v. Jowett*, 1 Esp. 427; Phip. Ev., 4th Ed., p. 323. M

(b) But such evidence was held insufficient to prove the whereabouts of the ship's officer at a particular time. *In Heathcote's Divorce*, 1 Macq. H.L. Cas. 277; Phip. Ev., 4th Ed., p. 323. N

(c) Again the log-books of a merchant vessel are only evidence against, but not for, the owners or writers, although they may be used to refresh the memory, or to contradict the statements of a witness. *The Earl of Dumfries*, 10 P.D. 81; Phip. Ev., 4th Ed., p. 323. O

1.—“Entry in any public or other official book, register or record.”
—(Continued).

**B.—EXAMPLES OF BOOKS ADMITTED OR REJECTED IN
ENGLISH AND OTHER COURTS—(Continued).**

(17) Army List or Gazette.

(a) The position of Military or Naval Officers may be proved by an Army List or Gazette published by authority. See Tay. Ev., 10th Ed., S. 1638-A, p. 1178. **P**

(b) The position of such officer, if in India, can be shown by such list or gazette published by some officer under the Governor-General of India, or the Governor of any Presidency in India. Such list or gazette will be evidence not only of the status and rank of the officer but also of any appointment held by him, and the corps or battalion of the service to which he belonged. See 44 and 45 Vic. C. 58; Tay. Ev., 10th Ed., S. 1638-A, p. 1178. **Q**

(18) Searcher's report kept at Custom-House.

The copy of the searcher's report kept at the Custom-House, and produced by the proper officer, is evidence of the shipment of the goods specified. *Johnson v. Ward*, 6 Esp. 48; Phip. Ev., 4th Ed., p. 324. **R**

(19) University and College books.

University and College books may be produced in proof of degrees conferred and other Collegiate proceedings. *Tracy Peerage Case*, Min. Ev., 68; *Moses v. Thornton*, 8 T.R. pp. 306 and 307; *Collins v. Carnegie*, 1 A. and E. 695; Phip. Ev., 4th Ed., p. 326. **S**

(20) Law list.

(a) The Law list published by authority is evidence *prima facie* of the solicitors and the conveyancers named therein being duly certified. *R. v. Wenham*, 10 Cox. 222; Phip. Ev., 4th Ed., p. 325. **T**

(b) And the absence of a person's name in such list is also *prima facie* evidence of the non-qualification of such person. (*Ibid*). **U**

(21) Medical sheet or register.

(a) A medical sheet kept under the Army Medical Service Rules, is evidence that a Military Officer was suffering from a venereal disease at a certain time, whereby to prove adultery. *Gleen v. Gleen*, 17 T.L.R. 62; Phip. Ev., 4th Ed., p. 323. **V**

(b) A medical register purporting to be printed and published under competent authority may be evidence to prove the qualifications of medical men, dentists, and veterinary surgeons. Phip. Ev., 4th Ed., p. 325; Tay. Ev., 10th Ed., S. 1638, p. 1177. **W**

(c) It is not material that the entries in such registers are not certified and countersigned. *Barrett v. Henry*, 2 Ir. 693; Phip. Ev., 4th Ed., p. 325. **X**

(d) The absence of the name of any person from such register may also be evidence, until the contrary is shown that such person was not duly registered. See Tay. Ev., 10th Ed., S. 1638, p. 1177. **Y**

1.—“Entry in any public or other official book, register or record.”
—(Continued).

B.—EXAMPLES OF BOOKS ADMITTED OR REJECTED IN
ENGLISH AND OTHER COURTS.—(Continued).

(22) Government Gazettes.

(a) The—are admissible in evidence as evidence of any public matter contained therein, but not of any private matters stated in them. See *Tay. Ss.* 1527, 1662, 1666; 2 *Phil. and Arm. Ev.*, 10th Ed., 138–140; *Whart Ss.* 671–675; *Phil. Ev.*, 4th Ed., p. 311. Z

(b) At Common Law the Gazette is evidence of addresses to the Crown, Proclamations for reprisals, articles of capitulation for the surrender of an Island, Privy Council Proclamations and other Acts of State. *R. v. Holt*, 5 Tr. 436; *A-G. v. Theakstone*, 8 Pri. 89; *R. v. Picton*, 30 How. St. Tr. 493; *R. v. McCarthy*, 1903, 2 I.R. 146; *Phil. Ev.*, 4th Ed., p. 311. A

(c) But at Common Law the Gazette is not evidence of Acts of Public Officials, having little or no reference to affairs of Government. *R. v. Holt*, 5 Tr. 436; *Greenwood v. Woodham*, 2 Moo. and R. 363; *R. v. Gardner*, 2 Camp. 513; *Phil. Ev.*, 4th Ed., p. 311. B

(d) The Gazette has been expressly made by statutes in England receivable as evidence of various public matters; for examples of such statutes, see *Phil. Ev.*, 4th Ed., p. 311. C

(e) The Gazette will be judicially noticed on its mere production; but the entire paper must be produced, not a mere cutting from it. *R. v. Lowe*, 15 Cox. 286; *Phil. Ev.*, 4th Ed., p. 312. D

(33) Recitals in public statutes—Proof of plots.

(a) For the purpose of proving that certain organised outrages had occurred in various parts of England, recitals to that effect contained in a public statute were held admissible. *R. v. Sutton*, 4 M. and S. 67 (69); *Phil. Ev.*, 4th Ed., p. 310. E

(b) But the existence of a certain plot cannot be proved by the journals of the House of Commons recording the resolution as to the existence of such plots. *R. v. Oates*, (1865), 10 How. St. Tr. 1163–1167, but see *Jones v. Randall*, 1 Cowp. 17; *Phil. Ev.*, 4th Ed., p. 310. F

(24) Journals of House of Lords—Proof of political controversies.

So also in order to prove the existence and nature of certain political controversies between the Kings of England and Spain, entries in the journals of the House of Lords were held admissible. *R. v. Franklin*, 17 How. St. Tr. 636 (638); *Phil. Ev.*, 4th Ed., p. 310. G

(25) Paper from Secretary of State's office—Proof of date of commencement of war.

In order to prove the date of the commencement of a war between two States, a paper from the Secretary of the State's office transmitted thereto by the British ambassador has been held to be admissible in evidence. *Thelluson v. Coaling*, 4 Esp. 266, cited in *Phil. Ev.*, 4th Ed., p. 310. H

1.—“Entry in any public or other official book, register or record.”
—(Concluded).

B.—EXAMPLES OF BOOKS ADMITTED OR REJECTED IN ENGLISH AND OTHER COURTS.—(Concluded).

(26) Public statutes.

Statements and recitals of public matters contained in public statutes are receivable in evidence. *R. v. Sutton*, 4 M. and S. 532; *R. v. De Berenger*, 3 M. and S. 67; Phip. Ev., 4th Ed., p. 209; Steph. Dig., 7th Ed., Art. 33, p. 47. I

(27) Private Acts.

(a) Private Acts of Parliament are not evidence against strangers of the facts recited therein, although they may contain clauses requiring them to be judicially noticed as public statutes. *Beaufort v. Smith*, 4 Ex. 450; *Cowell v. Chambers*, 21 Beav. 619; *Mills v. M. of Colchester*, 36 L.J.C.P. 210; *Polvi v. Gray*, 12 Ch. D. 411; *Locke-King v. Working Council*, 62 J.P. 167; Phip. Ev., 4th Ed., p. 310. J

(b) Nor are such private Acts evidence as notice of such facts. *Ballard v. Way*, 1 M. and W. 529; Phip. Ev., 4th Ed., p. 310. K

(c) In order to prove the title of the lords of a manor to toll on all coal exported within the manor, a private Act preserving such right cannot be admitted in evidence. *Beaufort v. Smith*, 4 Ex. 450; Phip. Ev., 4th Ed., p. 310. L

(28) Parliamentary journals.

Parliamentary journals as to matters properly before either house, whether legislative, ministerial, or in the House of Lords judicial, are also admissible. *A-G. v. Brallaugh*, 14 Q.B.D. 667; *Jones v. Randall*, 1 Cowp. 17, *Itcot v. Aung*, 17 Cowan, 613; Phip. Ev., 4th Ed., p. 310. M

2.—“Made by a public servant in the discharge of his official duty.”

(1) “Public servant or officer”—Definition.

(a) The term “public servant” is not defined in this Act; but see for a definition of the term, S. 21, L.P.C., S. 2 (17), Civil Pro. Code (Act V of 1908). N

(b) The word “officer” means a person employed to exercise to some extent a delegated function of Government; he must be either himself armed with some authority or representative character, or his duties must be immediately auxiliary to those of some one who is so armed. 12 B.H. C. 1. O

(c) Any person, whether receiving pay or not, who chooses to take upon himself the duties and responsibilities belonging to the position of a public servant, and performs those duties, and accepts those responsibilities, and is recognised as filling the position of a public servant, must be regarded as a public servant. 8 A. 201. P

(d) The person, who, in fact, discharges the duties of the office which bring him under some one of the descriptions of public servant, is, for all the purposes of the Act, rightfully a public servant, whatever legal defect there may be in his right to hold the office. 7 B.L.R. 448; 16 W.R. 27. Q

2.—“Made by a public servant in the discharge of his official duty.”
—(Continued).

(2) The following are public servants :—

- (a) The Nazir of a collectorate. 2 N.W.P. 298. **R**
- (b) A surveyor employed by the Collector in the *Khas Mehal* department. 26 C. 158. **S**
- (c) The manager of an estate employed under the Court of Wards. 21 A. 127 ; but see 28 C. 344. **T**
- (d) A peon in the service and pay of Government and attached to the office of a superintendent of the salt department. 28 C. 344. **U**
- (e) Peons executing any judicial process. 2 B.L.R. 21 (F. 5). **Y**
- (f) Peons executing any warrant of arrest. 22 C. 759 ; 22 C. 596. **W**
- (g) Convict-warders. 7 W.R. 99. **X**
- (h) Municipal servants under the City of Bombay Municipality Act. 6 Bom. L.R. 54. **Y**
- (i) Municipal Engineers. 6 B.H.C. 64. **Z**
- (j) A Municipal Inspector within the meaning of Madras District Municipalities Act. 13 M. 131. **A**
- (k) A Sanitary Inspector within the meaning of the Local Boards Act. 21 M. 428. **B**
- (l) A person serving as a volunteer in a Tahsildar's office. 8 A. 201. **C**
- (m) A karkun employed to execute revenue processes and receive rents by a manager appointed under Act XV of 1872. Unrep. Cr. C. 117. **D**
- (n) Zemindari karnam. 15 M. 127. But see also 23 C. 366. **E**

(3) Certain Acts of the Indian legislature have expressly stated the following persons to be “Public servants” :—

- (a) Appraisers and bailiffs of Presidency Small Cause Courts. (XV of 1882, S. 52). **F**
- (b) Coroners. (IV of 1871, S. 5). **G**
- (c) Delegates of Parsi Matrimonial Courts. (XV of 1865, S. 23). **H**
- (d) Certain emigration officers. (XXI of 1883, Ss. 16 and 18 ; V of 1877, S. 50 ; Mad. Act V of 1866, S. 3). **I**
- (e) Forest officers. (VII of 1878, S. 72 ; XIX of 1881, S. 71 ; Mad. Act V of 1882, S. 60). **J**
- (f) Servants and officers of Indian Museums. (XXII of 1876, S. 14). **K**
- (g) Judges and assessors of Courts of Survey and Ship-surveyors. (VII of 1880, S. 50). **L**
- (h) Managers of encumbered estates. (XXIV of 1870, S. 22 ; VI of 1876, S. 21 ; XIV of 1876, S. 32 ; XIV of 1877, S. 33 ; Reg. IV of 1872, S. 93). **M**
- (i) Municipal Commissioners and their servants. (XV of 1873, S. 25 ; VII of 1874, S. 22 ; Mad. Act I of 1874 ; Bom. Act III of 1872, S. 51 ; Bom. Act VI of 1873, S. 15). **N**
- (j) Officers, &c., executing warrants of Marine Court. (V of 1883, S. 14). **O**

2.—“Made by a public servant in the discharge of his official-duty.”
—(Concluded).

- | | |
|---|----------|
| (k) Patwaris and Kanungos. (XIX of 1873, S. 35). | P |
| (l) Pound keepers. (I of 1871, S. 6). | Q |
| (m) Rangoon Port Commissioners, officers and servants. (XV of 1879, S. 64). | R |
| (n) Registering officers. (III of 1877, S. 84). | S |
| (o) Registrars of Muhammadan marriages. (Ben. Act I of 1876, S. 25), and | T |
| (p) Telegraph officers. (XIII of 1885, S. 31.) See Whitley Stokes, Vol. I,
pp. 96, 97. | U |

(4) The following persons are not public servants :—

- | | |
|---|----------|
| (a) An arbitrator appointed by the parties to a proceeding under S. 145 of the Crim. Pro. Code. 30 C. 1084. | Y |
| (b) A carter employed by Government. 7 M. 18. | W |
| (c) A Mysore police man. Weir 203. | X |
| (d) A labourer or menial servant employed to do work on account of Government. 7 M. 18. | Y |
| (e) A peon employed by the manager of an estate under the charge of the Court of Wards. 7 M. 17. | Z |
| (f) A Poddar of the Bank of Bengal. 4 C. 376. | A |
| (g) A lessee of a village who has undertaken to keep an account of its Forest revenues and pay a certain proportion to the Government keeping the remainder for himself. 12 B.I.C. 1. | B |
| (h) A Police officer under suspension within the meaning of S. 8 of Act V of 1861. 8 B.L.R. Ap. 58. | C |
| (i) A Municipal Corporation within the meaning of S. 39 of Act V of 1877. 3 C. 758. | D |
| (j) A person nominated by a Collector under S. 69 of the Bengal Tenancy Act. 18 C. 518. | E |
| (k) A goods clerk of a Railway Company. 9 P.R. 1898. | F |
| (l) Manager of estate appointed under Court of Wards. 28 C. 344. But see 21 A. 127. | G |

36. Statements of facts in issue or relevant facts, made in

Relevancy of statements in maps, charts, and plans. published maps or charts generally offered for public sale, or in maps or plans made under the authority of Government¹, as to matters usually represented or stated in such maps, charts, or plans, are themselves relevant facts.

(Notes).

1.—“Statements of facts in issue....in maps or plans made under authority of Government.”

(1) Principle of the section.

The admissibility of the documents mentioned in this section rests upon the fact that they contain the results of inquiries made under competent authority, concerning matters in which the public are interested. See Ph. Ev., 4th Ed., 125; Tay. Ev., 10th Ed., S. 1767, p. 1275; Phip. Ev., 4th Ed., p. 327; Hubback 589; *Sturla v. Freccia*, 5 App. Cas. 623.

H

1.—“Statements of facts in issue...in maps or plans made under authority of Government.”—(Continued).

(2) Difference between the English and the Indian Law.

The rule in this section is a considerable extension of the English Law, according to which the maps of the Ordnance Survey in Ireland, though notoriously drawn with great care and accuracy, were held inadmissible. See *A. A. and W.* 4th Ed., p. 252; *Tay. Ev.*, 10th Ed., Ss. 1770, 1771; *Steph. Dig.*, 7th Ed., Art. 35, p. 48; *Field Ev.*, 6th Ed., p. 166; *Whitley Stokes' Anglo-Indian Codes*, Vol. II, p. 829; see also *Swift v. McTierman*, 2 Ir. Eq. Rep. 632; *Caton v. Hamilton*, 53 J.P. 504. I

(3) Applicability of section.

As regards public maps or charts generally offered for public sale this section refers to the physical features of the country, &c.; and as regards maps or plans made under the authority of Government, the section refers not only to such features but also boundaries of villages, estates, and (in *khasra* maps) fields. *Whitley Stokes' Anglo-Indian Codes*, Vol. II, p. 878 J

(4) Scope of section.

(a) Where a map is made by Government for a particular purpose, which is not a public purpose, the provisions of this section do not apply. 23 C. 335 (338). See also *Sturla v. Freccia*, 5 App. Cas. 623. K

(b) The object of the inquiry must be that it should be made for the purpose of keeping its result public, so that the persons concerned may make use of it, and have access to it afterwards. *Per Lord Blackburn in Sturla v. Freccia*, 5 App. Cas. 623; see also 23 C. 335 (338) L

(c) Thus a map made by a Deputy Collector, for the settlement of land forming the silted bed of a river, is not one which is admissible in evidence, under this section. 23 C. 335 (338). See also 5 C. 287 = 4 C.L.R. 473; 9 C. 741. M

(5) Conditions of admissibility of maps, &c., in English Law.

(a) In order to render maps, surveys, and other similar documents admissible in evidence, it must appear that they were made for the purpose of the public making use of them, and being able to refer to them. See *Tay. Ev.*, 10th Ed., S. 1769-A, p. 1277; *Sturla v. Freccia*, 5 App. Cas. 623; *Mercer v. Donne*, 2 Ch. 538; *Phip. Ev.*, 4th Ed., p. 327. N

(b) It is the fact that the public are interested in such documents, and that they are in a position to challenge the documents if inaccurate, that invests them with a certain amount of authority. *Per Lord Blackburn, J. in Sturla v. Freccia*, 5 App. Cas. 623 (643, 644); *per Farwell, J. in Mercer v. Donne*, 2 Ch. 534 (541); *Tay. Ev.*, 10th Ed., S. 1769-A, p. 1277. O

(c) Thus, War Office plans have been held not admissible, on the principle, that they are, by their nature, confidential. *Mercer v. Donne*, 2 Ch. 534; *Tay. Ev.*, 10th Ed., S. 1769-A, p. 1277. P

(d) Plans and reports made to the Board of Trade have also been rejected for the same reason. (*Ibid.*). Q

1.—“ Statements of facts in issue....in maps or plans made under authority of Government.”—(Continued).

(e) On similar grounds reports of surveyors to the Lord Warden of the Cinque Ports have been held inadmissible. (*Ibid*). **R**

(f) So also, estimates made by the King's Engineer for the preparation of Walmar Castle were not admitted, as they were not made for public use, or open to public reference. (*Ibid*). **S**

(g) This section does not require that the authority, under which a map is prepared, must be an authority given by statute. 11 C.W.N. 230. **T**

(6) Absence of entry in map or plan, whether evidence.

The absence of an entry in a map or plan may be taken into consideration to prove the non-existence of a fact in issue, when such entry would naturally be expected to have been made if the fact existed. *A-G. v. Antrobus*, 2 Ch. 188, Phil. Ev., 4th Ed., p. 333. **But** see 7 C.L.R. 356; 10 C. 1024; 25 A. 90 (*contra*). **U**

(7) Interest of officer making map or survey.

The— affects the weight but not the admissibility of the evidence. *Irish Society v. Derry*, 12 C. and F. 641 *Sturla v. Freccia*, 5 App. Cas. 623; Phil. Ev., 4th Ed., p. 328. **Y**

(8) Survey maps, their nature and admissibility.

(a) A survey map is not made under the authority of any enactment of the Legislature, but is purely an executive act. But the proceedings of the survey authorities have been recognised by the Legislature. Further, the rules made for the guidance of the survey authorities are embodied in a manual issued by the Board of Revenue, and some of these rules contain matters addressed by way of instruction and direction to the officers engaged in survey operations, who are required to seek the co-operation of the parties interested in the measurement. 9 C.L.R. 305 (307); 7 C.W.N. 849 (852) = 22 C. 252 (258) **W**

(b) When survey officers commence operations in a locality, neighbouring proprietors do, as a rule, carefully watch their proceedings; and if the persons interested consider that the boundary demarcated by these officers between any two estates is incorrect, they take immediate and prompt action to object, and to have the map rectified. 9 C.L.R. 305 (308). See also 19 W.R. 202; 20 W.R. 243 (244); 7 C.W.N. 849 (852) = 22 C. 252 (258). **X**

(c) Thus, the proprietors of estates have reasonable notice, and may be presumed to be well aware that the boundaries are about to be demarcated upon a map made by the officers of the Imperial Government, and which is, by consent and usage, regarded as important evidence in cases of boundary disputes; they are invited to co-operate, and to point out to the survey officers what they admit to be true boundaries between their estates. 9 C.L.R. 305 (308); 7 C.W.N. 849 (852); 22 C. 252 (258). **Y**

(9) Survey maps—Their evidentiary value.

(a) A survey map is a piece of evidence like other evidence in a case, and can be of no effect in determining the burden of proof. 22 W.R. 296 (297). **Z**

1.—“ Statements of facts in issue....in maps or plans made under authority of Government.”—(Continued).

- (b) The proprietors generally have notice of survey proceedings, and they are required to co-operate with the survey officers; if the proprietors or their agents point out their boundaries, and the boundaries so pointed out are demarcated on the survey map, which is then signed by them, this map is good evidence of an admission as to the correctness of the boundaries shown therein. 9 C.L.R. 305 (308). See also 20 W.R. 243 (244); 19 W.R. 202; 8 W.R. 167 (170); 7 C.W.N. 849 (852); 22 C. 252 (258). **A**
- (c) If the proprietors or their agents do not actively point out the boundaries, but afterwards sign the map, it is still evidence of an admission, though not of so strong a nature as in the case first put. 9 C.L.R. 305 (308). **But** see also 3 C.W.N. 99. **B**
- (cl) If the survey officers without active assistance from those interested demarcate the boundaries, and no objection is raised to their correctness, the reasonable supposition is that objections would have been raised if the boundaries were not correct; and we have here admission of conduct. 9 C.L.R. 305 (308); but see also 3 C.W.N. 99. **C**
- (d) If objections are raised and abandoned, or if objections taken before the survey officer unsuccessfully are not persisted in, no attempt being made to have the survey map rectified by a suit brought for this purpose, we have again evidence of admission by conduct, the value of which varies according to the circumstances supposed. 9 C.L.R. 305 (308); see also 2 W.R. 210 (212). **D**
- (e) If a suit has been brought to rectify the map, and brought successfully or unsuccessfully, there is a judicial decision as to the accuracy of the map or otherwise. 9 C.L.R. 305 (309). **E**
- (f) The value of any particular survey map in evidence will vary according as the above circumstances are or are not brought out in evidence. 9 C.L.R. 305 (309). **F**
- (g) As time passes on, and the production of living witnesses of what took place at the time of the survey proceedings becomes more or less impossible, the difficulty is increased of producing evidence which will enable the Court to weigh the value of a particular map in nice scales. 9 C.L.R. 305 (309). **G**
- (h) The proposition which is to be deduced from the cases is this: a survey map is not direct evidence of title in the same way as a decree in a disputed cause is evidence of title, for the survey officers have no jurisdiction to enquire into or decide questions of title. 9 C.L.R. 305 (309). See also 19 W.R. 202; 20 W.R. 243 (244). **H**
- (i) Their instructions are to lay down the boundary according to the actual possession at the time, and that is what they do, ascertaining such actual possession as well as they can, and, if possible, by the admissions of all the parties concerned. 9 C.L.R. 305 (309). **I**
- (j) A survey map is, therefore, good evidence of possession according to the boundary demarcated thereupon, and which may be taken to have been admitted by those concerned to be correct, regard being had to what has been said about the nature of this admission in each particular case. 9 C.L.R. 305 (309). **J**

1.—“Statements of facts in issue....in maps or plans made under authority of Government.”—(Continued).

(k) Courts have in several cases refused to lay down any general rule as to the weight to be assigned to a survey map as a piece of evidence; and Courts have also declined to say whether, in any particular case, maps ought not to be corroborated by independent evidence. 9 C.L.R. 305 (309). See also 19 W.R. 202. **K**

(l) Unless it can be proved that the person against whom a thak or survey is attempted to be used expressly consented to the delineation, or admitted the correctness of such maps, they have no binding effect. 3 C.W.N 99. **L**

(m) In the absence of direct title-deeds, acts of ownership are the best proofs of title. 2 W.R. 210 (212). **M**

(n) Acts of ownership, when submitted to, are analogous to admissions or declarations by the party submitting to them that the party exercising them has a right to do so, and that he is, therefore, the owner of the property upon which they are exercised. Starkie's Evidence, p. 470, note F; cited in 2 W.R. 210 (212). **N**

(o) A survey map is not sufficient, in the absence of other satisfactory proof of title, or of long antecedent possession, to establish the plaintiff's right to the land, or to disturb the defendant's possession. 2 W.R. 210 (212). **O**

(10) Survey maps—Relevant as admissions.

Maps filed by the parties in former arbitration proceedings may be used as admissions against them in a subsequent suit. 7 W.R. 249. **P**

(11) Government Survey maps—Of what facts evidence.

(a)——are evidence, not only with regard to the physical features of the country depicted, but also with regard to the other circumstances which the officers deputed to make the maps are specially commissioned to note down. 10 W.R. 300. **Q**

(b) Further than this, they are not evidence as to rights of ownership. 10 W.R. 300. **R**

(12) Survey proceedings—Presumption—Practice.

(a) Survey proceedings, if made without reference to any litigation then pending, are not only evidence, but are to be presumed to be correct. 19 W.R. 202. **S**

(b) It is beyond the functions of the High Court in special appeal to lay down any rule as to corroboration of such documents. 19 W.R. 202. **T**

(c) Where a survey proceeding, conducted in the presence of both parties, declares lands to be included in the zemindary of a person, a plaintiff who sues such person to recover possession of the lands as included in his own zemindary, must prove by counter-evidence at what precise time, if ever, he or any one from whom he claims was in possession of the lands. 12 W.R. 6 (P.C.) = 2 B.L.R. 111. **U**

(13) Survey maps—How far evidence of title.

(a) Survey maps prepared under the authority of Government are evidence of possession, and, therefore, also of title. 10 W.R. 343 (344). **Y**

1.—“Statements of facts in issue...in maps or plans made under authority of Government.”—(Continued).

(b) A survey map is evidence of possession at the particular time at which the survey was made. 15 C. 353 (356); see also 2 W.R. 210; 10 W.R. 343; 13 W.R. 50; 19 W.R. 202; 20 W.R. 243; 8 C. 975; 24 W.R. 317; 25 W.R. 51; 25 W.R. 453; 5 C. 212. **W**

(c) But evidence of possession at one particular time is not sufficient to raise a presumption of title, although coupled with other evidence, it may suffice to raise such a presumption. 15 C. 353 (356) **X**

(d) A survey map is direct evidence of possession; and with reference to the particular circumstances of each case, the Courts must decide whether this evidence of possession is sufficient to raise a reasonable presumption of title. 9 C.L.R. 305 (309); see also 2 W.R. 210 (211); 10 W.R. 343. **Y**

(14) Boundary dispute—Value of survey maps.

(a) In a case involving a boundary dispute, a survey map, if not conclusive evidence, is evidence of an important character which ought to be looked into and considered. 15 W.R. 3. **Z**

(b) It is not evidence which it is within the power of the plaintiffs to manufacture. Such a document is one which comes from a public office. The Judge cannot therefore reject it. 15 W.R. 3 (4). **A**

(c) If there has been a Government survey, the survey map must be taken as evidence. 20 W.R. 243. **B**

(d) If one of the parties has made a settlement according to the survey boundary, the fact must be taken into account unless explained away. 20 W.R. 243. **C**

(15) Fishery disputes—Value of survey maps.

Survey maps are not evidence of title in a dispute regarding a right of fishery. W.R. (1861), 120. **D**

(16) Survey award.

(a) An award by a Superintendent of survey is not conclusive evidence of a contested right in a regular suit. 12 W.R. 180 (182). **E**

(b) But where survey proceedings record a legal award of a competent Court, possession under it should not ordinarily be disturbed unless a superior title be shown by the opposite party. 1 W.R. 333. **F**

(17) Official opinion of Survey Superintendent.

(a) An—regarding the trustworthiness of the survey proceedings is not legal evidence. 1 W.R. 333. **G**

(b) The survey proceedings are not conclusive as to title. 1 W.R. 333. **H**

(18) “Thakbust map”—Nature and admissibility.

(a) A—is admissible as evidence under this section. 24 W.R. 317; 25 W.R. 54. **I**

(b) And, in one case, a suit was remanded for retrial because the—had not been recorded as evidence by the lower Court. 25 W.R. 54. **J**

(c) As to the amount of accuracy to be expected in a thak map. See 4 O.W.N. 113 (116)=27 C. 336. **K**

1.—“Statements of facts in issue...in maps or plans made under authority of Government.”—(Continued).

(19) Thakbust map—Evidentiary value.

- (a) A thak map prepared in 1859, is good evidence of what the boundaries of the properties in dispute were at the time of the permanent settlement and also as to what they admittedly were in 1859. 16 C. 186. See also 22 C. 252 (258). **L**
- (b) The object of the thak map being to delineate the various estates borne on the Revenue roll of the District, the entry in a thak map that certain lands formed part of a certain estate becomes a relevant fact under this section, and such entries in thakbust maps are evidence on which a Court may act. It is open to a Court to hold that the same state of things existed at the time of the permanent settlement. 7 C.W.N. 849 (853). See also 7 C.W.N. 193 = 30 C. 291; 9 C.L.R. 305. But see 3 C.W.N. 99; 18 C. 225. **M**
- (c) Unless it can be proved that the person against whom a thak or survey is attempted to be used expressly consented to the correctness of such maps, they have no binding effect. 3 C.W.N. 99. But see 7 C.W.N. 849 (852). **N**
- (d) Maps and surveys made in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they are made. 30 C. 291 (301) = 7 C.W.N. 193 (202); see also 7 C.W.N. 849 (851); 22 C. 252; 16 C. 186, 11 C. 784; 14 B.L.R. 221 (note); 19 W.R. 127. **O**
- (e) They are not conclusive and may be shown to be wrong. (*Ibid*). **P**
- (f) But in the absence of evidence to the contrary they may be properly judicially received in evidence as correct, when made. (*Ibid*). **Q**

(20) Thakbust maps—How far evidence of title.

- (a) Thakbust maps, where they are evidence of possession, are also some evidence of title, although not conclusive. 25 W.R. 36 = 22 C. 252 (258). **R**
- (b)—are evidence of possession at the time the survey is made; but as such evidence of possession they are also evidence of title. 22 C. 252 (258). See also 16 C. 186; 15 C. 353. **S**
- (c)—are not intended to represent, and are, in no sense, a record of tenures subordinate to Government revenue-paying estates. 25 W.R. 277. **T**
- (d) Such maps are of no value as evidence in a suit in which the extent of the interest of a *shukmee* talookdar is a matter for determination. 25 W.R. 277 (278). **U**

(21) Thak maps—Conditions affecting their value as evidence.

- (a) Thak maps are good evidence of possession; but the value of that evidence varies enormously. 8 C. 975 (983). **Y**
- (b) In the case of a thak map containing definite landmarks and undisputed boundaries signed by the parties or their accredited agents, and representing land which has been brought under cultivation, and is in the possession of ryots whose names are known or can be discovered from the zemindari papers, a thak map is very valuable evidence of possession. 8 C. 975 (983). **W**

1.—“Statements of facts in issue...in maps or plans made under authority of Government.”—(Continued).

- (c) But the value of such a map is greatly diminished when we find that there are no natural landmarks delineated thereupon; that the land was jungle when measured; that the boundaries are not discoverable from a mere inspection of the map; and that neither the zemindars nor their agents have, by their signatures, admitted the correctness of the thak. 8 C. 975 (1983). X

(22) Thak map—Survey map—Comparison.

A survey map may be resorted to for assistance in considering the evidence of a thak map as to the area and boundary. 20 W.R., 14. Y

(23) Thakbust map—Act of agent—Remand—Practice.

See 3 B.L.R. (A.C.J.), 377.

(24) Chittas—Their nature and admissibility.

- (a) Chittas made by the Revenue authorities in the course of measurement of a Government mehal stand precisely on the same footing as chittas made by them in inquiries relating to revenue, and are equally admissible as evidence. 13 W.R. 56. Z

- (b) The circumstance that the proceedings relate to a khas estate cannot deprive them of the character of public proceedings upon matters of public interest. 13 W.R. 56. A

- (c) Certified copies of survey-measurement chittas, field-books, and maps are admissible in evidence. 8 W.R. 167; see also 24 W.R. 192; 24 W.R. 410. B

- (d) Government chittas are admissible as legal evidence in cases in Chittagong. 10 W.R. 340. C

- (e) Resumption chittas are not admissible in evidence without the resumption proceedings. 1 C.W.N. 530. D

- (f) A Government chitta was admitted as evidence in a boundary dispute. 24 W.R. 410. E

(25) Chittas—Evidentiary value—Practice.

- (a) Chittas and maps made in contemplation of resumption-proceedings in the presence of both sides, and signed by the parties, are legal evidence. 19 W.R. 309. F

- (b) Where it appeared that the lower appellate Court greatly underrated the importance of a chitta of the revenue survey, the High Court sent back the case to the lower Court in order that it might reconsider the evidence. 24 W.R. 192 (193). G

- (c) Whatever might be the value of chittas in general in questions between the zemindar and his tenants or ryots, to receive them as evidence of boundary against a rival proprietor without any account, introduction or verification would tend to encourage the manufacture of evidence in a place already too prone to the fabrication of it. 11 W.R. 2 (4) (P.C.) = 2 B.L.R. 4 (P.C.). H

- (d) Kabuliysts, chittas, accounts and receipts do not prove themselves and are valueless without proper oral evidence respecting them. But they may be admitted for what they are worth. 29 C. 187 (201). I

1.—“ Statements of facts in issue....in maps or plans made under authority of Government.”—(Continued).

(26) Chittas—Attestation—Parol evidence of land being mal.

Where chittas were produced by the plaintiff as evidence of certain lands being *mal*, it was held that they were sufficiently attested by the deposition of the village-gomashta that they were the chittas of the village while he was gomashta, and that he had been present when, with their assistance, a *puttal* (new or revised) measurement has been carried out in the village. 10 W.R. 443. J

(27) Butwara—Chittas—Evidence.

A butwara between zemindars is not binding in any way upon the ryots, and butwara-chittas are no evidence in a suit for possession of a jote, and to set aside a summary award under Act XIV of 1859, S. 15. 21 W.R. 29. K

(28) Comparison of the lands with maps and chittas.

The Court has power to make a—, made on the occasion of a boundary dispute between a zemindar and Government, in order to determine the nature and incidents of a piece of land in dispute. 15 W.R. 444 (445). L

(29) Chittas—Thakbust maps—Survey maps—Comparison.

Direction was given to the lower Court to call for the thakbust and the survey maps, in order to throw light on the chittas. 24 W.R. 192 (193). M

(30) Disputed boundaries—Proof of map—Evidence.

In a case of disputed boundaries, to prove a map, a witness was called who had assisted as an Ameen in preparing it with another Ameen, who was dead; the witness had little or no knowledge of surveying, but the Ameen with whom it was prepared was a skilled surveyor, and the Collector has tested the accuracy of the measurements. *Held*, that the map was sufficiently proved to be admissible in evidence. 29 C. 187. N

(31) Suit for possession—‘ Onus probandi ’—Talook—Chittas.

The word “ talook ” imports a permanent tenure; and where a chitta describes the land to which it relates as a “ talook ” the presumption, in the absence of any evidence to the contrary, is that it implies a permanent interest. 22 W.R. 326. O

(32) Topographical survey map.

(a) A topographical survey map in which the boundary line between two Pargunnahs is given, is admissible in evidence under this section. 11 C.W.N. 230. P

(b) When Pargunnah boundaries are found entered in such map, the presumption is that they were so entered in pursuance of instructions received. (*Ibid*). Q

(c) Assuming that topographical survey maps were not prepared for revenue purposes, they are official documents prepared by competent persons, and with such publicity and notice to persons interested, as to be admissible and valuable evidence of the State things, at the time they were made. (*Ibid*). R

(d) They are not conclusive and may be shown to be wrong, but, in the absence of evidence to the contrary, they may be properly judicially received in evidence as correct when made. (*Ibid*). S

(e) In cases of boundary disputes, the fact that no satisfactory evidence as to possession is obtainable, does not relieve the Court of the duty of settling the boundary line on the evidence before it. (*Ibid*). T

1.—“Statements of facts in issue....In maps or plans made under authority of Government.”—(Continued).

(33) Chart of a river issued under the authority of Government.

The—, and the notes thereon, will be referred to as authoritative. 27 C. 860 (871). U

(34) Map prepared by Government for a particular purpose.

A —, which is not a public purpose, may be admitted in evidence, but not under this section or S. 83. Such a document is one, the accuracy of which must be proved before it can be admitted in evidence. 23 C. 335 (338). Y

(35) Measurement chittas made by Government for its own private use.

—, are nothing more than documents prepared for the information of the Collector, and are not evidence against private persons for the purpose of proving that the lands described therein are or are not of a particular character or tenure. 9 C. 741. W

(36) Map prepared by an officer of Government, while in charge of a *khulas mahal*.

A —, the possession of which by the Government being only that of a private proprietor, does not come under this section. 5 C. 287 = 4 C.L.R. 574.X

(37) Mahalwari map.

A — is relevant under this section. 9 C.W.N. 105 (113). Y

(38) Loazima and thaka papers.

The—, are legal evidence *quantum valcat*, that is to say, they show that such and such papers are kept in the sherishta of land owners. 10 W.R. 343 (344). Z

(39) Ameen's map.

(a) In a suit to establish a title to land, where an Ameen's map which professed to show the *daighs* of a *hustabood* chitta was not questioned by either party, it was not open to the Court to question its correctness, and to try whether it was possible to construct any map from the chitta. 14 W.R. 391 (392). A

(b) Where a civil Ameen makes a local enquiry as to the situation of certain disputed lands with reference to the Collectorate map put in by the plaintiffs, and not objected to by the defendants, the map must be taken to be one which the parties recognize as correct and trustworthy, irrespective of the question whether it was prepared with the authority of the Government. 21 W.R. 115. B

(40) Copy of Schedule Map—Admissions, effect as.

Where a copy of a schedule-map, showing the different plots of land belonging to each of several share-holders and defining their boundaries, had been filed on more than one occasion, and relied upon by the parties to the suit, and where it appeared, moreover, that the plaintiffs had, on many previous occasions, admitted the correctness of the map, and that their shares had been demarcated therein, *held*, that the plaintiffs could not now sue for a fresh measurement and demarcation. 18 W. R. 346. C

I.—“ Statements of facts in issue....in maps or plans made under authority of Government.”—(Continued).

(41) Pencil memoranda.

(a)—on a Government survey map may be admissible as evidence. 10 W.R. 343. **D**

(b) But such memoranda are not of themselves conclusive evidence of any fact. 10 W.R. 343. But see 2 W.R. 210 (211); 15 W.R. 3. **E**

(42) Proof of boundaries—Oral evidence.

Oral is sufficient to prove boundaries. 9 W.R. 125 (126). **F**

(43) Documents more than thirty years old.

A map, which is more than thirty years old, is entitled to the benefit of the presumption under S. 90 of this Act. 9 C.W.N. 111 (113). **G**

(44) Proof of documents mentioned in this section.

The documents mentioned in this section are public documents within the meaning of S. 74, *infra*; and as such they can be proved by the production of certified copies under S. 77. See Ss. 74 and 77, *infra*. See also 8 W.R. 167; 24 W.R. 192; 24 W.R. 410 **H**

(45) Presumption as to maps or plans made by authority of Government.

(a) The Court shall presume that maps or plans purporting to be made by the authority of Government were so made, and are accurate; but maps or plans made for the purposes of any cause must be proved to be accurate. See S. 83, *infra*. **I**

(b) The Court may also presume that such books or maps were written and published by the person, and at the time and place, by whom or at which it purports to have been written or published. S. 87, *infra* **J**

(46) Power of Court to take judicial notice of documents mentioned in this section.

See S. 57, *infra*.

A.—THE FOLLOWING MAPS, &c., HAVE BEEN ADMITTED IN ENGLISH COURTS.

(1) Map of Australia.

Maps of Australia were given in evidence to show the situation of various places at which the defendant said he had lived. *R. v. Orton*; Phip. Ev., 4th Ed., p. 350; Steph. Dig., Art. 35, p. 48. **K**

(2) Maps of Rhodesia and the Transvaal.

Standard—were admitted to show the geographical position of the places referred to in them. *R. v. Jameson*, Trial at Bar, Q. B. July 21st, 1896; Official Reports, 91-5; Phip. Ev., 4th Ed., p. 350; Steph. Dig., 7th Ed., Art. 35, p. 48. **L**

(3) Private maps and plans.

(a) —may be received as admissions against the party under whose authority they were prepared or his successors in title. *Craven v. Pridmore*, 18 T.L.R. 282; *M'Kenna v. Howth*, 27 Ir. L.T.R. 48; Phip. Ev., 4th Ed., p. 350. **M**

(b) But such maps cannot be admitted in favour of such persons. *Pollard v. Scott*, Peake. R. 19; *Whelan v. West*, 7 C. and P. 479; Phip. Ev., 4th Ed., p. 350. **N**

1.—“Statements of facts in issue....in maps or plans made under authority of Government.”—(Continued).

A.—THE FOLLOWING MAPS, &c., HAVE BEEN ADMITTED IN ENGLISH COURTS.—(Continued).

(4) Maps on the back of a lease or conveyance.

—are part of the contract, and, as such, evidence for or against both parties and their successors, of what was demised or conveyed. *Waheman v. West*, 7 C. and P. 479; Phip. Ev., 4th Ed., p. 350. **O**

(5) Surveys and maps.

(a) —, even when they cannot be treated as public documents may be received as admissions of persons in privity with those against whom they are tendered. *Earl v. Lewis*, 4 Esp. 1; *Pollard v. Scott*, Peak, R. 19; *Doe v. Lakin*, 7 C. and P. 481; Tay. Ev., 10th Ed., S. 1770-C. p. 1278. **P**

(b) But such maps are not admissible to explain a deed. *Wyse v. Leahy*, I.R. 9 C.L. 384; Phip. Ev., 4th Ed., p. 332. **Q**

(6) Down Survey.

(a) In Ireland, the—, which was made during the reign of Charles II, is rendered by Statute *conclusive* evidence as to the boundaries of the lands apportioned between the aboriginal inhabitants of Ireland and the English and Scotch settlers. See 14 and 15 C. 2, C. 2, Ir; Tay. Ev., 10th Ed., S. 1770, p. 1277; Phip. Ev., 4th Ed., p. 329. **R**

(b) The Down Survey is also admissible in evidence as a public document on all questions between any persons respecting the matters stated in it. *Archbishop of Dublin v. Trimleston*, 12 Ir. Eq. R. 251; *Tisdall v. Parnell*, 14 Ir. C.L.R. 1; Tay. Ev., 10th Ed., S. 1770, p. 1277; Phip. Ev., 4th Ed., p. 329. **S**

(7) Tithe map.

(a) A— is admissible as a public document to prove any matter contained in them, and which was within the scope of the authority of the Commissioners who made such map. *A.-G. v. Antrobus*, 2 Ch. 188; Tay. Ev., 10th Ed., S. 1770-B, p. 1278. **T**

(b) Such maps are not evidence on matters not within the scope of the statutory authority of the Commissioners. (*Ibid*); see also Phip. Ev., 4th Ed., p. 332. **U**

(c) But the Irish Ordnance Survey, though notoriously drawn up with great care and accuracy, is not regarded as a public document, and as such is held not admissible. See *Swift v. M'Tiernan*, 11 Ir. Eq. R. 602; Tay. Ev., 10th Ed., S. 1770-B, p. 1278; see also *Caton v. Hamilton*, 53 J.P. 504. **Y**

(d) Tithe Commutation maps may be received in evidence as public documents on questions of tithe. See 6 and 7 Will. IV, Ch. 71, Ss. 60—64; *Hammond v. Bradstreet*, 10 Ex. 390; Phip. Ev., 4th Ed., p. 331. **W**

(e) Such maps cannot be admitted to prove private boundaries as between two adjoining owners. *Wilberforce v. Herfield*, 5 Ch. D. 709; *Per Kay, J. in Coleman v. Kirkaldy*, W.N. (1882), 103; Phip. Ev., 4th Ed., p. 332. **X**

(8) Ordnance Survey maps.

—, are *prima facie* evidence on a question of private boundaries. *Spike v. Thompson*, W.N. (1882), 103; Phip. Ev., 4th Ed., p. 332. **Y**

1.—“Statements of facts in issue....in maps or plans made under authority of Government.”—(Concluded).

A.—THE FOLLOWING MAPS, &c., HAVE BEEN ADMITTED IN ENGLISH COURTS.—(Concluded).

(9) Domesday book.

The Domesday book, compiled a few years after the Conquest, by Commissioners styled the Justiciaries of the King, upon the oaths of the Sheriffs, the lords of the manors, &c., is evidence of the tenure of land and other particulars stated in them. *Tay. Ev.*, 10th Ed., S. 1768, p. 1276; *Phip. Ev.*, 4th Ed., p. 329. **Z**

(10) Book of Distribution.

The—, although only an abstract of the Down Survey, will be received in evidence as having been compiled by public authority, and as having been preserved among the records of a public office. *Poole v. Griffith*, 15 Ir. C.L.R. 239; *Spaight v. Twiss*, 13 Ir. C.L.R. 416; *Tay. Ev.*, 10th Ed., S. 1770-A, p. 1278; *Phip. Ev.*, 4th Ed., p. 329. **A**

(11) Land Act Assessment Books.

(a) —are evidence of the assessment upon the person, and for the property named. *Doe v. Seaton*, 2 A. and E. 171; *Doe v. Arkwright*, 2 A. and E. 182 n; *Doe v. Cartwright*, 1 C. and P. 218; *Johnson v. Thompson*, 15 L.T.O.S. 437; *Ronkendorff v. Taylor*, 4 Petters 349; *Phip. Ev.*, 4th Ed., p. 333. **B**

(b) Such books are also evidence of occupation by persons named therein. (*Ibid*). **C**

(c) But where it was proved that it was usual not to alter the names of occupiers so long as the land was in the same family, it was held that such books could not be admitted to prove seisin or the names of occupiers. *Doe v. Arkwright*, 2 A. and E. 182n; 5 C. and P. 575; *Phip. Ev.*, 4th Ed., p. 333. **D**

(12) Plans deposited by a Railway Company.

(a) —in connection with a proposed railway may be evidence on a question as to the existence of a public road, to show that the alleged road was not marked thereon. *A.-G. v. Antrobus*, 2 Ch. 188; *Phip. Ev.*, 4th Ed., p. 333; but see 7 C.L.R. 356; 10 C. 1024; 25 A. 90. **E**

(b) The ground of the decision in the former case was, that a local authority with whom such plans were deposited was the statutory guardian of the public roads, and that the plans were published for inspection and objection by those interested. (*Ibid*). **F**

(13) Admiralty Charts.

Judicial notice will be taken of the geographical position and general names applied to districts in the admiralty charts. *Birrell v. Dryer*, 9 App. Cas. 345; *Phip. Ev.*, 4th Ed., p. 350. **G**

(14) Engineer's Report.

An—concerning scientific facts beyond living memory was received in evidence on proof that it was accepted as accurate among Engineers. *East London Ry. v. Thames Conservators*, 90 L.T. 347; 68 J.P. Rep. 302; *Phip. Ev.*, 4th Ed., p. 351. **H**

37. When the Court has to form an opinion as to the existence of any fact of a public nature, any statement of it, made in a recital contained in any Act of Parliament, or in any Act of the Governor-General of India in Council, or of the Governors in Council of Madras or Bombay, or of the Lieutenant-Governor in Council of Bengal, or in a notification of the Government appearing in the *Gazette of India*, or in the gazette of any Local Government, or in any printed paper purporting to be the *London Gazette* or the *Government Gazette* of any colony or possession of the Queen, is a relevant fact¹.

Relevancy of statement as to fact of public nature contained in certain Acts or notifications.

(Notes).

1.—“Statement..made in a recital contained in any Act of Parliament..is a relevant fact.”

(1) Principle of the section.

The principle on which recitals in Acts of Parliament, &c., are admitted in evidence is the same on which the documents mentioned in Ss. 34, 35 and 36, *supra*, are admitted. See Phip. Ev., 4th Ed., p. 309; Tay. Ev., 10th Ed., S. 1660, p. 1193; A. A. and W. 4th Ed., p. 259. **I**

(2) English Law.

(a) Statutes, State papers, and other writings of a similar character will be admitted, under English Law, either as *prima facie* or conclusive evidence of the facts stated in them. See Tay. Ev., 10th Ed., S. 1660, p. 1193; see also Gr. Ev., S. 491. **J**

(b) Under the English Law, such papers will also be received as *prima facie* evidence of matters mentioned in them, though they be mentioned by way of introductory recital. See Tay. Ev., 10th Ed., S. 1660, p. 1193; see also Gr. Ev., S. 491. **K**

(c) Thus, recitals in public statutes about the commission of certain outrages, and recitals in a public proclamation offering a reward for the discovery of the perpetrators of those outrages were held admissible in evidence as to the existence of those outrages. See *R. v. Sutton*, 4 M. and S. 532; Phip. Ev., 4th Ed., p. 309; Tay. Ev., 10th Ed., S. 1660, p. 1193. **L**

(d) Thus, also, the recital in the preamble of a public statute about a state of war was held evidence of the existence of such war. *R. v. DeBerenger*, 3 M. and S. 67; Tay. Ev., 10th Ed., S. 1660, p. 1193; Phip. Ev., 4th Ed., p. 309. **M**

(e) But such recitals, even in a public Act, are not conclusive evidence. See *R. v. Greene*, 6 A. and E. 548; Tay. Ev. 10th Ed., S. 1660, p. 1193; Phip. Ev., 4th Ed., S. 309. **N**

(f) Thus, where the schedule of the Municipal Corporation Act described a place as an existing Borough, it was held that evidence was admissible to show that the description in the schedule was not correct. (*Ibid*). **O**

1.—“Statement..made in a recital contained in any Act of Parliament..is a relevant fact.”—(Continued).

(3) Private Acts—English Law.

(a) Local or—are not any evidence of facts stated in them as against strangers, even though such Acts may contain a clause requiring them to be judicially noticed. *Brett v. Beales*, M. and M. 421; *Taylor v. Parry*, 1 M. and Gr. 684; *D. of Beaufort v. Smith*, 19 L. J. Ex. 97; *Cowell v. Chambers*, 21 Bea. 619; *Mills v. May of Colchester*, L.R. 2 C.P. 476; *Polini v. Gray and Sturla v. Freccia*, 12 Ch. D. 411; *Tay. Ev.*, 10th Ed., S. 1660. p. 1194; *Phip. Ev.*, 4th Ed., p. 310. **P**

(b) Nor do they affect the public with a knowledge of their contents. *Ballard v. May*, 1 M. and W. 529; 5 L.J. Ex. 207; *Tay. Ev.*, 10th Ed., S. 1660, p. 1194; *Phip. Ev.*, 4th Ed., p. 310. **Q**

(c) “But recitals in such Acts are receivable, *inter alios*, in peerage claims, if passed when it was the practice for the evidence upon which they were founded to be approved by the Judges; but not if passed afterwards.” *Wharton Peerage*, 12 C. and F., p. 302; *Polini v. Gray*, 12 Ch. D. 411; *Shrewsbury peerage*, 7 H.L.C. 13; *Phip. Ev.*, 4th Ed., p. 313. **R**

(4) Public and Private Act of Parliament—Difference—Indian and English Law.

The difference obtaining in English Law, as to the effect of a recital in a Public Act and in Private Act, is not noticed in this section. This section only requires that the fact recited in the Statute to be one of a public nature. See A.A. and W., 4th Ed., p. 260. **S**

(5) Calcutta Gazette and Gazette of India.

The—were admitted even before the passing of this Act, under Act II of 1855. 15 W.R. 25 (27)=7 B.L.R. 63. **T**

(6) Gazette of India—Evidence of notifications, etc., published in them.

When, in any Regulation or Act, or in any rule having the force of law, it is directed that any order, notification, or other matter, shall be published in the official Gazette of any Presidency or place, such order, notification, or other matter, should be deemed to be duly published in accordance with the requirements of the law, if it be published either in the Gazette in which it would have appeared but for passing of this Act or in the Gazette of India under the directions of the Governor-General of India in Council. See S. 1 of Act XXXI of 1869. **U**

(7) Notice of dissolution of partnership—Calcutta Gazette—London Gazette—Difference.

In matters of notices of dissolution of partnership the official Gazette in Calcutta is not the same sort of paper as the London Gazette in England. The London Gazette has not only a large and general circulation in the commercial world, but it is the usual and now almost the invariable mode of advertising new partnerships, dissolutions of partnership, bankruptcy, and insolvency notices, and all that class of news.

The Calcutta Gazette, on the other hand, deals principally with official matters. It does indeed contain a number of advertisements of partnerships, insolvencies and the like, but not nearly the same amount of such information as the London Gazette; and in the commercial world especially among the natives, its circulation is not nearly so wide as that of London Gazette in England. 8 C. 678 (682–683). **V**

1.—“Statement..made in a recital contained in any Act of Parliament...is a relevant fact.”—(Continued).

(8) Government Gazette.

The Government Gazette containing the advertisement of sale, and a printed paper purporting to be the conditions of sale alluded to in the Gazette, and issued from the Master's Office in the name of the Master, were admitted in evidence to prove the actual conditions of the deed of sale. W.R. (1864), 51 (53). W

(9) Gazette—Evidence against prisoner—Necessity for interpretation.

(a) Although a prisoner has the undoubted right to have all or any part of a document used in his trial translated or interpreted to him, yet, as these gazettes are put in merely for the purpose “of giving formal proof of an incontestable fact, it would not be necessary to interpret them at length. 15 W.R. (Cr.), 25 (27)—7 B.L.R. 63. X

(b) It would be sufficient if the prisoner be made to understand what the Gazettes were about, and for what purpose they were used. *Per* Norman, C. J., in 15 W.R. 25 (27)=7 B.L.R. 63. Y

(10) Proof of commencement of hostilities—Gazette—Letter from Secretary of Government.

(a) A Court is bound to take judicial notice of the commencement, continuation, and termination of hostilities between the British Crown and any other State; and the Court has power to resort to appropriate books and documents of reference. 15 W. R. (Cr), 25 (27)=7 B.L.R. 63. Z

(b) A letter from the Secretary of the Government of the Punjab to the Secretary of the Government of India was admitted in evidence to prove the commencement and continuation of a war between the Government of India and certain Mahomedan fanatics on the frontier. 15 W.R. (Cr.), 25 (27)=7 B.L.R. 63. A

(c) But, such a letter is not evidence of the facts mentioned in detail by the writer of the letter. *Per* Norman, C. J., in 15 W.R. (Cr.), 25 (27)=7 B.L.R. 63. B

(11) Government Gazette—Evidentiary value at Common Law.

(a) The— is at Common Law, evidence of various acts of states, (as) addresses received by the Crown, &c. *R. v. Holt*, 5 T.R. 436 (443); *A.-G. v. Theakston*, 8 Price, 89; Tay. Ev., 10th Ed., S. 1662, p. 1195; Phip. Ev., 4th Ed., p. 311. C

(b) But, with regard to the actions of public officers, which have little or no relation to affairs of Government, the Gazette, unless specially made admissible by statute, cannot be received in evidence. *R. v. Gardner*, 2 Camp. 513; *Kirwan v. Cockburn*, 6 Esp. 283; *R. v. Holt*, 5 T.R. 443; Tay. Ev., 10th Ed., S. 1662, p. 1195; Phip. Ev., 4th Ed., p. 311. D

(c) Thus the Gazette was held inadmissible to prove the following particulars:—

(i) The appointment of an officer to a commission in the Army. *R. v. Gardner*, 2 Camp. 513. E

(ii) A grant of land by the Sovereign to a subject. *R. v. Holt*, 5 T.R. 443. F

(iii) An order in Council for the division of a parish. *Greenwood v. Woodham*, 2 Moo. and R. 363; Tay. Ev., 10th Ed., S. 1662 p. 1195; Phip. Ev., 4th Ed., p. 311. G

1.—“Statement..made in a recital contained in any Act of Parliament..is a relevant fact.”—(Continued).

(12) Gazette—Documentary Evidence Act, 1868.

The Gazette is rendered by the Documentary Evidence Act, 1868, *prima facie* evidence of any proclamation, order, or regulation issued by the Sovereign, or by the Privy Council, or by any of the principal departments of the Government. See 31 and 32, Vic. Ch. 37, S. 2; Tay. Ev., 10th Ed., S. 1662, p. 1195; Phip. Ev., 4th Ed., p. 311. **H**

(13) The Gazette is expressly rendered evidence of various public matters by particular Statutes.

For a list of such Statutes in English Law, see Tay. Ev., 10th Ed., S. 1663 A-4, p. 1195 n-8; Phip. Ev., 4th Ed., p. 311. **I**

(14) Gazette—Evidence as notice.

(a) The Gazette in common with other newspapers may be evidence of proving knowledge of facts advertised in them in the adversary. See Tay. Ev., 10th Ed., S. 1665, p. 1196; *Harrat v. Wise*, 9 B. and C. 712; Phip. Ev., 4th Ed., p. 312; Whart Ss. 671-675. **J**

(b) But, it is always desirable, and sometimes it is necessary, to furnish some evidence to show that the party sought to be affected by the notice had read the Gazette. Tay. Ev., 10th Ed., S. 1665, p. 1196; Phip. Ev., 4th Ed., pp. 312 and 128. **K**

(c) But, such proof of the party reading it need not be produced if the case is governed by any special enactment. See Phip. Ev., 4th Ed., pp. 128 and 312; Tay. Ev., 10th Ed., S. 1665, p. 1196. **L**

(d) This independent proof of knowledge may be furnished by showing that the party attends a reading-room where the Gazette is circulated, or by showing that he possesses knowledge of other matters contained in the same number of the Gazette, or that it is a publication which it was his duty to read. Tay. Ev., 10th Ed., Ss. 1665 and 1666, pp. 1196 and 1197; Phip. Ev., 4th Ed., p. 128; Whart Ss. 671-675. **M**

(e) But, to show simply that the paper circulates in the neighbourhood of the place where the party resides is no proof of the knowledge of the party. (*Ibid*); *Norwich and Lowestoft Navig. Co. v. Theobald*, M. and M. 153. **N**

(f) “Evidence may also be given, on behalf of the party sought to be affected with the knowledge, by showing that such party was unable to read.” Phip. Ev., 4th Ed., p. 128. **O**

(15) Proof of Gazette.

(a) “The Gazette will be judicially noticed on its mere production; but the entire paper and not a mere cutting from it must be produced.” *R. v. Lowe*, 15 Cox. 286; see also S. 57, *infra*; Phip. Ev., 4th Ed., p. 312. **P**

(b) “Where a Gazette was made evidence of certain fact, if it ‘purported to be printed by the Queen’s printer or by the Queen’s authority’ a Gazette purporting to be printed otherwise was rejected.” *R. v. Wallace*, 1 Cox, 500; but see Tay. Ev., S. 15n; Phip. Ev., 4th Ed., p. 312. **Q**

1.—“Statement..made in a recital contained in any Act of Parliament..is a relevant fact.”—(Concluded).

(16) The following statements have been admitted in English Courts on principles similar to those contained in this section.

- (a) Statements and recitals of public matters contained in public Statutes. *R. v. Sutton*, 4 M. and S. 532; *R. v. De Berenger*, 3 M. and S. 67; Phip. Ev., 4th Ed., p. 309. R
- (b) Such statements and recitals in Royal Proclamation. (*Ibid*). S
- (c) Such statements in speeches from the Crown. *R. v. Branchlin*, 17 How. St. Tr. 636—638; Tay. Ev., 10th Ed., S. 1661, p. 1194; Phip. Ev., 4th Ed., p. 309. T
- (d) Similar statements contained in addresses to the Crown from either House of Parliament. (*Ibid*). U
- (e) Recitals in State papers. *Thelluson v. Cosling*, 4 Esp. 266; Phip. Ev., 4th Ed., p. 309. Y
- (f) Recitals of diplomatic correspondence in State papers. *R. v. Francklin*, 17 How. St. Tr. at p. 638; *Radcliffe v. Union Ins. Co.*, 7 Johns, 38; *Talbot v. Seaman*, 1 Cranch, 1, 37, 38; Phip. Ev., 4th Ed., p. 309. W
- (g) Statements in Parliamentary journals as to matters properly before either House. *A.-G. v. Bradlaugh*, 14 Q.B.D. 667; *Jones v. Randall*, 1 Cowp. 17; *Root v. King*, 17 Cowan, 613; Phip. Ev., 4th Ed., p. 309. A
- (h) The above are only *prima facie* and not conclusive evidence of the facts recited. *R. v. Greene*, 6 A. and E. 548; Phip. Ev., 4th Ed., p. 310. Y

N.B.—For additional notes on this section, see notes under S. 35, *supra*.

38. When the Court has to form an opinion as to a law of any

Relevancy of statements as to any law contained in lawbooks.

country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government¹ of such country, and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant.

(Notes).

1.—“Any statement of such law contained in a book....published under the authority of the Government. etc.”

(1) English Law.

- (a) “Law being a science, under the law, of England, the existence and meaning of foreign laws may, and indeed must, be proved by calling professional or other official persons to give their opinion on the subject.” Tay. Ev., 10th Ed., Ss. 5, 9, 48, 1423; Phip. Ev., 4th Ed., p. 359; *Sussex Peerage*, 11 C. and F. 85, 114; Wigm. Ev., 05 Ed., S. 1952, pp. 2598 and 2599. Z
- (b) “But, the professional or official witness may refresh or confirm his recollection of the law by reference to text books, decisions, Statutes, etc.” Tay. Ev., 10th Ed., S. 1423, p. 1028; *Sussex Peerage*, 11 C. and F. 114; Phip. Ev., 4th Ed., p. 359. A

1.—“Any statement of such law contained in a book...published under the authority of the Government, etc.”—(Continued).

- (c) “And, if such witness states that those works truly state the law, they may be read not as evidence *per se*, but as part and parcel of his testimony.” *Sussex Peerage*, 11 C. and F. 114; *Ld. Nelson v. Ld. Bridport*, 8 Beav. 547; Tay. Ev., 10th Ed., S. 1423, p. 1028; Phip. Ev., 4th Ed., p. 359. **B**
- (d) “When an expert, however, vouches a foreign code, an English Court may construe it for itself.” *Concha v. Murrietta*, 40 Ch. D. 543; *Bremer v. Freeman*, 1 Deane, Ecc. R. 192; Tay. Ev., 10th Ed., S. 1423, p. 1028; Phip. Ev., 4th Ed., p. 359. **C**
- (e) Where the evidence of the expert witness is conflicting or obscure, the Court may examine and construe the passages cited for itself in order to arrive at a satisfactory conclusion. *Nelson v. Bridport*, 8 Beav. 527; *Bremer v. Freeman*, 10 Moo. P. C. 306; *Di Sora v. Phillips*, 10 H.L.C. 624; *Concha v. Murrietta*, 40 Ch. D. 543; Phip. Ev., 4th Ed., p. 359. **D**

(2) Principle of English Law.

- (a) “It is perfectly clear that the proper mode of proving a foreign law is not by showing to the House the book of the law: for the House has no organs to know and to deal with the text of that law, and therefore requires the assistance of a lawyer who knows how to interpret it.” *Per* Lord Brougham, in *Sussex Peerage case*, 11 Cl. and F. 115; Wigm. Ev., 5th Ed., S. 1953, p. 2599. **E**
- (b) “The mere contents of books might often mislead persons not familiar with the particular system of law.” *Per* Denman, L.C.J., in *Baron de Bode's case*, 8 Q.B. 265; Wigm. Ev., 5th Ed., S. 1953, p. 2599; see also Whitley Stokes' Anglo-Indian Codes, Vol. II, p. 829. **F**
- (c) “A Munssiff's opinion on the state of the Scotch marriage-law, or the meaning of an article of the Code Napoleon, is perhaps not very likely to be correct.” See Whitley Stokes' Anglo-Indian Codes, Vol. II, p. 829. **G**

(3) English and Indian Law—Difference.

Under this section books containing foreign laws may be directly referred to by the Court. But, according to the English Law, the laws usages and customs of foreign states can only be proved by calling professional or official persons to give their opinions on the subject. Tay. Ev., 10th Ed., S. 1423, p. 1027; Phip. Ev., 4th Ed., p. 359; Whitley Stokes' Anglo-Indian Codes, Vol. II, p. 829; A. A. and W. Ev., 4th Ed., p. 261. **H**

(4) Evidence of experts according to this Act.

Even according to this Act the opinions of experts may be admitted to prove a point of foreign law. See S. 45, *infra*. **I**

(5) Proof of foreign law by experts—Practice.

Foreign law can only be proved on oath, either orally or in some cases by affidavit, and not by the mere certificates of experts. *Wilson v. W.*, (1903), P. 167; Phip. Ev., 4th Ed., p. 359. But see *Re Oldenburgh*, 9 P.D. 294; *Re Klingeman*, 32 L.J.P. 16; Tay. Ev., S. 1784. **J**

1.—“Any statement of such law contained in a book....published under the authority of the Government, etc.”—(Concluded).

(6) Previous decisions upon point of foreign law, whether authority.

Previous decisions upon the same point of foreign law are not admissible; because, such decisions, being decisions on a question of fact, must be decided on evidence and not on authority. *M'Cormick v. Garnett*, 5 D. M. and G. 278; Phip. Ev., 4th Ed., p. 359. K

(7) Unauthorised translation of the Code Napoleon.

“An— is not a work to which reference can be made under this section.” 3 C.W.N. 614 (616) = 26 C. 931. L

(8) Presumption as to genuineness of books mentioned in this section.

“The Court shall presume that maps or plans purporting to be made by the authority of Government were so made, and are accurate; but maps or plans made for the purposes of any cause must be proved to be accurate.” See S. 83, *infra*. M

(9) Laws of British India—Court shall take judicial notice.

“The Court shall take judicial notice of all laws in British India and public Acts of Parliament, &c.” See S. 57, *infra*. N

(10) Presumption as to knowledge of law.

(a) Just as private individuals are presumed to know the law of the land for their personal guidance, so Courts also are deemed to be acquainted to the law of the land, so as to be able to administer justice to the various litigants. *Martindale v. Faulkner*, 2 C. B. 719-720; Best Ev., 9th Ed., S. 337, p. 297. O

(b) It is not necessary to state a matter of law in pleadings. Steph. Plead., 5th Ed., p. 383; 1 Chit. Plead., 6th Ed., p. 216; Best Ev., 9th Ed., S. 337, p. 297; O. VI, r. 2 of Act V of 1908 (C.P.C.). P

(c) Although the Sovereign is presumed to know the law, yet it is competent for him to show, in certain cases, that grants made by him were made under a mistake of law. Co. Litt. 99a; Plowd. 502; 2 Blackst. Comm. 348; *R. v. Clarke*, 1 Freem. 172; *Legal's case*, 10 Co. 109; Best Ev., 9th Ed., S. 337, p. 297. Q

(11) Statutory procedure for ascertainment of foreign law.

(a) “By 22 and 23 Vic. Ch. 63, a case may be stated for the opinion of a superior Court in any of His Majesty's Dominions to ascertain the law of that part.” See *Lord v. Colvin*, 1 D. and S. 24; *Login v. Princess of Coorg*, 30 Beav. 632; 1 Jur. O. S. 109; Phip. Ev., 4th Ed., p. 359. R

(b) “By 24 and 25 Vic. Ch. 11, a similar case may be stated for the opinion of a Court in any foreign state with which His Majesty may have entered into a convention for the ascertainment of such law.” Phip. Ev., 4th Ed., p. 359. S

N.B.—“This Act, however, is practically a dead letter, as no convention has ever been made in pursuance of it.” (*Ibid*).

N.B.—For further notes on this section, see notes under S. 45, *infra*.

How much of a Statement is to be proved.

39. When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, book, or series of letters or papers, as the Court considers necessary¹ in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made.

What evidence to be given when statement forms part of a conversation, document, book, or series of letters or papers.

(Notes).

1.—“Evidence shall be given of so much and no more of the statement, as the Court considers necessary, &c.”

(1) Section explained.

- (a) “When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be enquired into by the other; thus, when a letter is read, the answer may be given, and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.” *Cal. C.C.P.* (1872), S. 1854; *Wigm. Ev.*, 05 Ed., S. 2113, p. 2859. **T**
- (b) “Where either party introduces part of a document or a record, the opposite party may read so much of the balance as is relevant.” *Ga. Code* (1895), S. 5241; *Wigm. Ev.*, 05 Ed., S. 2113, p. 2859. **U**
- (c) “When an admission is given in evidence, it is the right of the other party to have the whole admission and all the conversation connected therewith.” *Ga. Code* (1895), S. 5196; *Wigm. Ev.*, 05 Ed., S. 2115, p. 2859. **Y**
- (d) The opponent using a party's confessions “must not divide them; they must be taken entire.” *La. Code Pr.* (1894), S. 356; *Wigm. Ev.*, 05 Ed., S. 2113, p. 2859. **W**
- (e) “When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be enquired into by the other; thus, when a letter is read, all other letters on the same subject between the same parties may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration or writing which is necessary to make it fully understood, or to explain the same, may be given in evidence.” *Mont. C.P.C.* (1895), S. 3190; *Wigm. Ev.*, 05 Ed., S. 2113, p. 2859. **X**

(2) Principle of the section.

“The principle on which this section is based is that, it would not be just to take part of a conversation, letter, &c., as evidence against a party without giving to the party at the same time the benefit of the entire residue of what he said or wrote on the same occasion.” *Per Abbott, C.J.*, in *The Queen's case*, 2 B. and B. 297; *Wigm. Ev.*, 05 Ed., S. 2113, p. 2861. **Y**

1.—“Evidence shall be given of so much and no more of the statement, . . . as the Court considers necessary, &c.”—(Continued).

(3) English law and practice.

(a) “When an admission is tendered against a party, he is entitled to have proved, as a part of his adversary’s case, so much of the whole statement, document or correspondence containing, or referred to in, the admission, as is necessary to explain the admission, and although such other parts may be favourable to himself; but the jury may attach different degrees of credit to the different parts.” *Philp. Ev.*, 4th Ed., p. 212. **Z**

(b) “Any party may, at the trial of a cause, matter or issue, use in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such answer; provided, always, that, in such a case, the Judge may look at the whole of the answers, and if he shall be of opinion that any others of them are so connected with those put in that the last mentioned answers ought not to be used without them, he may direct them to be put in.” (O. 31, r. 24); *Lyller v. Kennedy*, 27 Ch. D. 1, 15, 29; *Philp. Ev.*, 4th Ed., p. 212. **A**

(c) “Distinct matters, however, though relevant to the case, cannot be so introduced.” *Prince v. Samo*, 7 A. and E. 627; *Davies v. Moryan*, 1 Cr. and J. 587; *Philp. Ev.*, 4th Ed., p. 212; *Tay. Ev.*, Ss. 725-736, 738; *Ros. N.P.* 79, 182-183; *Wigm. Ev.*, 5th Ed., S. 2113, p. 2861. **B**

(4) Limits of the rule—English Law.

(a) Three general corollaries may be deduced from the principle on which this section rests :—

(i) No utterance irrelevant to the issue is receivable.

(ii) No more of the remainder of the utterance than concerns the same subject, and is explanatory of the first part, is receivable.

(iii) The remainder thus received merely aids in the construction of the utterance as a whole, and is not in itself testimony. See *Wigm. Ev.*, 5th Ed., S. 2113, p. 2860. **C**

(b) The rule enacted in this section will not warrant the reading of distinct entries in an account book, or distinct paragraphs in a newspaper, unconnected with the particular entry or paragraph relied on by the opponent. *Catt v. Howard*, S. Stark 3; *Reeve v. Whitmore*, 2 Dr. and Sm. 446; *Darby v. Ouseley*, 25 L.J. Ex. 227; *Tay. Ev.*, 10th Ed., S. 732, p. 527. **D**

(c) “Nor will it render admissible bundles of proceedings in bankruptcy, entries in corporation books, or a series of copies of letters inserted in a letter book, merely because the adversary has read therefrom one or more papers, or entries, or letters.” *Sturges v. Buchanan*, 2 P. and D. 573; *Tay. Ev.*, 10th Ed., S. 732, p. 527. **E**

(d) “If the extracts put in expressly refer to other documents, these may be read also; but the mere fact that the remaining portions of the papers or books may throw light on the portions selected by the opposite party, will not be sufficient to warrant their admission.” *Sturges v. Buchanan*, 2 P. and D. 573; *Tay. Ev.*, 10th Ed., S. 732, p. 528. **F**

1.—“Evidence shall be given of so much and no more of the statement, . . . as the Court considers necessary, &c.”—(Continued).

(e) “The rule about the whole being admissible must obviously mean that the additional conversation called for should be relevant to the matter in issue. All evidence is received under that qualification; and, if not so restrained, might operate as a waste of time; other subjects might be introduced having no connection with the subject-matter of the suit.” *Per* Cowen, J., in *Garey v. Nicholson*, 24 Wend. 350 (351); Wigm. Ev., 05 Ed., S. 2113, p. 2860. **G**

(f) “Ten subjects may be talked about in one conversation. When one of the ten is the subject of litigation, it is not competent to put in evidence the conversation about the other nine.” *Per* Grant, J., in *Atherton v. Defreeze*, 129 Mich. 364; 88 N.W. 886; Wigm. Ev., 05 Ed., S. 2113, p. 2860. **H**

(g) “There is an important limitation to the rule, in giving evidence of conversations or of oral statements and declarations. The proof in such case is to be confined to what was said upon or concerning those matters which are made subjects of enquiry or investigation. Every remark or observation made upon those topics is to be received as competent evidence, because they may essentially modify the character and purport of the whole conversation, and vitally affect what might otherwise appear to be explicitly asserted or denied. But if, during the same interview between the witness and the party, other subjects of conversation or discussion are introduced, remote and distinct from that which is the object of enquiry or investigation, it is obvious that whatever may be said concerning them can have no tendency to illustrate, vary or explain it. Everything pertaining to these additional and extraneous matters should therefore be rejected as irrelevant and useless.” *Per* Merrick, J. in *Cum v. Keyes*, 11 Gray 323 (325); Wigm. Ev., 05 Ed., S. 2113, p. 2861. **I**

(b) Evidentiary value of statements admissible under this section.

“There are cases where documents which are admissible are not proof of all the facts stated in them. For instance, if a notice to quit is given in evidence, and on its being read it appears that the landlord has drawn it up thus; ‘In consequence of your not having paid your rent for the last year and having ill-treated the farm, and allowed the premises to be out of repair, I hereby give you notice to quit on such a date,’ it is plain that a document may be admissible and yet not proof of all the facts stated in it.” *Per* Wilde, B., in *Milne v. Leisler*, 7 H. and N. 786 (803); Wigm. Ev., 05 Ed., S. 2113, p. 2860. **J**

(6) Conversation in which several distinct matters have been discussed.

(a) “If a portion of a conversation is relied on as an admission, the adverse party can give in evidence *only* so much of the same conversation as may explain or qualify the matter already before the Court.” *Tay. Ev.*, 10th Ed., S. 793, p. 528; *Prince v. Samo*, 7 L.J. Q.B. 123. **K**

(b) “Thus a witness who has acknowledged on cross-examination that he has heard the plaintiff admit on oath that he had repeatedly been insolvent, cannot be asked in re-examination whether the plaintiff had not,

1.—“Evidence shall be given of so much and no more of the statement,as the Court considers necessary, &c.”—(Concluded).

on the same occasion, expressly stated that certain money was given to him, and not lent.” *Prince v. Samo*, 7 L.J.Q.B. 123; Tay. Ev., 10th Ed., S. 733, p. 528. **L**

(7) Letters.

(a) “With regard to letters, a party may put in such as were written by his opponent, without producing those to which they were answers, or calling for their production. For, in such a case, the letters, to which those put in were answers, are in the adversary’s hands, and he may produce them if he thinks them necessary to explain the transaction.” *Ld. Barrymore v. Taylor*, 1 Esp. 326; *De Medina v. Owen*, 8 C. and K. 77; Tay. Ev., 10th Ed., S. 734, p. 528. **M**

(b) “This is the strict rule, but in practice if a party reads a letter from his opponent and is in possession of a copy of his own letter to which the opponent’s is an answer, he is expected to read both.” *Dagleish v. Dodd*, 5 C. and P. 238; Tay. Ev., 10th Ed., S. 734, p. 528. **N**

(c) “If a plaintiff puts in a letter by the defendant, on the back of which is something written by himself, the defendant is entitled to have the whole read.” *Dagleish v. Dodd*, 5 C. and P. 238; Tay. Ev., 10th Ed., S. 734, p. 528. **O**

(d) “Where a defendant laid before the Court several letters between himself and the plaintiff, he was allowed to read a reply of his own to the last letter of the plaintiff, it being considered as a part of an entire correspondence.” *Roe v. Day*, 7 C. and P. 705; Tay. Ev., 10th Ed., S. 734, p. 529. **P**

(8) Police diary, use of—Right of accused person.

(a) If the special diary is used by the Court to contradict the police officer who made it, or by the police officer who made it, to refresh his memory, the accused person or his agent is in law entitled to see only the particular entry used and so much of the special diary as is in the opinion of the Court necessary in that particular matter to the full understanding of the particular entry so used, and no more. 19 A. 390 (405). **Q**

(b) In such cases, the Court must be careful to see that the discretion entrusted to it in deciding what may or may not be seen by the accused or his agent is not abused, remembering that the discretion is to be a judicial discretion, and is not to be influenced by a mere arbitrary fancy. 19 A. 390 (405). **R**

Judgments of Courts of Justice when relevant.

40. The existence of any judgment, order or decree which by law

Previous judgments relevant to bar a second suit or trial.

prevents any Court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such Court ought to take cognizance of such suit or to hold such trial.

(Notes).

1.—GENERAL.

(1) Scope of the law contained in Evidence Act on judgments.

- (a) "The cases, which the Evidence Act provides for, are cases in which the judgment of a Court is in the nature of a law, and creates the right which it affirms to exist." Steph. *Intro.*, p. 141. S
- (b) "The subject, as ordinarily dealt with, introduces into the law of evidence an attempt to distinguish between judgments *in rem*, and judgments *in personam* or *inter partes*; the question of the effect of the pleas of *quatrefois acquit* and *autrefois convict*, which belongs to Criminal Procedure; the question of estoppels, which belongs rather to the law of pleading than to evidence; and the question of the effect given to the judgments of foreign Courts of Justice, which would seem more properly to belong to private international law." Steph. *Dig.*, 7th Ed., Note to Arts. 39—47, p. 185. T
- (c) Ss. 40 to 43 of the Evidence Act deal with the subject of relevancy of judgments. 6 C. 171 (174). *Per Muller, J.* U

(2) Scope and construction of section.

- (a) S. 40 provides for the cases, where a suit is barred by virtue of the Civ. Pro. Code for the following reasons. *Cun. Ev.*, 10th Ed., p. 182. Y
- (b) "That a suit, in which the matter in issue is also directly and substantially in issue, has been previously instituted for the same relief between the same parties or those whom they represent and is pending in a Court of competent jurisdiction in British India, or in any Court of competent jurisdiction established by the Governor-General in Council beyond British India, or before Her Majesty in Council." *Cun. Ev.*, 10th Ed., p. 182. W
- (c) "That the suit or matter in issue has been substantially in issue in a former suit between the same parties or those under whom they claim, litigating in the same title, in a Court of jurisdiction, competent to try such subsequent suit or the suit in which such issue has been raised, and has been heard and finally decided by such Court." *Cun. Ev.*, 10th Ed., p. 182. X
- (d) "That the relief sought forms part of a claim, for which the plaintiff omitted to sue in a former suit; or, was one of several remedies in respect of the same cause of action, for which the plaintiff, in a former suit, omitted, without the leave of the Court, to sue." *Cun. Ev.*, 10th Ed., p. 182. Y
- (e) "Under the first ground, an order admitting the plaint of a former suit would be relevant; under the second and third, the judgment." *Cun. Ev.*, 10th Ed., p. 183. Z
- (f) S. 40 was intended to include all cases in which the general law relating to *res judicata inter partes*, as understood when Act VIII of 1859 was in force, applied. 10 B. 489 (443). A
- (g) S. 40 may, without unduly straining the language, be read as including judgments on material issues between the same parties or their representatives. (*Ibid.*) B

1.—GENERAL—(Continued).

(h) S. 40 deals with estoppels, but many judgments may be evidence *inter partes*, which are not estoppels, and which are not admissible under S. 40. If such decisions are not admissible under S. 13, Evidence Act, they are not admissible either under any other section. 6 C.L.R. 439 (441)=6 C. 171, *per Mitter, J.* **C**

(i) S. 40 provides that the existence of a judgment, decree, or order, is a relevant fact, if it by law has the effect of preventing any Court from taking cognisance of a suit, or holding a trial. 6 C. 171 (174). *Per Mitter, J.* **D**

(j) A brings a suit against B for enhancement of rent. B sets up a mukarari patta in defence. A Court of competent jurisdiction finds the patta to be genuine and dismisses the suit. After the lapse of several years, B sells his right to C, and A then ejects the latter forcibly. Thereupon, C brings a suit against A to recover possession of the land covered by the mukarari patta. A denies the mukarari right and alleges that B was a tenant at will.

Before the Evidence Act was passed, the former judgment would have been conclusive evidence of B's mukarari. 6 C. 171 (175-7). *Per Mitter, J., referring to 12 B.L.R. 304 and 21 I.A. 283=1 C. 144.* **E**

(k) According to the law of evidence, as at present administered in England, it would be equally considered conclusive and, if not conclusive, at least as cogent, evidence, in the subsequent suit. (See Taylor on Evidence, S. 1497). 6 C. 171 (176). *Per Mitter, J.* **F**

(l) Such a judgment is not relevant under S. 40, because its existence does not by law prevent the Court from taking cognisance of the second suit. In the second suit, it is the plaintiff who would seek to use it as relevant evidence, and it is apparent that he would not rely upon it to bar the cognisance of his own suit. 6 C. 171 (176). *Per Mitter, J.* **G**

(m) Supposing that the word "trial" in S. 40 refers not only to a criminal trial, but also to a trial of an issue in a civil suit, the judgment in question would not have been relevant under this section before the present Procedure Code (Act X of 1877), because, under S. 2 of Act VIII of 1859, it would not have prevented any Court from holding a trial of the issue as to the mukarari title in the second suit. 6 C. 171 (176). *Per Mitter, J.* **H**

(n) Then again, suppose, in the second suit, the judgment in question was not produced at, or before, the trial, and evidence bearing upon this issue was allowed to be adduced. Then suppose at a later stage of the case, the plaintiff produced the judgment in question and satisfied the Court, that, in the exercise of its discretionary power, it ought to receive it. Under these circumstances, it would not be admissible under S. 40, as its existence would and could not at that stage of the case prevent the Court from holding a trial of the issue regarding B's mukarari title. 6 C. 171 (176-7). *Per Mitter, J.* **I**

(o) The former judgment in such a case would, undoubtedly, be admissible under S. 40, and would have the effect of prohibiting the Court from trying the same issue a second time. 6 C. 171 (191) (F.B.); *per Garth, C.J.* **J**

1.—GENERAL—(*Continued*).

- (p) If a judgment is stripped of the peculiar character of authority given to it by S. 40 *et seq.*, all that it amounts to is this, that A and B were, on a particular day, before Z, who is a Judge and who formed a particular opinion on a subject as to which A and B were at issue. This makes it highly probable that X, a different Judge, should come to the same conclusion upon a similar dispute between A and C. That the Legislature intended to give that sort of efficacy to the judgments of the Court is difficult to believe, even if the words otherwise suggested the construction which they do not. 6 C. 171 (185). *Per Jackson, J.* K
- (q) That, under Ss. 40 to 43, the English law upon the subject of judgments has been imperfectly enacted and that, in order to give it its full scope, it is necessary to have recourse to Ss. 11 and 13, are erroneous suppositions. 6 C. 171 (189) (F.B.). *Per Garth, C.J.* L
- (r) Thus, it has been considered, that S. 40 only makes former decrees admissible, when they have the effect of preventing a Court of justice from taking cognisance of a suit, that is, from dealing with a suit in its entirety, and that the words "holding a trial" must necessarily refer to criminal proceedings only. 6 C. 171 (190). *Per Garth, C.J.* M
- (s) This construction of S. 40 would confine its operation very materially. 6 C. 171 (190). *Per Garth, C.J.* N
- (t) For example, in the case of a suit for three years' rent, if a former decree had decided against the claim as regards the first year's rent only, the decree would by law be a bar to the suit as regards that one year's rent. But in the view which has been taken of the section, the decree, though a bar to the second suit *pro tanto*, would not be admissible in evidence under that section; because it would not prevent the Court from taking cognisance of the whole suit but only of a part of it. 6 C. 171 (190). *Per Garth, C.J.* O
- (u) So again, if, in answer to a suit, some ground of defence were set up, which had been decided against the defendant in a former judgment between the same parties, that judgment although, undoubtedly, a legal bar to the defence set up, would not be admissible under S. 40; because it would not prevent the Court from taking cognisance of the suit, but only of a defence set up to it. 6 C. 171 (190). *Per Garth, C.J.* P
- (v) But, surely, it could never have been the intention of the Legislature to confine the effect of S. 40 in this way, to let in as relevant evidence under that section one portion of a class of judgments, which operate by law as estoppels, and to leave another portion of the same class of judgments, which operate equally as estoppels, to be admissible as "transactions," under some other section of the Act. 6 C. 171 (190). *Per Garth, C.J.* Q
- (w) It is true that S. 40 might have been more clearly worded. 6 C. 171 (190). *Per Garth, C.J.* R
- (x) It has, in fact, much the same defect as S. 2 of Act VIII of 1859, which was pointed out by the Privy Council in the case of 12 B.L.R. 304. 6 C. 171 (190). *Per Garth, C.J.* S
- (y) It was intended to include all judgments, which by law operate to prevent a Court, whether civil or criminal, from taking cognisance of a suit, or trying any particular issue. 6 C. 171 (190). *Per Garth, C.J.* T

1.—GENERAL—(Continued).

(s) In other words, S. 40 admits as evidence all judgments *inter partes*, which would operate as *res judicata* in a second suit. 6 C. 171 (191). *Per Garth, C.J.* See, also, Whitley Stokes, Vol. II, p. 880. **U**

(aa) The words "holding a trial" are amply large enough to admit of this construction; and it is not because in some other Act the words "holding a trial" may have been construed to refer to criminal trial only, that we ought to confine their meaning in the same way in S. 40 of the Evidence Act. 6 C. 171 (190-1). *Per Garth, C.J.* **Y**

(bb) "This section simply declares that, in cases in which the law of procedure, civil or criminal, gives to a judgment or order the effect of precluding the Court from taking cognisance of or trying a subsequent cause, the existence of the judgment or order shall be a relevant fact." *Cun. Ev., 11th Ed., p. 111.* **W**

(cc) The conditions under which a judgment or order has the above stated effect do not fall within the province of the law of evidence. *Cun. Ev., 11th Ed., p. 111.* **X**

(dd) And, therefore, the present section, is so worded as to put into effect whatever may be the existing law on "*res judicata*." *Cun. Ev., 10th Ed., p. 183.* **Y**

(ee) Where, in a subsequent suit, the question was, whether certain former judgments as to whether a person was or was not the heir of another were admissible in evidence, it was held that the judgments did not fall within the purview of S. 40, Evidence Act. 12 A. 1 (9) (F.B.) **Z**

(ff) S. 40^a is inapplicable to a case, where the Court, by which the judgment was given, could not have tried the second suit. *Cun. Ev., 11th Ed., p. 111.* **A**

(gg) In a former suit, it was decided that S was the nearest heir of B; in a later one it was contended, by the defendant in both the lower Courts, that the judgment in the former suit could not be used as evidence in the second suit, as the present plaintiffs were no party to the former proceedings. *Held*, the judgment was not relevant under Ss. 40 to 42, Evidence Act. 6 C. 171 (F.B.). **B**

(hh) Judgments and decrees, which are either between the same parties as those in a second suit or between those under whom they respectively claim—one of them being founded on an admission made by the father of the later defendants—are evidence so nearly conclusive as, when produced, to shift the burden of proof from the plaintiffs to the defendants. 3 B. 3 (5 and 6). **C**

(3) Effect of judgments in barring further proceedings not dealt with by section.

"The sections as to judgments (40, 41) designedly omit to deal with the question of the effect of judgments in preventing further proceedings in regard of the same matter." *Steph. Introduct., p. 141.* **D**

(4) "Judgment," meaning of.

The word "judgment" in this portion of the subject means any final judgment, order, or decree of any Court. *Steph. Dig., 7th Ed., Art. 89, p. 51.* **E**

1.—GENERAL—(*Continued*).

(5) Judicial record consists of two parts.

There are two portions in the record of a Court of justice—the substantive and the judicial. Best Ev., 9th Ed., S. 590, p. 490. See, also, Phip. Ev., 4th Ed., p. 373 and Tay. Ev., 10th Ed., S. 1667, p. 1197. **F**

(6) Substantive portion, contents of.

In its substantive part, the Court records or attests its own proceedings and acts. Best Ev., 9th Ed., S. 590, p. 490. **G**

(7) Judicial portion, contents of.

In its judicial part, the Court expresses its judgment or opinion on the matter in dispute, and in forming that opinion, its duty is to have regard only to the evidence and arguments adduced before it by the parties to the proceedings, either of whom have generally a right of appeal. Best Ev., 9th Ed., S. 590, p. 490. **H**

(8) General principle of section.

(a) "The general principle is that the mere existence of a judgment, its date and its legal consequences are conclusively proved, as against all the world, by the production of the record, or the proof of an examined copy, (for, a judgment being a public transaction of a solemn character, must be presumed to be faithfully recorded), but that it furnishes no proof whatever of *collateral* facts, even though, as between the parties to such judgment themselves, such facts must have been proved." Tay. Ev., 10th Ed., S. 1667, pp. 1197-8. See, also, 9 C.W.N. 402 (410). See, also, Phip. Ev., 4th Ed., p. 373, cited *infra*. **I**

(b) "Every judgment is conclusive evidence for or against all persons, (whether parties, privies, or strangers) of its own existence, date and legal effect, as distinguished from the accuracy of the decision rendered." Phip. Ev., 4th Ed., p. 373. **J**

(c) "All judgments whatever are conclusive proof as against all persons of the existence of that state of things which they actually effect, when the existence of the state of things so effected is a fact in issue or is deemed to be relevant to the issue." Steph. Dig., 7th Ed., Art. 40, p. 51. **K**

(d) "If an action be brought, and the merits of the question be discussed between the parties, and a final judgment obtained by either, the parties are concluded, and cannot canvass the same question again in another action, though, perhaps some objection or argument might have been urged upon the first trial which would have led to a different judgment. After a recovery by process of law, there must be an end of litigation; if it were otherwise, there would be no security for any person." Per Lord Kenyon, C.J., Field Ev., 6th Ed., p. 176. **L**

(9) "Judgments conclusive of their existence," meaning of.

(a) The meaning of the proposition, "every judgment is conclusive of its own existence," is that the law attributes unerring verity to the substantive, as distinguished from the judicial, portions of the judgment. Phip. Ev., 4th Ed., p. 373. **M**

1.—GENERAL—(Continued).

- (b) "The law attributes unerring verity to the substantive portion; it will neither allow the record to be contradicted in these respects, nor the facts, thus recorded or attested, to be proved in any other way than by the production of the record itself, or by copies shown to be taken in the prescribed manner." Best. Ev., 9th Ed., S. 590, p. 490. **N**

(10) Examples.

- (a) Amongst the instances which Taylor in his Evidence cites is a judgment recovered against a surety. 9 C.W.N. 402 (410). **O**
- (b) Such a judgment would, in an action by the surety against the principal debtor, show the amount which the surety had been compelled to pay for the principal debtor, and,* in a footnote, the remark is made that the judgment furnishes no proof that the plaintiff was legally liable to pay that amount, owing to the principal's default. 9 C.W.N. 402 (410). **P**
- (b1) Similar principles are applicable to other cases, where the party has a remedy over, as for contribution, or the like. 9 C.W.N. 402 (410), citing Taylor. **Q**
- (c) Where a person has been tried and acquitted of a crime against another and subsequently sues the latter for malicious prosecution, the record of the previous criminal trial is conclusive evidence of the former's acquittal. But it is no evidence of the acquitted person's innocence or of the prosecutor in the former proceeding being the prosecutor, or that the prosecutor was inspired by malice. Phip. Ev., 4th Ed., p. 373, referring to *Legatt v. Tollerney*, 14 East 302 and *Purcell v. Macnamara* 9 East 361. See, also, Steph. Dig., 7th Ed., Art. 40, p. 52, referring to *Caddy v. Barlow*, 1 Man and Ry. 277 and Tay. Ev., 10th Ed., S. 1667, p. 1198. **R**
- (d) Where a matter is sued for the negligence of his servants, the verdict against him is conclusive proof in an action by the master against the servants of the amount of the damages recovered against the master; but it is not even admissible as evidence of the servant's negligence. *Green v. New River Co.*, 4 T.R. 590; Phip. Ev., 4th Ed., p. 373; Steph. Dig., 7th Ed., Art. 40, p. 52 and Tay. Ev., 10th Ed., S. 1667, p. 1198. **S**
- (e) Where a surety sues the principal debtor, a judgment by a creditor against the surety is proof of the amount that the surety was compelled to pay, but not of his liability to pay, it. *King v. Norman*, 4 C.B. 884 and *Exp. Young, re Kitchin*, 17 Ch. D. 668; Phip. Ev., 4th Ed., p. 373; Tay. Ev., 10th Ed., S. 1667, p. 1198. **T**
- (f) A surety pleaded that the creditor had received money from the debtor in discharge of his claim; to rebut this defence, the creditor was permitted to show the existence of a judgment obtained against himself by the assignees of the principal, whereby such moneys were recovered back. *Pritchard v. Hitchcock*, 4 M. and G. 165; Phip. Ev., 4th Ed., p. 373; Tay. Ev., 10th Ed., S. 1667, p. 1198. **U**

1.—GENERAL—(Continued).

(g) Judgments are relevant in this connection when adduced in evidence to contradict a witness. *Watson v. Little*, 5 H. and N. 472; Phip. Ev., 4th Ed., p. 373. See, also, Tay. Ev., 10th Ed., S. 1668, p. 1199. **Y**

(h) A had sworn that her son B was born on the 18th of March, i.e., five days after her marriage. To contradict her evidence, an affidavit order of deceased justices, stating that A swore that B was born on March 8, was admitted in evidence, but not to prove the bastardy or date of birth. *Watson v. Little*, 5 H. and N. 472; Phip. Ev., 4th Ed., p. 374. See, also, Tay. S. 1668. **W**

(i) On the trial of a receiver of stolen goods, the evidence of the thief that he had committed the theft was permitted to be discredited by the record of his acquittal. *R. v. M'Cue*, Jebb. C.R.C. 120; Phip. Ev., 4th Ed., pp. 374, 399. See, also, Tay. Ev., 10th Ed., S. 1698, p. 1222. **X**

(j) Judgments are relevant as constituting a link of title or an act of ownership. *Brew v. Haren*, I.R. 11 C.L. 198; Phip. Ev., 4th Ed., p. 374; Tay. S. 1698, p. 1222. **Y**

(k) Judgments are also relevant as explaining the character in which the parties, sue, defend, or hold property. *Davies v. Loundes*, 6 M. and Gr. 520 and *Lyll v. Kennedy*, 14 Ap. Cas. 437; Phip. Ev., 4th Ed., p. 374; Tay. S. 1668, pp. 1199, 1200. **Z**

(l) Judgments are also relevant, when they are adduced in evidence as influencing conduct. *Thomas v. Russell*, 9 Exch. 764; Phip. Ev., 4th Ed., 374. **A**

(m) Where a person obtained probate of the will of another (which he had forged) and sued a third person for a debt due to the testator, the probate was held to be conclusive evidence, till revoked, that he was the executor of the testator. *Allen v. Dundas*, 3 T.R. 125; Phip. Ev., 4th Ed., p. 379; Tay. Ev., 10th Ed., S. 1676, p. 1207 and Steph. Dig., 7th Ed., Art. 40, p. 52. **B**

(n) But, though the probate may conclusively prove the title of the executor, till the probate decree stands, any person, not a party to the probate proceedings who could not have intervened in that suit, can sue to revoke the probate on the ground that the will, for which probate was decreed, was a forgery. *Young v. Holloway*, (1895), P. 87; Tay. Ev., 10th Ed., S. 1675, p. 1207. **C**

(o) On the question whether a ship-owner is entitled to recover as for a loss by capture against an underwriter, a judgment of a competent French prize Court, condemning the ship and cargo as prize, is conclusive evidence that the ship and cargo were lost to the ship-owner by capture. *Geyer v. Aguilar*, 7 T.R. 681; Steph. Dig., 7th Ed., Art. 40, p. 52; Phip. Ev., 4th Ed., p. 379 and Tay. Ev., 10th Ed., S. 1675, p. 1206. **D**

(p) Where A is deprived of his living by the sentence of an ecclesiastical Court, the sentence is conclusive proof of the act of deprivation in all cases. *Philips v. Bury*, 2 T.R. 346, 351; Steph. Dig., 7th Ed., Art. 40, p. 52; Tay. Ev., 10th Ed., S. 1675, p. 1206. **E**

1.—GENERAL—(Continued).

(q) Where A and B are divorced *a vinculo matrimonii* by a sentence of the Divorce Court, the sentence is conclusive proof of the divorce in all cases. *Needham v. Bremner*, L.R. 1 C.P. 583; Steph. Dig., 7th Ed., Art. 40, p. 52; Tay. Ev., 10th Ed., S. 1675, p. 1206. **F**

(r) Wherever a question at issue is concluded by a previous judgment between the same parties, that judgment is relevant. *Cun. Ev.*, 11th Ed., pp. 111-2. **G**

(11) Proof of existence of judgment.

"The existence of the judgment effecting the state of things it actually effects may be proved in the manner prescribed by the rules laid down in Part II "On Proof." Steph. Dig., 7th Ed., Art. 40, p. 52. **H**

(12) Judgments *inter alios*—Admissibility.

(a) "Judgments *inter alios* are admissible as evidence, where the record is matter of *inducement*, or merely introductory to other evidence." Tay. Ev., 10th Ed., S. 1668, p. 1198. **I**

(b) In order to discredit a witness, by showing that he gave a different testimony in a previous trial, the former judgment will, (though the parties to it were strangers to the subsequent suit), be admissible for the purposes of laying the foundation for the evidence of the previous statements. *Clarges v. Sherwin*, 12 Mod. 343; *Foster v. Shaw*, 7 Serg. and R. 163 (Am.); Tay. Ev., 10th Ed., S. 1668, pp. 1198-9. **J**

(c) On a charge of perjury committed on the trial of an action in the High Court, the production by the officer of the filed copy of the writ and of the pleadings will sufficiently prove the existence of the action. Tay. Ev., 10th Ed., S. 1668, p. 1199, referring to *R. v. Scott*, 2 Q.B.D. 415. See, also, Phip. Ev., 4th Ed., p. 515. **K**

(d) Where a person is charged with aiding the escape of a felon from jail, the production of the record of conviction from the proper custody will be conclusive evidence that the prisoner was convicted of the crime mentioned in it. *R. v. Shaw*, R. and R. 526; Tay. Ev., 10th Ed., S. 1668, p. 1199. **L**

(e) Where a sheriff was sued for neglect in regard to an execution, it was usual to give in evidence judgments against third persons, to show the character in which the plaintiff claimed, and the amount of damage he had sustained. *Davies v. Lowndes*, 1 Bing. N.C. 607 and *Adams v. Balch*, 5 Greenl. 188 (Am.); Tay. Ev., 10th Ed., S. 1668, p. 1199. **M**

(f) In an action by A against the sheriff for trespass to his goods, the latter may adduce in evidence a judgment against B, and show that he seized the goods by virtue of a *fiery facias* upon that judgment, and that the goods belonged to B. Tay. Ev., 10th Ed., S. 1668, p. 1199. **N**

(g) A record constituting one of the muniments of a person's title to land or goods,—as where a deed was made under a decree in Chancery, or where goods were purchased at a sale made by a sheriff upon an execution—may be tendered in evidence against a person who is a stranger to it. Tay. Ev., 10th Ed., S. 1668, p. 1199. **O**

1.—GENERAL—(Continued).

- (h) In an action to recover lands, a decree in a suit between the defendant's father, and other persons unconnected with the plaintiff, which directed the defendant's father to be let into possession of the estate as his own property, was held to be admissible, not as proof of any of the facts therein stated, but to explain in what character the father, through whom defendant claimed, had taken possession of the estate. *Davies v. Loundes*, 12 L.J.C.P. 506; see Tay. Ev., 10th Ed., S. 1668, p. 1200. See, also, Phip. Ev., 4th Ed., p. 289. See, also, 11 C. 745 (747), per *Cunningham, J.* P

(13) Admissibility of judgments for protection of Magistrates.

- (a) "Adjudications are sometimes tendered in evidence for the purpose of protecting the Magistrates who pronounced them, and the officers who enforced them, against an action of trespass." Tay. Ev., 10th Ed., S. 1669, p. 1200. See Phip. Ev., 4th Ed., p. 374. Q
- (b) "Here the rule of law is that, if the adjudication, when read in connection with the other proceedings, shows, either expressly or by fair and necessary inference, that a judicial authority pronouncing it had jurisdiction over the subject-matter, it will furnish conclusive evidence of the truth of the facts stated in it, even if those facts are necessary to give such authority jurisdiction." Tay. Ev., 10th Ed., S. 1669, p. 1200. R
- (c) "Or, perhaps, the doctrine may be more correctly stated as being that the production of the judgment, and of the proceedings on which it is founded, will be a bar to all enquiry respecting the truth or falsehood of those facts on the question which must have been in controversy before the adjudicating tribunal which are stated in it, and will conclusively establish the immunity of every person who has acted judicially with regard to such matters." Tay. Ev., 10th Ed., S. 1669, p. 1200, referring to *Aldridge v. Haines*. See, also, Phip. Ev., p. 374. S
- (d) "The protection thus given does not extend to cases where a Judge, either wilfully, or under a mistake, not of fact but of law, acts wholly without jurisdiction." *Anderson v. Gorrie*, 71 L.T. 382 (C.A.); *Houlden v. Smith*, 19 L.J.Q.B. 170; *Calder v. Hall*, 3 Moo. P.C.C. 28; Tay. Ev., 10th Ed., S. 1669, p. 1200. See, also, Phip. Ev., p. 374. T
- (e) "But such doctrine is best illustrated by, and is usually applied to, cases in which justices of the peace are sued by parties who imagine themselves wronged by a conviction or order." Tay. Ev., 10th Ed., S. 1668, p. 1200. U
- (f) The rule only protects justices and others acting in a judicial enquiry. Tay. Ev., 10th Ed., S. 1672, p. 1202; Phip. Ev., 4th Ed., p. 374. Y
- (g) "In an action of trespass against Magistrates for issuing a warrant of distress to enforce payment of a rate, they have no defence should the rate prove invalid; for the rate must be good in order to give them jurisdiction, but they cannot themselves give judicially any conclusive decision as to its validity, and consequently their warrant is not any, still less conclusive, evidence, of any fact on which the validity of the rate depends." Tay. Ev., 10th Ed., S. 1672, p. 1202. W

1.—GENERAL—(Concluded).

(14) Admissibility of judgments for concluding opponent upon facts determined.

- (a) "A judgment is often tendered in evidence, not merely to prove its existence and legal consequences, or to protect the party who pronounced it against legal proceedings, but also to conclude an opponent upon the facts determined." Tay. Ev., 10th Ed., S. 1673, p. 1203. **X**
- (b) "For this purpose, the rules which govern its effect will vary according to the nature of the judgment." Tay. Ev., 10th Ed., S. 1673, p. 1203. **Y**
- (c) "If it be a judgment *in rem*, it will bind all persons whomsoever; and this was probably so under the old practice of pleading even though it had not been pleaded." Tay. Ev., 10th Ed., S. 1673, p. 1203, referring to *Hannaford v. Hunn*, 2 C. and P. 155, etc. **Z**
- (d) "If it be a judgment *inter partes*, it will, generally, bind only parties and privies to it; and, as against them, it was not, even under the old practice, regarded as absolutely conclusive, unless it was specially pleaded as estoppel." Tay. Ev., 10th Ed., S. 1673, p. 1203. **A**
- (e) "Where the point could have been taken on the pleadings, a judgment, whether *in rem* or *inter partes*, must, in order to act as an estoppel, be a judgment of a Court of competent jurisdiction; therefore, a judgment of a Court, on a matter beyond its jurisdiction, binds neither strangers nor parties or privies." Tay. Ev., 10th Ed., S. 1673, p. 1203, referring to *Toronto Ry. Co. v. Corporation of Toronto*, (A.C.) 809. See, also, Phip. Ev., 4th Ed., p. 389. **B**

2.—STATUTORY PROVISIONS ON SUBJECT-MATTER OF SECTION.

(1) Statutory provisions bearing on subject-matter of section.

- (1) Civ. Pro. Code, 1882, Ss. 12, 13, 14, 43, corresponding to Ss. 10, 11, 13 and O. 2, r. 2 of Act V of 1908, respectively;
- (2) Crim. Pro. Code, 1898, Ss. 403 and 511; and
- (3) Act I of 1880 (Bombay Khoti Settlement), S. 17. **C**

(2) Ss. 13 and 14, C.P.C., 1882, or Ss. 11 and 13, C.P.C., 1908.

- (a) No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I.—The expression "former suit" shall denote a suit which has been decided prior to the suit in question, whether or not it was instituted prior thereto.

Explanation II.—For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III.—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

2.—STATUTORY PROVISIONS ON SUBJECT-MATTER OF SECTION—(Continued).

Explanation IV.—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.—Any relief claimed in the plaint, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation VI.—Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

(b) "In the Code of Civil Procedure, Ss. 13 and 14, it is laid down generally that suits, which have been already heard and finally determined, shall not be heard again." Mark. Ev., pp. 36-7. D

(3) Judgment relied on as bar admissible.

"When, therefore, it is contended that on this ground a trial is barred, of course, the judgment which is relied on to prove this must be admissible. It is the only evidence which can be procured." Mark. Ev., p. 37. E

A.—Res Judicata.

(1) 'Res judicata'—Nature.

The principle of *res judicata* (simple enough in its statement, is one that seems to present considerable difficulty in its application. 11 B.H.C.R. 224 (228). Per *West, J.* F

(2) 'Res judicata,' whether rule of procedure or evidence.

(a) The plea of *res judicata*, as a bar to an action, belongs to the province of adjective law, *ad litem ordinationem*, but difference of opinion prevails among jurists as to whether the rule belongs to the domain of procedure or constitutes a rule of the law of evidence as furnishing a ground of estoppel. 8 A. 324 (331). Per *Mahmood, J.* G

(b) In England, and also in America, the rule is usually dealt with as belonging to the law of evidence, for, there judgments *in personam*, which operate as *res judicata*, are as often treated as falling under the category of estoppels by record. 8 A. 324 (332). Per *Mahmood, J.* H

(c) Sir Fitz James Stephen, the distinguished jurist who framed the Indian Evidence Act, and, whose views have been accepted by the Indian Legislature in framing this section of the Act, adopted, what seems to be, the only logical and juristic classification by treating the rule of *res judicata*, as falling beyond the proper region of the law of evidence, and as appertaining to procedure properly so called. 8 A. 324 (332). I

(d) The subject of *res judicata*, treated by English text books as a branch of the law of evidence, on which such prolonged controversy has raged, belongs properly to procedure, and is now, so far as Indian Courts are concerned, regulated by the provisions of Code of Civil Procedure. Oun. Ev., 10th Ed., p. 183. J

2.—STATUTORY PROVISIONS ON SUBJECT-MATTER OF SECTION—(Continued).

A.—Res Judicata—(Continued).

(e) Whether a suitor ought ever to be permitted to re-open a question once decided between him and the defendant, and if so, by what restrictions his right to do so should be limited, are questions of policy which, on account of the intricacy and confusion in which the subject is enveloped, have never yet, probably, received sufficient consideration. *Cun. Ev.*, 10th Ed., p. 183. **K**

(f) The subject, however, does not in any proper sense fall within the domain of the law of evidence, whose province it is merely to provide the means by which litigants may prove any right to which they may be legally entitled. *Cun. Ev.*, 10th Ed., p. 183. **L**

(3) Comparison between res judicata and estoppel.

(a) That the effect of the plea of *res judicata* may, in the result, operate like an estoppel, by preventing a party to a litigation from denying the accuracy of the former adjudication, cannot be doubted. 8 A. 324 (332). **M**

(b) But here the similarity between the two rules virtually ends; and, it is equally clear that the *ratio* upon which the doctrine of estoppel, properly so called, rests, is distinguishable from that upon which the plea of *res judicata* is founded. 8 A. 324 (332). **N**

(c) The essential features of estoppel are those which have found formulation in S. 115 of the Act, the provisions of which proceed upon the doctrine of equity (upon which S. 41 of the Transfer of Property Act is also based) that he who by his declaration, act, or omission has induced another to alter his position, shall not be allowed to turn round and take advantage of such alteration of that other's position. 8 A. 324 (332). **O**

(d) To raise an estoppel not only must the former suit have been between the same parties as the latter, it must also have raised the same issues. 1 C.L.J. 594 (600)=9 C.W.N. 938 (P.C.). **P**

(d1) A judgment on the trial of an action operates as an estoppel between the parties when bringing a subsequent action, though such a judgment might be reversed in appeal. *Huntly v. Ashell*, (1905), 2 Ch. 656, C.A. See "Annual Practice," 1908, Vol. II, p. 392. **Q**

(e) The law as to estoppel by a judgment is stated in S. 6 of Act XII of 1879 and S. 13 of Act XIV of 1882. 16 C. 173 (182) (P.C.). **R**

(f) It is, that the matter must have been directly and substantially in issue in the former suit, and have been heard and finally decided. 16 C. 173 (182) (P.C.). **S**

(g) In order to see what was in issue in a suit, or what has been heard and decided, the judgment must be looked at 16 C. 173 (183) (P.C.). **T**

(h) All the other rules to be found in Ch. VIII of the Evidence Act, relating to the estoppel of tenant, or of acceptors of bills of exchange, bailees or licensees, proceed upon the same fundamental principles. 8 A. 324 (332). **U**

2.—STATUTORY PROVISIONS ON SUBJECT-MATTER OF SECTION—(Continued).

A.—Res Judicata—(Continued).

- (i) On the other hand, the rule of *res judicata* does not owe its origin to any such principle, but is founded on the maxim *nemo debet bis vexari pro una et eadem causa*—a maxim which is itself an outcome of the wider maxim *interest reipublicae ut sit finis litium*. 8 A. 324 (332). **Y**
- (j) The principle of estoppel, as already said, proceeds upon different grounds, and the framers of the Indian Codes of procedure acted upon correct juristic classification in dealing with the subject of *res judicata* as appertaining to the province of procedure properly so called. 8 A. 324 (332). **W**
- (k) Perhaps the shortest way to describe the difference, between the plea of *res judicata* and an estoppel, is to say that whilst the former prohibits the Court from entering into an enquiry at all as to a matter already adjudicated upon, the latter prohibits a party, after the enquiry has already been entered upon, from proving anything, which would contradict his own previous declaration or acts, to the prejudice of another party, who, relying upon those declarations or acts, altered his position. 8 A. 324 (332-3). **X**
- (l) In other words, *res judicata* prohibits an enquiry in *limine*, whilst an estoppel is only a piece of evidence. 8 A. 324 (333). **Y**
- (m) Further the theory of *res judicata* is to presume by a conclusive presumption that the former adjudication declared the truth, whilst "an estoppel," to use the words of Lord Coke, "is, where a man is concluded by his own act or acceptance to say the truth," which means, he is not allowed, in contradiction of his former self, to prove what he now chooses to call the truth. 8 A. 324 (333). **Z**
- (n) Thus, the plea of *res judicata* proceeds upon grounds of public policy properly so called, whilst an estoppel is simply the application of equitable principles between man and man—two individual parties to a litigation. 8 A. 324 (333). **A**

(3-A) Consent judgment an estoppel.

A judgment by consent acts as an estoppel. *Re S. American and Co.*, (1895) 1 Ch. 37. See "Annual Practice," 1908, Vol. II, p. 390. **B**

(4) Foundation and object of doctrine of 'res judicata.'

- (a) The maxim of the law upon which the doctrine of *res judicata* rests is "*nemo debet bis vexari pro una eadem causa*" (no man shall be twice tried for one and the same cause). The leading case is that of the *Duchess of Kingston*, 2 Smith L.C. 680. **C**
- (b) The principles are two in number—the one, public policy, that it is in the interest of the State that there should be an end of litigation; and the other, the hardship on the individual that he should be vexed twice for the same cause. 24 A. 112 (115, 116). See, also, 20 B. 86 (91), referring to *Lockyer v. Ferryman*, L.R. 2 App. Cas. 519 (530) and 14 B. 31 (35). **D**

2.—STATUTORY PROVISIONS ON SUBJECT-MATTER OF SECTION—(Continued).

.A.—Res Judicata—(Continued).

- (c) "The principle of *res judicata* applies to prevent parties raising a second time, in the same suit, or in the same execution-proceedings, an issue which, in that suit or in execution-proceedings in the suit, had been previously determined." 24 A. 138 (141) **E**
- (d) The doctrine aims against superfluous suits. 16 M.L.J. 526 (528)=2 M.L.T. 40; see, also, 9 C.L.R. 474 (478). **F**
- (e) To constitute a *res judicata*, the issue must have been heard and finally decided. 104 P.R. 1883; 2 W.R. 79 (80). **G**
- (f) A judgment to have the authority, or even the name of *res judicata*, must be a definitive judgment of condemnation or dismissal. 11 A. 148 (160). **H**
- (g) A provisional condemnation, then, cannot have either the name or the authority of *res judicata*, for, although it gives the party obtaining it a right to compel the opposite party to pay or deliver provisionally the money or things demanded, it does not put an end to the cause, or form a presumption *juris et de jure* that what is ordered to be paid or delivered is due, since the party condemned, after satisfying the sentence, may be admitted in the principal cause to prove that what he was ordered to pay is not due, and consequently to obtain a revocation of the judgment. 11 A. 148 (160). **I**
- (h) The Court must be satisfied, before giving effect to the plea, that the ground of legal right on which the plaintiff sues was a point raised and opened for decision in the former suit, and that it was finally dealt with by the judgment and decree therein. 2 M.H.C. 131. *Distgd.* in 3 M.H.C. 217. **J**
- (i) "*Res judicata*" means, by its very words, a thing upon which the Court has exercised its judicial mind. *Jenkins v. Robertson*, L.R. 1 Sc. Ap. 117; cited in 3 B. 223 (226). **K**
- (j) A decree means a formal expression of an adjudication deciding a suit. 9 Bom. L.R. 259 (264). **L**
- (k) So, where there is no evidence to show whether a certain question was in truth adjudicated-upon or not, the rule of *res judicata* does not apply. 17 B. 35 (40). **M**
- (l) It seems to be that the main object of the doctrine of *res judicata* is to prevent multiplicity of suits and interminable disputes between litigants, *ne autem lites immortales essent, dum litigantes mortales sunt*. This saying of Voet is in accord with the maxims *nemo debet bis vexari pro una et eadem causa*, and the broader maxim *interest reipublice ut sit finis litium*. 11 A. 148 (162). **N**
- (m) "From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true." *Duchess of Kingston's case*, 2 Smith's L.C. 642; cited in Field Ev., 6th Ed., p. 176. **O**

2.—STATUTORY PROVISIONS ON SUBJECT-MATTER OF SECTION—(Continued).

A.—Res Judicata—(Continued).

- (u) "First, that the judgment of a Court of concurrent jurisdiction directly upon the point is, as a plea, a bar, or, as evidence, conclusive between the same parties upon the same matter directly in question in another Court." (*Ibid*). P
- (o) "Secondly, that the judgment of a Court of exclusive jurisdiction directly upon the point is, in like manner, conclusive upon the same matter between the same parties coming incidentally in question in another Court for a different purpose." (*Ibid*). Q
- (p) "But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment." (*Ibid*). R

(5) Use of prior judicial decisions.

- (a) Judicial decisions recognising the existence of a disputed custom amongst the Jains of one place are very relevant as evidence of the existence of the same custom amongst the Jains of another place, unless it is shown that the customs are different. 27 C. 379 (391). S
- (b) Decrees in previous suits which are not reversed are not conclusive, but are at least admissible in evidence under S. 13, Evidence Act, for showing that the right has been not only asserted by the claimants, but recognised by the tribunals of the country on several occasions. 3 B. 3 (5). T

(6) Res judicata not peculiar to England.

There is nothing technical or peculiar to the law of England in the rule as stated in the *Duchess of Kingston's case*. It was recognised by the civil law, and it is perfectly consistent with the second section of the Code of Civil Procedure, 1859 (under which this case was tried). 7 B.L.R. 673 (678) (P.C.) = 15 W.R. 30 (P.C.); cited in 9 C. 439 (443) (P.C.); see, also, 26 M. 760 (770). U

(7) Plea of res judicata is a technical objection.

The plea of *res judicata* is a technical objection and may well be met by arguments of the same character. It cannot be established on broad general grounds and without a careful analysis, and a critical examination of the previous proceedings. 57 P.R. 1907 = 68 P.W.R. 1907. V

(8) Application of doctrine.

- (a) The section applies to two classes of cases, in one of which a subsequent suit is wholly barred by the decision in a former suit, by reason of the subject-matter of the two suits being the same; and, in the other, the trial of an issue in a subsequent suit is barred by the adjudication upon the same issue in a former suit, though the subject-matters of the two suits are different. 2 C.W.N. 297 (300) = 25 C. 571. W

2.—STATUTORY PROVISIONS ON SUBJECT-MATTER OF SECTION—(Continued).

A.—Res Judicata—(Continued).

- (b) "In considering the operation of the previous judgment, it should be borne in mind that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effects as an estoppel in another action between the same parties upon a different claim or cause of action." *Per* Field, J., in *Cromwell v. Sac*, 94 U.S. 351; *cited* in *Field Ev.*, 6th Ed., App. B., p. 513. **X**
- (c) "In the former case the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action." *Per* Field, J., *Cromwell v. Sac*, 94 U.S. 351, *cited* in *Field Ev.*, 6th Ed., p. 513. **Y**
- (d) "It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Per* Field, J., in *Cromwell v. Sac*, 94 U.S. 351, *cited* in *Field Ev.*, 6th Ed., p. 513. **Z**
- (e) "Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defences actually existed, of which no proof was offered, such as forgery, want of consideration or payment." *Per* Field, J., in *Cromwell v. Sac*, 94 U.S. 351, *cited* in *Field Ev.*, 6th Ed., p. 513. **A**
- (f) "If such defences were not presented in the action and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defences never existed." *Per* Field, J., in *Cromwell v. Sac*, 94 U.S. 351, *cited* in *Field Ev.*, 6th Ed., p. 513. **B**
- (g) "The language, therefore, which is so often used, that a judgment estops, not only as to every ground which might have been presented in the action, but also as to every ground which might have been presented, is strictly accurate when applied to the demand or claim in controversy. Such demand or claim having passed into judgment cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever." *Per* Field, J., in *Cromwell v. Sac*, 94 U.S. 351, *cited* in *Field Ev.*, 6th Ed., p. 513. **C**
- (h) "But where the second action between the same parties is often a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered." *Per* Field, J., in *Cromwell v. Sac*, in 94 U.S. 351, *cited* *Field Ev.*, 6th Ed., p. 513. **D**
- (i) "In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit on a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original

2.—STATUTORY PROVISIONS ON SUBJECT-MATTER OF SECTION—(Continued).

A.—*Res Judicata*—(Continued).

action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action." *Per* Field, J., in *Cromwell v. Sac*, 94 U.S. 351, cited in Field Ev., 6th Ed., p. 513. **E**

(j) S. 13 bars a second trial, not only of a suit, but also of an issue. The subject-matter of the two suits need not be identical. 23 A. 5 (8). **F**

(k) The principle of *res judicata* applies to prevent parties raising a second time in the same suit, or in the same execution proceedings, an issue which, in that suit or in the execution proceedings in the suit, had been previously determined. 24 A. 138 (141), referring to 6 A. 269 (P.C.). **G**

(l) A judgment liable to appeal or under appeal is only a provisional and not a definite or final adjudication, and cannot operate as *res judicata* during the interval preceding the appeal or the interval preceding the decision of the appeal. 11 A. 148 (161), referring to 5 M.H.C.R. 176 and 6 B. 110. See, also, the citation from *Pothier* at p. 160. **H**

(m) This is the case even where the sentence ought to be executed provisionally, notwithstanding the appeal, for such execution only gives the sentence the effect of provisional judgments, which have not the authority of *res judicata*. 11 A. 148 (160). **I**

(n) The rule contained in S. 13, C.P.C., is not limited to the Courts of first instance, but it applies equally to the procedure of the first and second appellate Courts by reason of Ss. 582 and 587 respectively, and, indeed, even to miscellaneous proceedings by reason of the general provisions of S. 647 of the Code. 11 A. 148 (162-3). **J**

(9) Previous proceedings to be looked at before holding decision *res judicata*.

(a) In order to determine whether the decision upon an issue in one case operates as *res judicata*, it is necessary to look at the whole of the proceedings; when, therefore, the proceedings are not in evidence in the subsequent suit, there is not sufficient evidence to support an estoppel under S. 13 of the Civ. Pro. Code. 1 C.L.J. 594 (601)=9 C.W.N. 938 (P.C.). **K**

(b) No notice will be taken of a *res judicata*, where the decree or order upon which it rested has not been produced. 18 C. 216 (224)=17 I.A. 181 (P.C.). **L**

(10) Court has power to examine previous case and pleadings for this purpose.

(a) The Court has power to examine the pleadings and the facts of the former case and the grounds of decision and to see for itself whether the matter pleaded as *res judicata* was directly in issue before. 57 P.R. 1907=66 P.W.R. 1907. **M**

(b) To determine whether a suit is barred by the principle of *res judicata*, reference must be made not merely to the decree but also to the judgment, and, if need be, to the pleadings in the previous case. 1 C.L.J. 337 (349); 5 C.L.J. 611 (624); 31 C. 95; 16 C. 173 (P.C.); 19 C. 159 (P.C.). See, also, *Robinson v. Dukip Singh*, 11 Ch. D. 798. In *re May*, 25 Ch. D. 236; *Houstoun v. Marquis of Sligo*, 29 Ch. D. 448; cited in 1 C.L.J. 337 (349) and 4 M. 134 (136). **N**

(c) The fact that the Court in the former suit thought the issue to be a necessary one is not conclusive. 57 P.R. 1907=66 P.W.R. 1907. **O**

2.—STATUTORY PROVISIONS ON SUBJECT-MATTER OF SECTION.—(Continued).

A.—Res Judicata—(Continued).

(11) Uncertain allegations in the record raise no *res judicata*.

- (a) The rule of English Law that, where the allegation on the record is uncertain, there is no *res judicata*, is also the rule embodied in S. 13 of the Code of Civil Procedure. 26 B. 25 (32). Per *Chandavarkar, J.* P
- (b) In order to sustain a plea of *res judicata*, the estoppel relied upon must be certain. 14 M.L.J. 379 (392). See, also, pp. 389, 390, and 391, for a citation of English and American cases. Q

(12) Uncertain decisions raise no *res judicata*.

So, where the first Court decides upon one ground, the second Court decides upon a different and inconsistent ground and the third Court simply upholds the above two decisions, the decision is uncertain and cannot operate as *res judicata*. 14 M.L.J. 379 (389). R

(13) *Res judicata* must be based on grounds stated in judgment.

It is neither competent nor proper to the Court to depart from the clear statement in the judgment as to what was decided and, because such decision would by itself be unsound with reference to the reason assigned for it, to substitute something else quite different, in order to make it seem right, so as to enable one of the parties thereto to found a plea of *res judicata* thereon. 16 M.L.J. 35 (96)=29 M. 42 (43-4). S

(14) Plea of *res judicata* set aside—Right of Court to re-open.

Where a plea of *res judicata* is set aside and a suit admitted by a Judge, his successor would have no authority to re-open the question. 16 W.R. 85. T

(15) *Res judicata* may be raised at any stage.

- (a) A plea of *res judicata* may be raised at any stage of a suit, whether in first or second appeal. 21 A. 446 (448-9), referring to 4 A. 69 and A W.N. 1898, p. 104. U
- (b) The objection about *res judicata* may be taken notice of even in appeal. P.J. for 1873, No. 17; 20 B. 86 (96). See, also, 6 M. 76; 4 A. 69; 4 A. 91, P.J. for 1885, p. 34; 5 C. 832 and 15 C. 808. Y
- (c) The plea of *res judicata* may be raised at any stage of the suit, the words of this section being imperative. 139 P.R. 1888. W
- (d) But, where the plea is urged in the appellate Court, the facts which are alleged to bar the suit must be in evidence already. 189 P.R. 1888. (80 P.R. 1884, R); see, also, 21 A. 446. X
- (e) Even if such plea has not been urged in either of the lower Courts, or in the memorandum of appeal, it may be considered and determined in second appeal. 4 A. 69 (72); Marsh 276; 2 Hay 154; 3 W.R. (Act X Rulings), 146; 21 A. 446=19 A.W.N. 164 and 18 A.W.N. 104. Y

(16) Court not bound to entertain plea of *res judicata*, if it necessitates further findings of facts.

- (a) An appellate Court is not bound to entertain the plea of *res judicata*, if it cannot be decided upon the record before that Court, and if its consideration involves the reference of fresh issues for the determination of the lower Court. 21 A. 446 (448-9)=19 A.W.N. 164; (but, see, 18 A.W.N. 104 and 4 A. 69, *infra*). Z
- (b) The Court may, however, allow the plea to be argued before it on appeal, and refer issues to the lower Court. 18 A.W.N. 104 and 4 A. 69 (72). A

2.—STATUTORY PROVISIONS ON SUBJECT-MATTER OF SECTION—(Continued).

A.—Res Judicata—(Continued).

(17) Judgment not *res judicata*, when appealed against.

When the judgment of a Court of first instance upon a particular issue is appealed against, that judgment ceases to be *res judicata* and becomes *res sub judice*; and if the appellate Court declines to decide that issue, and disposes of the case on other grounds, the judgment of the first Court upon that issue is no more a bar to a future suit than it would be if that judgment had been reversed by the Court of appeal. 6 B. 110 (1/2). B

(18) Plea raised in special appeal—Powers of High Court.

(a) The High Court, in special appeal, ought not to refuse a plea of *res judicata* to be taken before it by reason of its not having been taken in the Courts below, if it is one which the lower appellate Court ought to have taken up and decided for itself. 22 W.R. 362=15 B.L.R. 248. C

(b) The High Court can raise and adjudicate upon certain points in special appeal, when they are apparent on the face of the pleadings, even though the parties to the suit are silent. 3 W.R. 40. D

(19) Burden of proof as to plea of *res judicata*.

A party setting up the plea of *res judicata* has to establish whether a particular point was directly in issue before and has to satisfy the Court trying the later suit that it is substantiated. 57 P.R. 1907=66 P.W.R. 1907. E

(20) Conflicting decisions—Latest decision is *res judicata*.

Where there are conflicting decisions regarding the subject-matter in dispute between the parties to the suit or their predecessors in interest, the latest of those decisions would override the earlier decisions and operate as *res judicata*. 1 A.L.J. 416 (418). F

(21) Decree in conflict with statement of facts.

(a) A finding not embodied in a decree could not be pleaded as constituting *res judicata*, if the clear wording of the decree is against such finding and no application was made to bring the decree into conformity with the judgment. 15 A. 3 (5)=12 A.W.N. 119; 15 A.W.N. 108; 19 A.W.N. 182. G

(b) Thus, a decree in a suit gave the plaintiff an absolute right to certain property, but the judgment stated that the defendant was entitled to certain rights in respect of the same property. No application was made to bring the decree into conformity with the judgment, and the decree as it stood was upheld on appeal. Held, the finding in favour of the defendant would not constitute *res judicata* in the face of the clear wording of the decree. 15 A. 3 (5)=12 A.W.N. 115. H

(c) In order that a finding in a judgment, which has not been embodied in the decree, may constitute *res judicata* in a subsequent suit, it is necessary that such finding should be essential to the making of the decree as framed in the former suit. 19 A.W.N. 182 (17 A. 47, F; 12 I.A. 29, R). I

2.—STATUTORY PROVISIONS ON SUBJECT-MATTER OF SECTION—(Continued).

A.—Res Judicata—(Continued).

(22) Extension of rule of res judicata.

- (a) The rule of *res judicata* is a wholesome one, but it ought not to receive an undue extension, nor be too stringently applied, particularly in India. 57 P.R. (1907) = 66 P.W.R. 1907. J
- (b) An estoppel, to use the language of *Sir B. Peacock* in 8 W.R. 175, "shuts out enquiry into the truth;" it is necessary to see that the principle of *res judicata* is not unduly enlarged and that it would be a wholesome restriction to the rule of *res judicata*, if it is held that, in order that the judgment in former suit may be conclusive upon any issue arising in a subsequent one, it must have been open to appeal in the same way as a judgment in the subsequent suit is. 2 C.W.N. 297 (301) = 25 C. 571. K
- (c) The proper application of the doctrine of *res judicata* should be confined to a subsequent suit relating to the same subject-matter, and the extension of the doctrine to exclude the trial of an issue in a subsequent suit relating to a different subject matter, merely because that same issue was tried in a previous suit in a Court of jurisdiction competent to try the subsequent suit, is of doubtful propriety. 2 C.W.N. 297 (301) = 25 C. 571. L
- (d) The reason is that a suit for a comparatively small amount, say Rs. 100, though triable only in a Subordinate Judge's or a District Judge's Court, which is of jurisdiction competent to try a suit for a *lakh* of rupees and more, is not likely to be conducted by the parties with the same interest and the same care in the production of evidence as a suit of the latter description. 2 C.W.N. 297 (301) = 25 C. 571. M

(22-A) Application of doctrine must not bind higher Courts by decision of inferior Courts.

- (a) The principle of estoppel ought to be so applied that, as far as possible, Courts of higher jurisdiction are not tied down by the decisions of inferior Courts. 29 M. 195 (199) = 1 M.L.T. 25 = 16 M.L.J. 41 (F.B.). N
- (b) S. 13, Civ. Pro. Code, cannot be so construed as to bind the superior Courts by decision of inferior Courts, which were not and could not have been considered on the merits by the superior Courts. 111 P.R. 1907, *distinguishing* 20 P.R. 1891 (F.B.). O
- (c) And a decision by an officer presiding in a Court, passed in the exercise of a certain jurisdiction, cannot be *res judicata* in a subsequent case, triable by that officer, but not triable in the exercise of that same jurisdiction, but of what might be called a superior jurisdiction. 111 P.R. 1907. P

(23) Withdrawal from suit with permission to bring a fresh suit.

- (a) The withdrawal from a suit with permission to bring a fresh suit, after the evidence had been recorded, but before the passing of the final judgment, will not bar a subsequent suit. 16 W.R. 276. Q
- (b) The dismissal of a former suit "in the form in which it was brought" does not amount to a permission to sue again. 5 A. 595 (596). But, see, 8 A. 282, and the cases cited therein. R

2.—STATUTORY PROVISIONS ON SUBJECT-MATTER OF SECTION—(Continued).

A.—Res Judicata—(Continued).

(24) Reservation of right to bring fresh suit—Second suit not barred.

(a) Where a former decision reserved the present plaintiff's right to bring a fresh suit under certain circumstances, *held*, it would not operate as *res judicata*. 18 M.L.J. 198 (199). **S**

(b) Thus, where an auction-purchaser's suit to recover lands was dismissed on the ground that he had not obtained a sale certificate, but the decree reserved his right to bring a fresh suit on obtaining the certificate, a second suit in respect of the same property, on production of the certificate, is not barred. (*Ibid.*) **T**

(25) Suit for wrong remedy will not bar second suit for proper remedy.

Where a wrong remedy was sought in the previous suit in respect of the same cause of action, a subsequent suit for the proper remedy is not barred. 3 C.L.R. 395 (396). **U**

(25-A) Court's order without jurisdiction will not be *res judicata*.

Where the Court had no power to make an order, it is not binding on the decree-holder and the order does not operate as *res judicata*. 11 C.W.N. 236 (238). **Y**

(26) Void decision will not be *res judicata*.

A decision, which must, of necessity, be void of any effect, could not properly be regarded as *res judicata* at all. Per *West, J.* 7 B. 408 (410). **W**

(27) Suits need not be similarly appealable to constitute *res judicata*.

(a) In order to make a matter *res judicata*, it is not necessary that the two suits must be open to appeal in the same way. 25 C. 571 (577), followed in 28 C. 78. [But see 9 B. 75 (80).] **X**

(b) Everything that should have the authority of *res judicata* is, and ought to be, subject to appeal, and, reciprocally, an appeal is not admissible on any point not having the authority of *res judicata*. Savigny, S. 293, cited in 7 B. 464 (466); see, also, Whitley Stokes, Vol. II, p. 476 (note). See, also, P.J. for 1873, p. 170 and *Barrs v. Jackson*, 1 Y. and C. (Ch. C.), 585. **Y**

(28) Overvaluation of suit cannot avoid *res judicata*.

A person cannot get rid of the bar of *res judicata* by re-valuing his suit, so as to put it beyond the pecuniary jurisdiction of the Court which originally disposed of it. 10 C.P.L.R. 89 (90). **Z**

(29) Change in law cannot re-open matter already *res judicata*.

A change in the law, or a different interpretation of it by the appellate authorities, cannot operate to re-open matters which had previously become *res judicata*. 21 M. 18 (25). See, also, 1 C.L.J. 176. **A**

(30) *Res judicata* refers not to date of commencement of litigation.

(a) The doctrine of *res judicata*, so far as it relates to prohibiting the re-trial of an issue, must refer not to the date of the commencement of the litigation, but to the time when the Judge is called upon to decide the issue. For, even in cases where the Judge has commenced the trial

2.—STATUTORY PROVISIONS ON SUBJECT-MATTER OF SECTION—(Continued).

A.—Res Judicata—(Continued).

of an issue, which is also an issue in a pending litigation, a final judgment pronounced meanwhile in such previous litigation by a competent Court (the identity of parties and other conditions being satisfied) should operate as *res judicata* preventing the Judge dealing with the later litigation from adjudicating differently. 11 A. 148 (162); followed in 24 M. 350 (355), *q.v.* **B**

- (b) If this is not done, it seems that the evil against which *res judicata* aims would not be removed and the doctrine itself would be defeated. 11 A. 148 (162). **C**

(81) Conditions excluding and maintaining *res judicata*.

- (a) The conditions for the exclusion of jurisdiction on the plea of *res judicata* are that the same identical matter must have come in question already in a Court of competent jurisdiction, must have been controverted, and must have been heard and finally decided. 3 C.W.N. 517 (523-4) (P.C.), citing *Langmead v. Maple*, 18 C.B.N.S. 270; 2 M.H.C. 131; 10 W.R. 1 (P.C.); 11 M.I.A. 50 and 3 M.H.C. 84. **D**
- (b) The parties, subject-matters and the cause of action must be the same. 9 W.R. 217; 1 W.R. 121; W.R. (1864), 320; 21 W.R. 109 and 13 W.R. 317 (318). **E**

(82) Competency of Courts essential to constitute *res judicata*.

- (a) A decree in a previous suit cannot be pleaded as *res judicata* in a subsequent suit, unless the Judge, by whom it was made, had jurisdiction to try and decide, not only the particular matter in issue, but also the subsequent suit itself, in which the issue is subsequently raised. 29 C. 707 (715) (P.C.)=6 C.W.N. 825 (928). **F**
- (b) The decision must be of a Court, which would have had jurisdiction over the matter raised in the subsequent suit, in which the decision is given in evidence as conclusive. 8 W.R. 175 (179). **G**
- (c) In order to establish the plea of *res judicata*, it has to be shown that the Court of concurrent jurisdiction, which decided the former suit, was a Court of jurisdiction competent to try the subsequent suit. 35 C. 353 (358)=12 C.W.N. 859=7 C.L.J. 470; see, also, 1 A.L.J. 503. **H**
- (d) The rule of *res judicata* cannot prevail, if the first suit had been brought in a Court of jurisdiction not competent to try the second. 23 C. 415 (418); [11 C. 301 (P.C.), *D.*]; 24 B. 456 and 1 A. 588; but, see, 24 M. 275. **I**
- (e) Nor where the Court trying a case has not concurrent jurisdiction with the Court trying the subsequent case. 3 C.W.N. 202 (206). **J**
- (f) The jurisdiction, besides its being over the subject-matter, must be such as not to be ousted by the pecuniary limits imposed on Courts in India. 9 C. 499 (444) (P.C.)=12 C.L.R. 520=9 I.A. 197; see, also, 11 C. 301=12 I.A. 23 and 8 M. 89. **K**
- (g) The Court in the former suit ought to have had concurrent jurisdiction both as regards pecuniary limit and subject-matter. 29 M. 65 (67). **L**

2.—STATUTORY PROVISIONS ON SUBJECT-MATTER OF SECTION—(*Continued*).

A.—*Res Judicata*—(*Continued*).

(h) The word "competent" means competent to try with conclusive effect, with reference to the jurisdiction of the Court at the time of the first suit was brought. 2 O.C. 261 (267) and 9 B. 75 (80). See, also, 13 B. 224. **M**

(i) It is the competency of the original Court, which decided the former suit, that must be looked to, and not that of the appellate Court, in which the suit was ultimately decided upon appeal. 35 C. 353 (359) 12 C.W.N. 359 = 7 C.L.J. 470. **N**

(j) The bar of *res judicata* arises where the Court deciding the first suit was competent to try the same, and its inability to entertain it arose, not from incompetence, but from the existence of another Court with a preferential jurisdiction. 28 B. 338 (340) = 6 Bom. L.R. 77. **O**

(k) In order to establish the plea of *res judicata*, the Court which decided the former suit must have been such a Court as would have been competent to try and decide, not only the particular matter in issue in the subsequent suit, but also the subsequent suit itself in which the issue is subsequently raised. 12 C.W.N. 359 (363). **P**

(l) In considering the competency of a Court for the purpose of deciding upon a plea of *res judicata*, regard must be had to the powers of the Court, in which the suit was instituted and not to the powers of the Court, which decided the suit on appeal. 5 C. 832 (838) and 23 C. 415; 7 Bom. L.R. 821 (822) = 30 B. 220. **Q**

(m) The decision in the former suit shall be that of a Court which is competent to try the subsequent suit. 1 C.P.L.R. 92 (98). **R**

(n) The trial by a competent Court is what is especially made necessary, because the result of the case depends so much on the trial, the Court of appeal deciding the case, as a rule, on the records of the first Court. 1 C.P.L.R. 92 (98). **S**

(o) "There is no *res judicata* where the Court by which the judgment was given could not have tried the second suit, and so the question may arise, whether a judgment in a prior suit, between the same parties and relating to the same matter, is, though not conclusive, admissible in evidence." Cun. Ev., 11th Ed., p. 111. **T**

(p) "A competent Court for the purposes of S. 13, C.P. Code, means a Court competent to try the subsequent suit and includes a foreign Court." Cun. Ev., 11th Ed., p. 111. **U**

(33) Want of jurisdiction may be set up against plea of *res judicata*.

It is always allowable in a subsequent suit in which the plea of *res judicata* is set up to show that the former decision was passed by a Court without jurisdiction. The word "jurisdiction," as used in S. 13, C.P.C., means competency to entertain the suit with reference to its subject-matter and to the powers of the Court. P.L.R. (1900), p. 431 and 11 C.W.N. 236 239. **Y**

2.—STATUTORY PROVISIONS ON SUBJECT-MATTER OF SECTION—(*Continued*).

A.—*Res Judicata*—(*Continued*).

(34) Decree of competent Court presumed to be valid.

The decree of a competent Court must be presumed to be valid and binding, until the party attacking it shows that it was improperly obtained by fraud or misrepresentation. 6 W.R. 215; 6 B. 715; 11 B. 537 (540) and 25 B. 821. W

(35) Decree obtained by fraud or collusion.

(a) A decree obtained by fraud or collusion is a nullity. 26 A. 272 (283) and 26 C. 891. X

(b) The only possible ground on which a matter once litigated out may be re-opened is that the first suit was entirely mismanaged and had in fact been brought in collusion. 24 W.R. 217. Y

(c) It is always competent to any Court to vacate any judgment or order, when it is brought to its notice that it was obtained by manifest fraud, practised upon the Court or a party. 6 B. 148 (150). See, also, 26 A. 272 (283) and 19 B. 821 (826). Z

(d) Where a judgment has been obtained by the fraud of a party to a suit in a foreign country, he cannot prevent the question of fraud from being litigated in the Courts of this country where he seeks to enforce the judgment so obtained. 26 C. 891 (911). A

(e) The specific fraud attributed must be alleged and proved. 14 A.W.N. 141.B.

(36) Negligence in conduct of suit will not invalidate decree.

(a) Want of honesty and diligence in conducting a suit, however gross, but not amounting to fraud or collusion, is no ground for avoiding the decree. 13 M.L.J. 68 (69). C

(b) Mere negligence on the part of a guardian in protecting the minor's interest would not be sufficient to prevent the decree being binding on the minor. 14 A.W.N. 141. D

(37) Cause of action must be the same for *res judicata*.

(a) The test to be applied to know whether a suit is barred, is, whether the cause of action, upon which the new suit is brought, is distinct from the cause of action upon which the former suit was instituted. 12 W.R. 79 and 2 M. 232 (355). E

(b) There must be an identity of the cause of action, proposed for adjudication in a later suit, with the cause disposed of in an earlier one; and this is impossible when in the earlier one there was no really existing cause at all. 7 B. 408 (410). F

(c) The cause of action must be the same and the issue must be material for the decision of the case. 3 Suth. (P.C.), 218. G

(d) The term "cause of action" is to be construed with reference to the substance rather than to the form of actions. 20 W.R. 380 (P.C.) and 2 Suth. (P.C.), 540. H

2.—STATUTORY PROVISIONS ON SUBJECT-MATTER OF SECTION—(*Continued*).

A.—*Res Judicata*—(*Continued*).

- (e) The cause of action must be identical, though the form of action differs on the second occasion ; and the test to be applied is, whether evidence to support both actions is substantially the same. *Hitchin v. Campbell*, 2 W. Bl. 881 and *Martin v. Kennedy*, 2 B. & P. 69. See 11 B. 153 (155). I
- (f) The cause of action is not changed by the difference in the title alleged. 2 B.L.R. 102. J
- (g) But so long as causes of action are distinct, a party may bring as many actions as there are causes of action, and the principle of *res judicata* does not apply. 27 A. 142 (144) ; 9 Bom. L.R. 274. K
- (h) So, where a person obtained a decree for wages up to a certain time, and subsequently sued for damages for breach of contract by the employer, the question whether the defendant was so liable in damages is not *res judicata* and is not barred under S. 13 or S. 43 of the C.P. Code. Select Cases, Part X, 22. L
- (i) The defendant agreed to convey certain property belonging to him and his son to the plaintiff. Disputes having arisen before the conveyance was executed, the plaintiff sued for specific performance and got a decree, in pursuance of which the price was fully paid and a conveyance executed. Subsequently, the plaintiff sued for possession, and was awarded the value of the defendant's share and again sued to recover the balance of the price paid on the ground of failure of consideration to the extent of the son's share. *Held*, the cause of action in the latter suit being entirely different from that in the suit for specific performance, S. 43, C.P. Code, did not bar the suit. 24 M. 27 (31). M
- (j) According to the general law relating to *res judicata*, where a question has been necessarily decided in effect, though not in express terms, between parties to a suit, they cannot raise the same question as between themselves in any other suit in any other form. S. 2, Act VIII of 1859, does not prevent the operation of this general law. The words "cause of action" in that section must be construed in reference to the substance rather than the form of the action. 12 B. L.R. 304. N
- (38) Not subject-matter of the two suits,* but matter in issue, is test of *res judicata*.
- (a) For the purpose of *res judicata*, it is not essential that the subject-matter of the litigation should be identical with the subject-matter of the previous suit of which the adjudication is made the foundation of the plea, which plea, is extensive enough to bar a suit as well as the retrial of an issue. 11 A. 148 (156). O
- (b) It is the matter in issue, not the subject-matter of the suit, that forms the essential test of *res judicata*. 4 A. 55 (58) ; 13 B. 25 (32). See, also, 4 A. 65 (68) ; P.J., 1881, p. 281. P
- (c) The true test is whether the matter has been directly and substantially in issue in the former suit, and has been heard and finally decided. 157 P.R. 1889 (F.B.) ; (6 C. 301, *diss.*) ; 10 Bom. L.R. 380=32 B. 315. Q

2.—STATUTORY PROVISIONS ON SUBJECT-MATTER OF SECTION—(Continued).

A.—Res Judicata—(Continued).

- (d) The distinction between the two aspects of the plea must not be lost sight of, for it is of special significance in cases of recurring liabilities. 11 A. 148 (156). R
- (e) The general rule of law may be briefly stated to be that where a recurring liability is the subject of a claim, a previous judgment dismissing the suit upon findings which fall short of going to the very root of title upon which the claim rests, cannot operate as *res judicata*, but, if such previous judgment does not negative the title itself, the plaintiff cannot re-agitate the same question of title by suing to obtain relief for a subsequent item of the obligation. 11 A. 148 (156). S
- (f) Although the subsequent suit related to different property, a previous adjudication as to adoption, such adoption, being a necessary element of the plaintiff's title, operated as *res judicata* barring the re-agitation and retrial of the same issue in the subsequent litigation. 11 A. 148 (157). T
- (g) It is the decision of the issue as a judicial act of the Court which bars a repetition of the same act and not the commencement of a suit as an act of a party which precludes the Court from exercising its function. Correctly speaking, the term "former" qualifies a decision, and not a suit. *Per* Karamat Husain, J., in A.W.N. (1908), 211 (212). U
- (h) The expression "a former decision" means a decision of an issue which is in existence at the time at which a Court has to decide that issue again, and a former decision precludes both the original and the appellate Court from deciding that issue again. A.W.N. (1908), 211 (212). Y
- (i) A previous decision in a District Munsiff's Court in the exercise of its ordinary jurisdiction may operate as *res judicata* in a subsequent suit on the Small Cause side of the Court. 27 M. 63 (64)=13 M.L.J. 23. (24 M. 444, *app*). W
- (j) In a suit for money, the defendant admitted that there had been money dealings between him and the plaintiff, but averred that the taking of an account would show that the plaintiff was indebted to him. The Court dismissed the plaintiff's suit, but declined to take an account against the plaintiff. *Held*, the defendant was not entitled to have an account taken in the suit and that Civ. Pro. Code, S. 12, would not have precluded him from suing for an account during the pendency of the plaintiff's suit. 20 M. 418 (420). X
- (k) The identical question of right or title must have been before *in judicio*. 3 M.H.C.R. 320. Y
- (l) But, where a question is necessarily decided in effect, though not in express terms, the parties to the suit cannot raise the same question as between themselves in any other suit either directly or in any other form. *Select Cases*, Part X, 24; see, also, 20 W.R. 377 (P.C.). Z

2.—STATUTORY PROVISIONS ON SUBJECT-MATTER OF SECTION--(Continued).

A.—*Res Judicata*—(Continued).

- (m) Where a suit was based on the allegation that the debt for which the sale impeached took place was not such as to bind the plaintiff under the Hindu Law, but this ground was not raised in a previously instituted execution proceeding which was relied on as precluding the Judge, under S. 12, C.P.C., from trying the present suit, *held*, the identity of matter directly and substantially in issue required by that section being wanting in the present suit, it should not be dismissed. 22 *Mt* 256 (258). **A**
- (n) Where a plea of *res judicata* is set up under S. 13, C.P.C., 1882, or S. 11, C.P.C., 1908, there must be shown to exist the identity of the subject matter, the competency of the Court, and the continuing validity of the judgment. *Cun. Ev.*, 11th Ed., p. 111. **B**
- (o) Another case which prohibits the trial of a suit is that for which S. 12, C.P.C., 1882 (S. 10 of the Code of 1908) provides. (*Ibid.*) **C**
- (p) That section enacts that the Court shall not try any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit for the same relief between the same parties in the same or any other Court having jurisdiction. (*Ibid.*) **D**
- (q) "In effect, S. 43 of the Code, 1882, (O. II, r. 2 of the Code of 1908) relating to the case in which the plaintiff has in a previous suit omitted to sue for or relinquished any portion of his claim, belongs to the same category; although by that section it is declared that he shall not afterwards sue in respect of the portion so omitted or relinquished, and not that the Court shall not try such suit." (*Ibid.*) **E**
- (r) A, who was employed by B and Co., as their agent at Calicut, instituted a suit for the balance of an account against his principals in the Court of the Subordinate Judge there in July 1878. In December of the same year, B and Co. instituted the present suit against A, for an account, and for damages caused by his alleged negligence. *Held* that, as in both suits practically the same issues were triable, A was entitled, as having been first to institute his suit, to proceed in the Court in which he had chosen to bring his suit, and to have the other suit stayed, but without prejudice to the right of the plaintiff in the latter suit to institute a cross claim in the Calicut Court. 4 C.L.R. 282. **F**
- (s) Pending the final hearing in appeal of a suit for confirmation of possession of certain land, and for recovery of produce of such land alleged to have been carried away by the defendants, the plaintiff brought a suit again asking for confirmation of possession, but also for the recovery of the produce which had arisen since the institution of the other suit. *Held*, the second suit, so far as it sought for the recovery of the produce, was not barred by the first suit. 8 C.L.R. 113. **G**
- (t) Where the points on which the plaintiff relied were matters directly and substantially in issue in a former suit, they cannot be tried in the subsequent suit. 9 *Bom.L.R.* 259 (264); see, also, 6 *W.R.* 157. **H**

2.—STATUTORY PROVISIONS ON SUBJECT-MATTER OF SECTION—(Continued).

A.—*Res Judicata*—(Continued).

- (u) In order that a subsequent suit may be barred, it is necessary not only that the parties should be the same, but that the subject-matter of the suit should have been directly and substantially in issue in the former suit. 10 C. 924 (927). I
- (v) It is not necessary, for the application of the principle of *res judicata*, to show that the subject-matter of the former suit was the same as that of the subsequent suit, in which it is sought to be applied, but that the question, the trial of which is sought to be barred in the subsequent suit, was directly and substantially in issue in the former suit, subject to the specified qualifications. 2 C.L.J. 540 (541); 11 A. 148=9 A.W.N. 42. J
- (w) The matter must be directly raised and with the precision and certainty. 3 Bom.L.R. 450. K
- (x) The ground of action in the second suit may not be the same as in the first. 5 M. 299 (241). L
- (y) A decision may operate as *res judicata*, although no issue has been expressly raised. The test to be applied is, whether it plainly appears that the question so raised by the parties in their pleadings was actually submitted by them to the Court and judgment given on it. 6 C.L.J. 621 (629). M
- (z) A practical test for determining whether matter has been directly in issue in a previous suit is furnished by effecting a separation of the discussions and findings on the various groups of issues dealt with in the judgment. If, after the elimination of all but one such group, the judgment still remains intelligible and in itself sufficient for the adjudication of the suit, and the decree is in entire harmony with it, then the matter so dealt with has been directly and substantially in issue. 41 P.R. 1899. N
- (a1) The doctrine of *res judicata* applies to all matters which existed at the time of the giving of the judgment, and which the party had an opportunity of bringing before the Court. But, if there be matter subsequent which could not have been brought before the Court at the time, the party is not estopped from raising it. *Newington v. Levy*, L.R. 6 C.P. 180 (193), cited in 14 B. 31 (36). O
- (aa) In order to see what was in issue in a suit or what has been decided, the judgment must be looked at, and it would be wrong to look only at the decree. 25 I.A. 102=2 C.W.N. 33 (P.C.); 12 M. 500 (502). P
- (bb) The question of *res judicata* could not be decided by the judgment in the former case, without the decree, which is not produced. 15 M. 264 (266). Q
- (cc) Where a finding on an issue in a judgment is in conflict with the decree, no plea of *res judicata* can be sustained on the strength of such finding. 15 A. 3 (5 and 6). R

2.—STATUTORY PROVISIONS ON SUBJECT-MATTER OF SECTION—(Continued).

A.—Res Judicata—(Continued).

- (dd) A certain matter was not really dealt with and decided in a former suit, although an issue was raised in regard to that matter; held that a subsequent suit involving the same matter was not barred by reason of the previous suit. 5 O.W.N. 304 (306-7). **S**
- (ee) If for any cause "no final judgment of the Court has been pronounced upon the matter in issue, the proceedings are not conclusive." Taylor on Evidence, S. 1528, cited in 15 W.R. 527 (529). **T**
- (ff) If the former suit went off on a preliminary ground not calling for adjudication on any other grounds of defence, whether raised or not, those grounds remain undecided. 10 Bom. L.R. 380=32 B. 315. **U**
- (gg) Where a widow, who had taken possession of her husband's property, was ejected by means of a suit in which her defence raised no right of lien for dower, but in which suit an absolute decree of right was given to his heirs, the right of lien, as between her and them, is *res judicata*. 8 W.R. 307 (308). **V**
- (hh) Where the Court refused to consider a question at all, there is no adjudication of it, and so the matter is not really *res judicata*. 14 C. 323 (343); 10 C. 507 (509); 3 O.C. 273 (275); 25 P.R. 1884 and 51 P.R. 1891. **W**
- (ii) A question not only decided in the previous suit, but in express language excluded from the decision therein, cannot be treated as *res judicata*. 8 C.L.R. 117 (120). **X**
- (jj) A suit by ryots, for a declaration of the annual rent on measurement, will be barred as *res judicata* by a prior suit between the same parties for arrears of rent, wherein the Judge had declined to try if the extent had been overstated as alleged by the tenants, and decided that suit on the basis of a *jama bandi* signed by them. 7 C. 214=8 C.L.R. 393. **Y**
- (kk) When the decision of a lower Court is taken on appeal to a superior tribunal, and that tribunal, for any reason, does not think fit to decide the matter, it is left an open question. 5 C.L.J. 653 (657)=34 C. 223. **Z**
- (ll) Where an issue is not necessary for the decision of the suit in which it is raised, the decree couched in general terms does not cover the finding on that issue, nor can the insertion of such finding in the decree give it the force of *res judicata*. 18 B. 597 (601). **A**
- (mm) The expression of opinion in a judgment as to facts in issue, but unnecessary to decide for decree, does not constitute *res judicata*. 4 M. 134 (196). **B**
- (nn) An incidental finding of a District Court on a question of title, in a case not admitting of further appeal, cannot be *res judicata* as to that point in a future suit. 7 B. 464 (467). **C**

(38-A) Point of law, whether *res judicata*.

- (a) A point of law can never be *res judicata*. 22 B. 669 (671). But, see, 32 C. 749=9 C.W.N. 466. **D**
- (b) A decision upon a particular matter in dispute is conclusive, so far as that dispute is concerned, although it proceeds upon points of law; but the decision as regards the points of law is not conclusive, where a different matter is in dispute. 2 O.C. 261 (268). **E**

2.—STATUTORY PROVISIONS ON SUBJECT-MATTER OF SECTION—(Continued).

A.—Res Judicata—(Continued).

(39) Person must be in some way party to former suit, to maintain a plea of res judicata.

- (a) To maintain the plea of *res judicata*, it must appear, from an inspection of the record, that the person whose interest it is sought to bind was in some way a party to the suit. A mere intention on the part of one of the parties that it should be for his benefit is not enough to support the plea. 7 Bom. L.R. 912=2 C.L.J. 413=2 A.L.J. 813=9 O.C. 7=10 C.W.N. 115=15 M.L.J. 407=28 I.A. 1=32 I.A. 229 (P.C). **F**
- (b) A final decision by a Court of competent jurisdiction, of a matter directly and substantially at issue between certain contending parties, shall, as a plea, be a bar and, as evidence, be conclusive in any subsequent suit between the same parties. *Per Bashyam Iyengar, J.* 25 M. 300 (315) (F.B.). **G**
- (c) "The section of the Code requires that there should be identity of the parties, that is, that the parties in the pending suit and the parties in the suit in which the judgment was given should be the same, or that, at least, the persons to be affected by the judgment should have been represented in the suit." *Cun. Ev., 11th Ed., p. 111.* **H**
- (d) "The present section (S. 40, Evidence Act) is evidently intended to refer to judgments of that kind and not to the judgments mentioned in S. 41 for which no provision is made in the Code of Civil Procedure." (*Ibid.*). **I**
- (e) A judgment in a suit, in which a person not interested in its subject matter is made a defendant, is not *res judicata* in a subsequent suit between him and the plaintiff in that suit. 14 M.L.J. 281 (282 and 283). **J**
- (f) A judgment against a benamidar is *res judicata* against the true owner. 15 M. 267 (268). **K**
- (g) Such a former judgment is not *res judicata*, when the plaintiff in the later suit was only a nominal party in the previous suit. 25 B. 74 (76). **L**
- (h) A suit is not barred under the section against an unrepresented minor. 7 Bom. L.R. 912=2 C.L.J. 413=2 A.L.J. 813=10 C.W.N. 115=28 A. 1=15 M.L.J. 407 (P.C.); see, also, 21 W.R. 109. *Select Cases, Part X, 25.* **M**
- (i) Where a judgment was obtained against a dead man, and subsequently another suit was brought against his representatives, it was held that the former judgment must be treated as never having existed, and that it could not operate as *res judicata*. 9 Bom.L.R. 274. **N**

(40) Decision binding on person or his representative.

- (a) Decision against one person is not conclusive or binding in any way against other persons, who do not derive title from him, and who come into Court upon an independent title or independent rights of their own. 16 W.R. 298. **O**
- (b) The principle of *res judicata* has no application to a dispute between the parties, all of whom claim under the person, in whose favour the decision in the previous suit was given. 80 C. 556 (564) (P.C.)=7 C.W.N. 482; see, also, 6 M. 43. **P**

2.—STATUTORY PROVISIONS ON SUBJECT-MATTER OF SECTION—(*Continued*).

A.—*Res Judicata*—(*Continued*).

- (c) The doctrine of estoppel cannot apply, when the person making the representation was not the person as whose representative another claims the property. 17 M. 473 (474)=4 M.L.J. 192. **Q**
- (d) Where a later suit is not between the representatives in interest of the parties in the former suit, a deposition made in the former suit is not admissible in the latter. 23 W.R. 42. **R**
- (e) The person whose interest it is sought to bind must be in some way or other a party to the suit, the judgment in which is pleaded to be *res judicata*. 15 M.L.J. 407=10 C.W.N. 115=2 A.L.J. 813=2 C.L.J. 413=7 Bom. L.R. 912=9 O.C. 7. **S**
- (f) The parties should be interested in the subject-matter of the suit. 25 B. 74 and 14 M.L.J. 281. **T**
- (g) A judgment *inter partes* binds only the parties, and persons deriving title from them subsequent to the date of judgment. *Doe v. Earl of Derby*, 1 A. and E. 783; cited in 22 C. 364 (371) **U**
- (h) And, also, those on whose behalf the suit was brought. 4 O.C. 100 (104). **Y**
- (i) So long as the decree subsists unreversed and unvaried, the parties to it and those claiming under them are bound by it, and effect cannot be given to a prior agreement touching the same matter, on the ground that the decree differs in terms from the agreement. 8 B.H.C. (A.C.), 241. **W**

(41) Judgment, in suit subject-matter of which ceased to exist, not *res judicata*.

The judgment on merits in a suit the subject-matter of which had ceased to exist, at the date of the institution of the suit, could not have the effect of *res judicata* on any of the points thus unnecessarily decided. 2 A.W.N. 50. **X**

(42) Suit where plaintiff asks for or receives no relief is not *res judicata*.

- (a) A suit is not *res judicata*, if no relief is asked for by, or granted to, the defendant in the former suit, though he was a party to it. 25 B. 589 (592). **Y**
- (b) Although a decree does not in terms give a certain relief, yet if it is construed, in orders passed upon it, as having given that relief, it is not competent to the Court on a subsequent application to treat those orders as erroneous and put a different construction on the decree. 19 M. 54 (56), referring to 22 I.A. 68; 8 I.A. 123; 11 I.A. 37 and 11 I.A. 181. **Z**
- (c) Where there is a subsisting decree in a previous suit, its validity cannot be questioned in a subsequent suit, though the party might get the decree set aside in a separate suit. 20 A. 370 (374). **A**

(43) Every decree is not a *res judicata*.

- (a) It is not every decree or judgment which will operate as *res judicata*, and every dismissal of a suit does not necessarily bar a fresh action. It is necessary also to show that there was a decision finally granting or withholding the relief sought. *Per Mahmood, J.*, 8 A. 282 (286 and 290). See, also, 24 C. 616 (F.C.). **B**

2.—STATUTORY PROVISIONS ON SUBJECT-MATTER OF SECTION—(Continued).

A.—Res Judicata—(Continued).

- (b) The Court may be satisfied that the ground of legal right on which a person sues was finally dealt with by the judgment and decree therein. 10 W.R. 1 (P.C.); see, also, 24 C. 504 and 1 C.W.N. 249 (P.C.). **C**
- (c) Judgments, orders or decrees which operate in bar of an action have been provided for by S. 40, Ev. Act, which makes them relevant and thus admissible in evidence. 8 A. 282 (285). **D**
- (d) But that section comprehends a vast class of such proceedings which cannot be confounded with the rule of *res judicata*. 8 A. 282 (286). **E**
- (e) For instance, we have in the Code of Civil Procedure itself the provisions in Ss. 43, 108, 244, 317, 373, which, though barring an action *in limine*, must not be confounded with the rule of *res judicata* as enacted in S. 13 of the Code of Civil Procedure, 1882. 8 A. 282 (286). **F**
- (f) The dismissal of a suit under cl. ii, S. 10 of the Court Fees Act, can never operate as *res judicata* so as to bar a fresh action, where the plaintiff has valued his claim rightly and has paid adequate Court-fees. 8 A. 282 (286). **G**

(44) Reasoning of former judgment is not *res judicata*.

- (a) Only the matters decided are binding, and the reasoning on the findings of facts which induced the Courts to come to a decision is not binding as between the parties further than for the purposes of the particular decision. 15 W.R. 327; 21 W.R. 30 and 9 M. 272. **H**
- (b) The reasoning upon which the former judgment was based may be equally applicable to the present case, but that cannot have the effect of *res judicata* in the present suit in regard to the issue which arises in it. 23 A. 5 (8). **I**
- (c) Suppose two bonds are executed by the same debtor in favour of the same creditor on exactly similar terms, and, in a suit brought on the basis of one of the bonds, the question arises whether under the terms of that bond interest is payable. A decision of that question cannot surely bar the trial of a similar question, if such question be raised in a subsequent suit brought upon the other bond. 23 A. 5 (9). **J**
- (d) The reason for the decision of the issue in the one case would equally apply to the other, but it cannot be said that the issue in the one case is the same as that of the other. The issue in the first case would be whether interest was payable on the amount of the first bond. The issue in the subsequent suit would be whether interest was payable in respect of the amount of the other bond. These are not identical issues. 23 A. 5 (9). **K**
- (e) As the law stands, a Court is forbidden to try, not only a suit, but an issue, in which the matter has been directly and substantially in issue in a former suit between the same parties in a Court of jurisdiction competent to try the subsequent suit, in which such issue has been subsequently raised, and has been heard and finally decided by such Court. 23 A. 5 (11). *Per Aikman, J.* **L**

2.—STATUTORY PROVISIONS ON SUBJECT-MATTER OF SECTION—(Continued).

A.—Res Judicata—(Continued).

(45) Res judicata applies only to items adjudicated upon.

The plea of *res judicata* applies only to that item in the present suit, which was adjudicated upon in the former suit, and not to the remaining items which were not in dispute in the former suit. 15 M. 264 (266). M

(46) Decree couched in general terms to what extent res judicata.

(a) Where the final decree is couched in general terms, the extent to which it ought to be regarded as *res judicata* can only be determined by ascertaining what were the real matters in controversy in the cause. 24 C. 504 (520) = 1 C.W.N. 249 (P.C.). N

(b) When an issue is raised and a decree is given, that which was in issue must be held to be decided by the judgment. If a Court neglect to take any point of a case, there is no ground for allowing a fresh suit on the same question. Select Cases, Part X, 24. O

(47) Foreign judgments.

(a) The existence of a decree in a foreign Court is no bar to the execution of a decree of a Court in British India, even though the cause of action in both suits be the same. 7 C. 82 (83). P

(b) Even a foreign judgment, if otherwise valid, must be accepted in England as conclusive on any matter thereby adjudicated upon, and as unimpeachable for any error of law, whether in regard to foreign law or English law. *Goddard v. Gray*, 40 L.J.Q.B. 62; cited in 14 C.P.L.R. 111. Q

(48) Erroneous decision on point of law, how far res judicata.

(a) A decision is no less a *res judicata*, because it may have been founded on an erroneous view of the law, or the view of the law which a Full Bench has subsequently disapproved. 10 C. 1087 (1091); followed in 1 C.W.N. 687. R

(b) The principle of *res judicata* does not depend for its application upon the question whether the decision, which is to be used as an estoppel, was right or wrong in law or on facts. 24 A. 138 (141). S

(c) The conclusiveness referred to in S. 13, C.P.C., includes as well the law as the facts involved in the case. 14 C.P.L.R. 109 (111). T

(d) Where a judicial decision, pleaded as constituting *res judicata*, in all other respects fulfils the requirements of this section, and no appeal has been preferred against it within limitation, it is immaterial whether such decision is or is not sound in law. 13 A.W.N. 110 = 15 A. 327; (5 M. 304, D). U

(e) An erroneous opinion on a point of law may be between the parties to it, but not further, a sufficient *res judicata* to preclude them from re-agitating it. 8 Bom. L.R. 992 = 81 B. 128. Y

(f) It is not every decision of a question of law between the parties, which is binding on them in a subsequent suit; but a previous decision of a question of law, which affects the subject-matter of the subsequent suit or creates a legal relation between the parties or defines the status of either of them, is as binding upon them as a previous decision of a question of fact, if the other requirements of the rule of *res judicata* are satisfied. 8 O.C. 37 (43); see, also, 9 O.C. 243. W

2.—STATUTORY PROVISIONS ON SUBJECT-MATTER OF SECTION—(Continued).

A.—*Res Judicata*—(Continued).

- (g) The operation of a decree as *res judicata*, so far at any rate as the object matter of a direct adjudication contained in the decree is concerned, can in no way be affected, in the absence of fraud or collusion, by the fact that the suit was the result of a mistake of law or that the decree proceeded on such mistake. 26 M. 104 (109). **X**
- (h) The erroneous decision by a competent tribunal of a question of law, directly and substantially in issue between the parties to a suit, does not prevent a Court from deciding the same question in a subsequent suit according to law. 17 M.L.J. 250=30 M. 461 (463); *referring to* 5 M. 304; 11 M. 396; 28 M. 517; 22 B. 669 and 32 C. 749. **Y**
- (i) But the Court cannot allow the correctness of the decree given in the former suit to be questioned in the later suit, on the ground that the former suit was decided under a mistake of law, nor can it pass a decree the effect of which would be to set at naught, in whole or in part, the decree in the former suit. 17 M.L.J. 250 (251)=30 M. 461 (463); *referring to* 26 M. 104; 29 M. 225 and 32 C. 749. **Z**
- (j) A decision on a question of law in a previous suit is not *res judicata* in a subsequent suit between the same parties, when the object matters of the two suits are different. 28 M. 517 (519)=15 M.L.J. 466. **A**
- (k) An erroneous decision on a pure question of law in a suit does not operate as *res judicata* in a subsequent suit between the same parties, where the cause of action in the subsequent suit is not identical with the cause of action in the previous suit. 1 C.L.J. 176 (179)=9 C.W.N. 466=32 C. 749. **B**

(49) Decision of question of mixed law and fact, how far *res judicata*.

A judgment in a former suit, not based on a misapprehension as to a general rule of law, but deciding a question of mixed law and fact, is binding as *res judicata* in a subsequent suit. 29 M. 225 (231); 28 C. 318 (323) and 44 P.R. 1908. **C**

(50) Meaning of the word "suit."

- (a) The word "suit" means such a matter as might have formed the subject of a separate suit independently of the special provisions of the Code which enable a plaintiff to unite several causes of action in one and the same suit. 12 C.P.L.R. 91 and 7 A. 247=5 A.W.N. 15 (F.B.). **D**
- (b) It would be outside the scope of the enactment to construe the word "suit" in an absolutely literal sense. 12 C.P.L.R. 91 (95). **E**
- (c) The word "suit" does not include an appeal. 23 C. 415 (419). **F**

(51) What amounts to a suit.

- (a) An application by a petition, under S. 63 of the Administrator-General's Act (II of 1874), is a "suit" and is barred by the disposal of a similar former application in the same matter, though the order passed is capable of being reviewed. 3 C. 340 (346). **G**

2.—STATUTORY PROVISIONS ON SUBJECT-MATTER OF SECTION—(*Continued*).

A. -- *Res Judicata*—(*Continued*).

- (b) The proceeding under the Probate and Administration Act is not a suit properly so called, but takes the form of a suit according to the Code. 20 C. 888 (895). **H**
- (c) As to whether an application for revocation of probate is a suit, see 4 C.L.J. 492. **I**
- (d) A proceeding, under S. 53 of the Oudh Land Revenue Act (1876), is a suit, and an adjudication therein upon the liability of an alleged grant to redemption is a decree. Therefore, the question decided in the proceedings under S. 53 of that Act is *res judicata*. 5 O.C. 97 (99). *Per Chamier, A.J.C.* **J**
- (e) An application under S. 25, Act X of 1859, is not equivalent to the institution of a suit. The Collector, whether acceding to or refusing it, does not adjudicate between the parties. 10 W.R. 295. **K**
- (f) A suit for ejectment from land assigned for building purposes brought upon a contract is not barred by reason of an order for ejectment on an application under S. 25, Act X of 1859. Such an application to eject is not a suit. 18 W.R. 208. **L**
- (g) Insolvency proceedings under the Punjab Laws Act do not amount to a "suit." A decision in such proceedings is no bar to subsequent proceedings under S. 344 (of the Code of 1882) between the same parties. 145 P.R. 1884. **M**
- (h) An application under S. 344, Civ. Pro. Code, 1882, is not a suit 122 P.L.R. 1903 (145 P.R. 1884, *F.*). **N**
- (i) The rejection of an application under S. 311, Civ. Pro. Code, 1882, is not a bar to a subsequent application on arrest at the instance of the decree-holder who previously caused applicant's arrest or at the instance of another decree-holder. 122 P.L.R. 1903. **O**
- (j) When an applicant applies for insolvency, under S. 344, C.P.C. (1882), and his application is rejected on the merits, a subsequent application by him to be declared an insolvent on the same facts is barred by the rule of *res judicata*, which can be applied to insolvency proceedings, under the above section under the general maxim "*Nemo bis vexari debet pro eadem causa.*" 75 P.R. 1905 (**F.B.**). **P**
- (k) The plea of set-off is one form of bringing a suit, and a defendant cannot, under the plea of set-off, set up a claim for which a suit has been previously brought and dismissed. 15 W.R. 252; see, also, 20 W.R. 380=13 B.L.R. 146 (**P.C.**); 8 A. 396. **Q**

(52) Plaintiff bound to make as ground of attack matter that ought to be made such.

- (a) A plaintiff is only bound to make as a ground of attack in the suit, a matter which not merely might but ought to have been made a ground of attack, and it is only when a matter might and ought to be made a ground of attack in a former suit that the section provides that such matter shall be deemed to be a matter directly and substantially in issue in the suit. 1 A.L.J. 498 (501); [A.W.N. (1886), 69, *F.*] **R**

2.—STATUTORY PROVISIONS ON SUBJECT-MATTER OF SECTION.—(*Continued*).

A.—*Res Judicata*—(*Continued*).

- (b) To make a matter *res judicata*, not only *might* the ground of attack have been raised but it *ought* to have been raised. 4 C.L.J. 492 (495); see, also, 8 Bom. L.R. 296 = 30 B. 895.
- (c) A right, which might and ought to have been made a ground of attack or defence in the former suit, must be deemed to have been a matter substantially and directly in issue in such suit. 4 P.R. 1903 and 96 P.R. 1881. T
- (d) A party is bound to bring forward his whole case in respect of the matter in litigation and open to him upon the points for decision in the suit. He cannot abstain from relying upon, nor abandon a ground of claim which is in question and proper for consideration and decision in the suit, and afterwards make it a cause of fresh suit in respect of the same subject-matter. 2 M.H.C.R. 131. U
- (e) The abandonment of a point, which ought to have been put forward, amounts to a substantial determination of the point against the party giving it up. U.B.R. (1892-1896), p. 242; see, also, 10 W.R. 1 (P.C.); 8 W.R. 307; 14 W.R. 272; 1 A. 480 and 5 A. 514. Y
- (f) The effect of his omission to set up in the previous suits the defence which he raised in the subsequent suit, is that it must be taken that the Court had refused in the previous litigations to recognise the right which he claimed in the subsequent suit. 2 A.L.J. 278 = A.W.N. (1905), 107. W
- (g) The question whether any matter ought to have been made a ground of attack or defence in a prior suit depends upon the particular circumstances and facts of each case. 20 C. 79 (85) (P.C.). X
- (h) Dissimilar matters, if their union does not lead to confusion, ought to be united as grounds of attack or defence but not otherwise. 20 C. 79 (85) (P.C.) = 19 I.A. 234. Y
- (i) Where the title, on which a relief is claimed in a second suit, could have been put forward in the first suit in the alternative, the second suit would be barred. 25 B. 189 (193); *per* Jenkins, C.J., *explaining* 20 C. 79 (P.C.). Z
- (j) Every cause of action a plaintiff may have at the date of the first suit in respect of the property then litigated need not be made a ground of attack by the plaintiff. 13 M.L.J. 439 (441), *explaining* 20 C. 79 (P.C.) = 19 I.A. 234. A
- (k) S. 12 of the Civ. Pro. Code only provides that no suit shall be tried if the same issues are involved in a previously instituted suit in a competent Court. This provision is merely intended to secure general convenience; it cannot be construed as dispensing with the institution of a suit within the proper time when the law expressly requires such institution. 22 B. 640 (645). B.

2.—STATUTORY PROVISIONS ON SUBJECT-MATTER OF SECTION—(*Continued*).

A.—*Res Judicata*—(*Continued*).

(l) In England, the omission of a defendant to set up a defence in an earlier action does not estop him from setting it up in a later action brought by the same plaintiff, provided that such defence is not inconsistent with any traversable averment made by the plaintiff in the earlier action. *Houlett v. Tarte*, 31 L.J.C.P. 146; 15 C.P.L.R. 167 (170). **C**

(m) Every ground, which could and ought to have been urged in support of the claim actually made in the suit, shall be deemed to have been adjudicated upon therein, whether it was actually urged or not. 5 C. 923=6 C.L.R. 597 and 26 M. 760 (767). **D**

(n) "Where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject-matter in contest, but which was not brought forward, only because they have, for negligence, inadvertence, or even accident omitted part of their case." *Henderson v. Henderson*, 3 Hare 100, cited 26 B. 661 (667)=4 Bom. L.R. 492. **E**

(o) "The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." *Henderson v. Henderson*, 3 Hare 100; cited in Field Ev., 6th Ed., App. B, p. 510. **F**

(53) Decision may be *res judicata* between parties on the same side.

(a) A decision may be *res judicata* between the same parties on the same side, the mere circumstance of persons having been arrayed on the same side in a suit being immaterial. If a matter has been actively in issue between them, and if as to that matter they had an active controversy against each other, they will be estopped by the decision in that matter. 4 O.C. 108. **G**

(b) Any issue which is material to the rights of parties in the matter of the suit between them, whether actually contested or not, shall not afterwards be raised in a subsequent suit between the same parties. 8 W.R. 366 (367). **H**

(c) The fact that the parties to the second suit were both defendants in the first suit cannot prevent the decision passed therein from being conclusive and binding on them in the second suit. 2 C.P.L.R. 52 (53). (*Dissented from* in 6 C.P.L.R. 87). See, also, 2 C.P.L.R. 55. **I**

(d) The precise form in which the suits are brought, or the fact that the plaintiff in the one suit was the defendant in the other, becomes immaterial. 3 C. 145=1 C.L.R. 35 (F.B.); followed in 6 C. 715. **J**

2.—STATUTORY PROVISIONS ON SUBJECT-MATTER OF SECTION—(Continued).

A. — Res Judicata —(Continued).

- (e) In cases of this kind, a defendant who has an interest in common with the plaintiff as against his co-defendant has not the conduct of the suit in his hands, and if the plaintiff were to abandon the suit, so as to cause it to be dismissed, it could not reasonably be held that a fresh suit by that defendant against the co-defendant would be barred. 12 C. 580 (582) (F.B.). (Overruling 9 C. 120; 3 C. 146, distinguished; followed in 6 C.P.L.R. 87). **K**

(54) Applicability of res judicata to formal parties.

- (a) Where the plaintiffs in the subsequent suit have been merely *pro forma* defendants in the former suit, the suit is not barred by reason of the former suit. 60 P.R. 1894 (19 C. 159, cited). **L**
- (b) Per *Benton, J.*—There is no distinction between *pro forma* defendants and other defendants, and if a *pro forma* defendant does not show that he is substantially interested in the matter, the decree will bind him. 60 P.R. 1894. **M**
- (c) A decree in a former suit against one of the two defendants in that suit, after the determination of that person's liability alone, would not bar a subsequent suit against the other defendant. 21 W.R. 189. **N**
- (d) A *pro forma* defendant in a suit, who neither put in an appearance nor defended it, and from which no relief was asked, no decree being given either for or against him, is not debarred from subsequently bringing a suit as plaintiff, although the matter in issue in the second suit had also been in issue and formally determined in the suit in which he was a *pro forma* defendant. 41 P.R. 1899; see, also, 70 P.R. 1900. **O**
- (e) Where the defendant had been "made a party" to a prior suit, but only "for the purposes of discovery," and there was no decree against him as a party, and no relief asked from him, *held*, that this irregular proceeding had not rendered him a party to that suit so as to make this section applicable. 14 B. 408 (415-6), affirmed in 17 B. 341 (348) = 20 I.A. 1 (P.C.). See, also, 25 B. 74. **P**

(55) Res judicata as between co-defendants.

- (a) The fact that a question in issue between the plaintiff and the defendant was formerly decided in a suit in which the plaintiff and the defendant were arrayed together on the same side as co-defendants does not, except under exceptional circumstances, constitute that question a *res judicata*. 11 A.W.N. 34; 10 A.W.N. 177 and 8 A. 91. **Q**
- (b) A decision in a former suit has not the effect of an estoppel as between co-defendants in that suit or parties claiming under them. W.R. (1864), 299 and 1 W.R. 287. **R**
- (c) But this section does not preclude the decision upon any issue from operating as *res judicata*, merely because the issue is raised as between co-defendants, if the matter involved was directly and substantially in issue in a former suit and the other necessary conditions are satisfied. 8 C.W.N. 30 = 31 C. 95. **S**

2.—STATUTORY PROVISIONS ON SUBJECT-MATTER OF SECTION—*Continued*).

A.—*Res Judicata*—(*Concluded*).

- (d) And the same will be the case, if the matter in dispute in the second suit formed the subject of active controversy between the co-defendants in the former suit. 15 M. 264 (265); (14 M. 324, F.) **T**
- (e) So, where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, there must be such an adjudication, and, in such a case, the adjudication will be *res judicata* between the defendants as well as between the plaintiff and the defendants. U.B.R. (1907), Civ. Procedure, 5; 11 B. 216 (220). **U**
- (f) But, for this effect to arise, there must be a conflict of interests among the defendants, and a judgment defining the real rights and obligations of the defendants *inter se*. 18 A. 65 = 15 A.W.N. 156. **Y**
- (g) There is no *res judicata*, in the circumstance of there being no active controversy between parties who were defendants in a former suit. 18 M. 374 (377). **W**
- (h) Where an adjudication between defendants is *necessary* to give the appropriate relief to the plaintiff, there must be an adjudication, and in such a case the adjudication will be *res judicata* between the defendants as well as between the plaintiff and the defendants; but, for this, there must be a conflict of interest amongst the defendants and the judgment must define the real rights and obligations of the defendants *inter se*. 5 C.L.J. 611 (628-9); *referring to* 31 C. 95; 22 A. 386; 25 B. 74; 26 M. 337 and *Cottingham v. Earl of Shrewsbury*, 3 Hare 627. **X**
- (i) A finding between co-defendants unnecessary for the determination of the suit, or the rights of the parties involved in the suit, is not *res judicata*. 22 B. 245 (250). (See, also, 11 B. 216; 18 B. 597; 18 A. 65, F.) **Y**
- (j) Nor will it be *res judicata* amongst them by mere inference from the fact that they have been collectively defeated in resisting a claim to a share made against them as a group. 22 A. 386 = 20 A.W.N. 120. **Z**
- (k) In England, the Courts would not formerly decide rights between co-defendants, except where necessary in order to determine the right of the plaintiff or unless the evidence was clear and the case ripe for decision. *Cottingham v. Earl of Shrewsbury*, 15 L.J. Ch. 441; *referred to* in 16 C.P.L.R. 43. **A**
- (l) But, this is now altered by the Judicature Act, 1873, S. 24 (7), the intention of the Legislature being that "so far as possible" all matters in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of such matters avoided. See 16 C.P.L.R. 43. **B**
- (m) The law in this country is very similar. 16 C.P.L.R. 43. See, also, 11 B. 216; 25 B. 74 and 22 A. 386. **C**

2.—STATUTORY PROVISIONS ON SUBJECT-MATTER OF SECTION—(Continued).

B.—Criminal cases.

(1) Applicability of section to judgments of Criminal Courts.

(a) The principles of *res judicata* may also apply to orders of Criminal Courts.
5 A. 224 (226). Per Mahmood, J. D

(b) "It is just that a person, who has been formally tried for an offence and acquitted, should not be subjected to the harassment of being tried over again for the same offence. Accordingly the plea of *autrefois convict* or *autrefois acquit*, i.e., of a previous lawful conviction or lawful acquittal has always been held to be a good 'plea.' Field Ev., 6th Ed., p. 179. E

(c) A Magistrate disallowed an application by the husband, objecting to the payment of maintenance to his wife, on the ground that the adultery alleged by the husband was not established. On a subsequent application by the husband to the same effect, a succeeding Magistrate allowed the application on proof of adultery alleged to have been committed before the date of the order of the former Magistrate. *Held*, that the general principles of *res judicata* applied to the case and that the second Magistrate was wrong in law in re-opening matters already adjudicated upon by the first. 5 A. 224 (226). F

(d) Where the Magistrate, who acquitted an accused had no jurisdiction, his proceedings were held to be simply void, under S. 550 of the Code of Criminal Procedure, 1882. There was nothing, therefore, to prevent a trial by a competent Court, under S. 403 of the Code, and no reason for the interference of the High Court. 8 B. 307 (308). G

(2) S. 403, Crim. Pro. Code, 1898—Of previous acquittals or convictions.

(a) A person who has once been tried by a Court of competent jurisdiction for an offence, and convicted or acquitted of such offence, shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under S. 236, or for which he might have been convicted under S. 237. H

(b) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under S. 235, sub-sec. (1). I

(c) A person convicted for any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last-mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted. J

(d) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed, if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged. K

2.—STATUTORY PROVISIONS ON SUBJECT-MATTER OF SECTION—(Continued).

B.—Criminal cases—(Concluded).

- (e) Nothing in this section shall affect the provisions of S. 26 of the General Clauses Act, 1897, or of S. 188 of this Code. L

Explanation.—The dismissal of a complaint, the stopping of proceedings under S. 249, the discharge of the accused, or any entry made upon a charge under S. 273, is not an acquittal for the purposes of this section. M

(3) Judgment of Criminal Court whether will prevent action of Civil Courts.

The judgment of a Criminal Court does not operate as *res judicata* to prevent the Civil Court from determining the suit or issue. 4 A. 97 (99). See Whitley Stokes, Vol. II, p. 475 (note). N

(4) S. 511, Cr. P.C., 1898—Previous conviction or acquittal, how proved.

In any inquiry, trial or other proceeding under this Code, a previous conviction or acquittal may be proved in addition to any other mode provided by any law for the time being in force,—

- (a) by an extract certified, under the hand of the officer having the custody of the records of the Court in which such conviction or acquittal was had, to be a copy of the sentence or order ; or

- (b) in case of a conviction, either by a certificate signed by the officer in charge of the jail in which the punishment or any part thereof was inflicted, or by production of the warrant of commitment under which the punishment was suffered ;

together with, in each of such cases, evidence as to the identity of the accused person with the accused person so convicted or acquitted. O

C.—Bombay Khoti Settlement Act (I of 1880).

Bombay Khoti Act, 1880, S. 17—Entry in Settlement Officer's record, conclusiveness of.

- (a) An entry in the Settlement Officer's record, referred to in S. 17 of the Khoti Act (Bombay Act I of 1880), is conclusive as to the nature and amount of rent. The words "conclusive and final evidence of the liability" in S. 17 have the effect of shutting out any other evidence on the subject which might be adduced before the Civil Court. 18 B., 133 (196). P

- (b) An entry of a record prepared under S. 108 of the Land Revenue Code, Bombay Act V of 1879, by the survey officer, describing certain lands as *khoti*, is, by force of S. 17 of the Bombay Khoti Act (I of 1880), conclusive and final evidence of the liability thereby established and shuts out the evidence of a prior decision, otherwise relevant, under S. 40 of the Evidence Act, as proof of *res judicata*, whereby a Civil Court adjudged the land to be *dhara*. 20 B. 475 (479). Q

- (c) Held that the entries of the rent payable by occupancy tenants, who were the defendants in a suit for a declaration that the plaintiff was entitled to recover from the defendant one-third of the produce of *bhat* and *varkasal* by *pahani* (survey settlement) as rent of certain

2.—STATUTORY PROVISIONS ON SUBJECT-MATTER OF SECTION—(Concluded).

C.—Bombay Khoti Settlement Act (I of 1880)—(Concluded).

lands situate in a certain place were duly made under S. 17 of the Bombay Khoti Settlement Act, 1880, according to the provisions of S. 33, so as to make them conclusive and final evidence of the defendants' liability which it is not open to the Civil Court to question. 21 B. 235 (240). **R**

(d) S. 17, Khoti Settlement Act, 1880, only makes the entry duly made by a Collector as the result of his decision final and conclusive evidence of the liability established thereby. It is not open to a Civil Court to inquire into the validity of the reasons which induced the Collector to exercise his jurisdiction. 21 B. 244 (247-8). **S**

(e) The decision of a survey officer determining the tenure on which a survey number is held is not final, under the Khoti Act, 1880, and it can be reversed or modified by a competent Court. 21 B. 480 (488). **T**

(f) A survey officer, under the Bombay Khoti Settlement Act (I of 1880), decided and entered in the survey register that the defendants held the suit lands as occupancy tenants. The plaintiffs, the *Khots* of the village, took objection to the decision and sued for its reversal and for a declaration that the lands were held by them on *dhara* tenure and that the defendants were ordinary tenants thereof. The Judge dismissed the suit in appeal, on the ground that the survey entry was conclusive evidence of the tenants' liability, and that it afforded the plaintiffs no cause of action. *Held*, reversing the decree, that the decision of the survey officer as to tenure was not final, and that a suit, like the present, would lie. 21 B. 608 (610). **U**

41. A final judgment, order or decree of a competent Court¹ in the exercise of probate², matrimonial³, admiralty⁴ or insolvency jurisdiction⁵, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant⁶.

Relevancy of certain judgments in probate, &c., jurisdiction.

Such judgment, order or decree is conclusive proof—

that any legal character which it confers accrued at the time when such judgment, order or decree came into operation ;

that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person ;

that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease ;

and that any thing to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property.

(Notes).

I.—“A final judgment, order or decree of a competent Court.”

(1) General.

- (a) “This section deals with another class of cases.” Mark. Ev., p. 37. **Y**
- (b) S. 41 deals with what are usually called judgments *in rem*. 6 C. 171 (174).
Per Mitter, J. See, also, 12 A. 1 (44) (F.B.). **W**
- (c) “The judgments for which provision is made in this section are usually called judgments *in rem*, which means that certain judgments are conclusive, not only against the parties to them, but also against all the world.” Cun. Ev., 11th Ed., p. 113. **X**
- (d) The words “order or decree” in S. 41, wherever they occur were inserted by the Indian Evidence Act Amendment Act, XVIII of 1872, S. 3. See General Acts, Vol. 2, 1898 Ed., p. 404. **Y**

(2) Judgments to be universally binding must proceed from jurisdictions specified.

S. 40 clearly states that the only judgments which are universally conclusive are those passed by the Courts in the exercise of one of the special jurisdictions specified in the section. Cun. Ev., 11th Ed., p. 114 and see, also, Field Ev., 6th Ed., p. 180. **Z**

(3) General rule as to judgments.

- (a) “Generally speaking, a judgment only concerns those persons who are parties to it; other persons are not affected by it.” Mark. Ev. p. 37. **A**
- (b) “Every judgment is conclusive proof, as against parties and privies, of facts directly in issue in the case, actually decided by the Court, and appearing from the judgment itself to be the ground on which it was based; unless evidence was admitted in the action in which the judgment was delivered which is excluded in the action in which that judgment is intended to be proved.” Steph. Dig., 7th Ed., Art. 41, p. 53. **B**
- (c) “Thus, if A claims an estate from B and recovers it in a Court of law, this will not prevent C from claiming the same estate.” Mark. Ev., p. 37. **C**
- (d) As a general principle, a transaction between two parties in judicial proceedings ought not to be binding upon the third. *Duchess of Kingston's Case*, 2 Sm. L.C. 424; cited in 7 W.R. 388 (341). **D**
- (e) For, it would be unjust to bind any person who could not be admitted to make a defence, or to examine, and to cross-examine witnesses, or to appeal from a judgment which he might think erroneous. (*Ibid*). **E**
- (f) And, therefore, the depositions of witnesses in another cause in proof of a fact, the verdict of a jury, or, in India, of a Court, finding the facts, and the judgment of the Court upon the facts found, although evidence against the parties and all claiming under them, are not, in general, to be used to the prejudice of strangers. (*Ibid*). **F**

I.—“A final judgment, order or decree of a competent Court.”—(Contd.).

(4) Exceptions to the above general rule.

- (a) The rule, which makes a judgment conclusive against parties and those who claim under them, is subject to certain exceptions, which are the offspring of positive law, and, the reason for the exception may be generally stated to be that the nature of the proceedings, by which there is a fictitious, though not unjust, extension of parties, renders it proper to use the judgment against those not formally parties. 2 M. H.C. 276 (288). See, also, the English cases of *Caspigna v. Imrie*, 8 C.B.N.S. 1 and 405; *Cammell v. Sewell*, 27 L.J. Ex. 477; *Simpson v. Fogo*, 1 H. and M. 211; and *Scott v. Shearman*, 2 W. Bl. 977, therein cited and discussed. **G**
- (b) There are certain decrees, which, although it would be most improper to receive them as conclusive evidence against third parties, ought to be admitted as evidence. (*Ibid*). **H**
- (c) There are some exceptions to the general rule founded upon particular reasons. *Duchess of Kingston's Case*, 2 Sm. L.C. 424. See 7 W.R. 341. **I**
- (d) The principle that a judgment is not to be used to the prejudice of strangers was not applicable to judgments in actions *in rem*. 7 W.R. 338 (341). **J**
- (e) “But, the decree of a competent Court sometimes actually does more than decide a disputed question of right; it creates or destroys rights.” Mark. Ev., pp. 37-8. **K**
- (f) “For example, the decree of a Court may annul or dissolve a marriage; it may make a man a bankrupt; it may declare a man's property forfeited under S. 62 of the Penal Code and other provisions of the Criminal Law.” (*Ibid*). **L**

(5) In such cases the judgment is relevant evidence.

- (a) “In all these cases, the decree of the Court which accomplishes these facts may be produced in evidence, if the fact is in dispute.” Mark. Ev., p. 38. **M**
- (b) The judgment of a Court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or, as evidence, conclusive between the same parties, upon the same matter, directly in question in another Court, or (in another action between the same parties in the same Court). *Duchess of Kingston's Case*, 2 Sm. L.C. 424. See 7 W.R. 341. **N**
- (c) The judgment of a Court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter between the same parties coming incidentally in question in another Court for a different purpose. (*Ibid*). **O**
- (d) But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognisable, nor of any matter to be inferred by argument from the judgment. (*Ibid*). **P**
- (e) A decree, according to the nature of it, may prevent particular persons or the subjects of a particular Government, or it may be the whole world, from averring to the contrary. 7 W.R. 338 (342). **Q**

1.—“A final judgment, order or decree of a competent Court.”—(Contd.).

(f) It is quite clear that there are no judgments *in rem* in the Mofussil Courts, and that, as a general rule, decrees in those Courts are not admissible against strangers either as conclusive or even as *prima facie* evidence, or to prove the truth of any matter directly and indirectly determined by the judgment or by the finding upon any issue raised in the suit, whether relating to status, property, or any other matter. (*Ibid*), p. 345. R

(g) If a judgment in a suit between A and B, that certain property for which the suit was brought belonged to A as the adopted son of O, were a judgment *in rem* and conclusive against strangers as to the fact and validity of the adoption, the greatest injustice might be caused. (*Ibid*), p. 345. See, also, the illustration of the principle in the following pages. S

(6) Source of section.

For the sake of simplicity, and in order to avoid difficulty of defining or enumerating judgments *in rem*, the statement of the law by Sir Barnes Peacock in 7 W.R. 388 has been adopted. See Select Committee's Report, Gazette of India, July 1, 1871, Part V, p. 273. See, also, Field Ev., 6th Ed., p. 180 and A.A. and W. Ev., 4th Ed., p. 273. T

(7) Expressions ‘in rem’ and ‘in personam’ not defined.

“As applied to judgments, the terms *in rem* and *in personam* which are adopted from, though not belonging to, the Roman Law, have never been clearly defined in reference to our own or any other system.” Phip. Ev., 4th Ed., p. 377. U

(8) Judgment ‘in rem,’ definition of.

(a) “Judgments *in rem* are adjudications pronounced upon the status of some particular subject-matter by a tribunal having competent authority for that purpose.” Best. Ev., 9th Ed., S. 593, p. 492; Phip. Ev., 4th Ed., p. 377 and Tay. Ev., 10th Ed., S. 1674, p. 1204. Y

(b) This definition, though apparently the best that can be framed upon a difficult subject, is open to the objection that it fails to distinguish between territorial and ex-territorial status. Phip. Ev., 4th Ed., p. 377. W

(c) This definition is objectionable besides, as, including in its terms matters which are not properly classed as judgments *in rem*, e.g., inquisitions and criminal convictions. Phip. Ev., 4th Ed., p. 377. X

(d) A more complete definition would be that it is an adjudication which not merely declares the status of the person or thing adjudicated on, but actually renders the status of the person or thing such as it declares it to be.” Tay. Ev., 10th Ed., S. 1674, p. 1204. Y

(e) Another definition is that it is “a judgment by a Court having special jurisdiction over the subject-matter.” Phip. Ev., 4th Ed., p. 377. Z

(f) But such judgments have effect *in rem* only if they alter status. Phip. Ev., 4th Ed., p. 377. A

1.—“A final judgment, order or decree of a competent Court.”—(Contd.).

(9) Principle of conclusiveness of judgments ‘in rem.’

- (a) “The principle of the conclusiveness of judgments *in rem* as regards persons is, that public policy for the peace of society requires that matters of social status should not be left in continual doubt.” Phip. Ev., 4th Ed., p. 378. B
- (b) “And as regards things the principle is that, generally speaking, every one, who can be affected by the decision, may protect his interests by becoming a party to the proceedings.” (*Ibid*). C
- (c) “Further a decision *in rem* not merely declares the status of the person or thing, but *ipso facto* renders it such as it is declared.” (*Ibid*). D
- (d) “This rule rests partly upon the ground that judgments *in rem* not merely declare the status of the subject-matter adjudicated upon, but, *ipso facto*, render it such as they declare it to be; and partly, if not principally, upon the broad ground of public policy, that the social relations of every member of the community should not be left doubtful, but that, after having been once clearly defined by solemn adjudication, they should ever after remain at rest.” Tay. Ev., 10th Ed., S. 1676, p. 1207. E
- (e) “Such judgments the law has, from motives of policy and general convenience, invested with a conclusive effect against all the world.” Best. Ev., 9th Ed., S. 593, p. 492. F
- (f) “At the head of these, stand judgments in the Exchequer, of condemnation of property as forfeited, adjudications of a Court of Admiralty on the subject of Prize, &c.” Best. Ev., 9th Ed., S. 593, p. 492. G
- (g) “In certain instances also, judgments as to the status or condition of a party are receivable in evidence against third persons, although they are not conclusive.” Best. Ev., 9th Ed., S. 593, p. 492. H
- (h) “Thus, in an action against an executor, sued on a bond of his testator, a commission finding the testator lunatic at the time of the execution of the bond is *prima facie* evidence against the plaintiff, though he was no party to it.” Best. Ev., 9th Ed., S. 593, p. 492. I
- (i) “And by analogy to the general rule of *res inter alios acta*, judgments and judicial proceedings *inter alios* are receivable on questions of a public nature, and in other cases where the ordinary rules of evidence are departed from.” Best. Ev., 9th Ed., S. 593, p. 492. J

(10) Judgment ‘in rem’ furnishes conclusive proof of facts adjudicated upon as against all.

- (a) Generally, a judgment *in rem* conclusively proves the facts adjudicated upon as well against strangers as against parties, and concludes all persons from saying that the status of the thing adjudicated upon is not such as is declared by the adjudication.” *It. v. Hartington*, 4 E. and B. 780; *Cammell v. Sewell*, 3 H. and N. 646; *Simpson v. Fogo*, 1 J. and H. 18; *Castrique v. Imrie*, 8 C.B. (N.S.), 405; Tay. Ev., 10th Ed., S. 1674, p. 1204. K
- (b) “Every judgment, whether it be *in rem* or *inter partes*, must and does prove what it actually effects, though the effects of different sorts of judgments differ as widely as the effects of different sorts of deeds.” Steph. Dig., 7th Ed., note to arts. 39—47, p. 186. L

1. — "A final judgment, order or decree of a competent Court."—(Contd.).

(11) Rule whether applicable to all judgments.

(a) "This principle does not extend to all judgments falling within the above definition : thus, inquisitions in lunacy, inquisitions *post mortem*, and other inquisitions, which are regarded as judgments *in rem*, so far as to be admissible in evidence of the facts determined against all mankind, are not considered as conclusive evidence." Tay. Ev., 10th Ed., S. 1674, p. 1204, referring to *The Irish Society v. Bp. of Derry*, 12 Cl. and Fin. 666 (H.L.). M.

(b) An order passed in affiliation proceedings is not a judgment *in rem*—*Anderson v. Collinson*, 2 K.B. 107; Tay. Ev., 10th Ed., S. 1674, p. 1205. N

(c) An order to wind up a company is also not a judgment *in rem*. *Bouchier v. Taylor*, 4 Bro. P.C. 708; Tay. Ev., 10th Ed., S. 1674, p. 1205. O

(12) Judgment 'in rem' binding on all on precise points decided.

A judgment *in rem* is conclusive upon all the world as to the exact point actually decided, and cannot be impeached by showing that the facts on which it immediately rests are false. Tay. Ev., 10th Ed., S. 1677, p. 1207. P

(13) But it is not conclusive on points incidentally decided.

(a) But, like any other judgments, it is binding only with regard to the matter actually decided. *Att.-Gen. v. King*, 5 Price, 195; *Concha v. Concha*, 11 A.C. 541; Tay. Ev., 10th Ed., S. 1677, p. 1207. Q

(b) It is not binding as to points which incidentally were in question. See (*Ibid*). R

(c) Thus, where the facts upon which it is based are put directly in issue in a subsequent suit, the judgment is not, with one exception, conclusive proof of their truth, however essential it may have been for the Court acting *in rem*, to have decided those facts before it adjudicated upon the principal point. Tay. Ev., 10th Ed., S. 1377, pp. 1207-8. S

(14) Exception to rule that judgment 'in rem' does not prove the truth of facts in subsequent actions.

(a) "The exception referred to exists in cases where it appears on the face of the proceedings *in rem* that the very fact in dispute in the subsequent civil action was the one chiefly in dispute in the previous suit, and that it was actually decided in such previous proceedings." Tay. Ev., 10th Ed., S. 1678, p. 1208, referring to *Bailey v. Harris*, 18 L.J.Q.B. 115. T

(b) "The reason is that, should the same fact be again in dispute between the same parties, or persons claiming under them, whether in the same or in a different Court, the judgment *in rem* will, almost universally, be conclusive upon the point." Tay. Ev., 10th Ed., S. 1678, p. 1209, referring to *Spencer v. Williams*, L.R. 2 P. and D. 230. U

(15) Extent of conclusiveness of judgments 'in rem.'

(a) "Judgments *in rem* are so far conclusive, not only against the parties who were the actual litigants in the cause, but against all others, that, unless it can be shown, either that the Court had no jurisdiction, or that the judgment was obtained by fraud or collusion, no evidence can be generally admitted, at least, in any civil cause, for the purpose of disputing the status of the *res* adjudicated on." Tay. Ev., 10th Ed., S. 1678, p. 1206. Y

1.—“A final judgment, order or decree of a competent Court.”—(Contd.).

(b) Subject to impeachment for certain reasons, a domestic judgment *in rem* is, in civil proceedings, conclusive proof for or against all persons whether parties, privies or strangers of the points actually determined. Phip. Ev., 4th Ed., p. 376. **W**

(c) And this is the case, even though it may not have been pleaded as such. (*Ibid*). **X**

(d) Further, as between parties and privies, it is conclusive evidence of the grounds of the decision, where these have been put in issue and actually determined by the Court. (*Ibid*). **Y**

(e) But, as between strangers, or a party and a stranger, it is no evidence of such grounds save upon questions of prize, where it is binding, if the ground of condemnation is plainly mentioned. Phip. Ev., 4th Ed., pp. 376-7 and Tay. Ev., 10th Ed., Ss. 1733-1734, pp. 1257-8. **Z**

(16) All judgments are impeachable on certain grounds.

(a) Domestic judgments, adduced in evidence of the truth of the finding, may, ordinarily, be impeached on the following grounds. Phip. Ev., 4th Ed., p. 375. **A**

(b) They may be impeached as being **not final**, *e.g.*, interlocutory, reversed, a mere non-suit, discontinuance, stay on payment of money, or withdrawal; though a judgment by default may estop if the grounds appear on the face of the judgment. Phip. Ev., 4th Ed., p. 375 and the cases there cited. See, also, Tay. Ev., 10th Ed., S. 1719, p. 1246 and S. 1721, p. 1248. **B**

(c) It may also be shown that they were given **not on the merits**, *i.e.*, obtained on some technical objection, or default of pleading; (*Re Orrell*, 12 Ch. D. 681) or misconception of the form of action, or because the debt was not then due, or the plaintiff was under a temporary disability to sue. Phip. Ev., 4th Ed., p. 375; Tay. Ev., 10th Ed., S. 1719-A, p. 1247 and the cases cited therein. **C**

(d) It may further be shown that they were **without jurisdiction** (or, in the case of orders by justices, or under special statutory powers, that there was omission to recite facts showing jurisdiction). Phip. Ev., 4th Ed., p. 375. See, also, Tay. Ev., 10th Ed., Ss. 1714—1719, pp. 1240—1246. **D**

(e) Or it may also be shown that they were **fraudulent, collusive, or forged**. Phip. Ev., 4th Ed., p. 375; Tay. Ev., 10th Ed., S. 1713, p. 1240. **E**

(f) But, generally, only a stranger to the judgment can take advantage of a plea of fraud, who was in no way privy to the fraud, and not a party to it; for, if the latter were innocent, he might have applied to vacate the judgment, and if guilty, he cannot escape the consequences of his own wrong. Phip. Ev., 4th Ed., p. 375; Tay. Ev., 10th Ed., S. 1713, p. 1240 and Steph. Dig., 7th Ed., Art. 46, p. 58. **F**

(g) So, as to collusion, *e.g.*, where the parties, even without fraud, were not really in contest. *Bandon v. Becher*, 3 C. and F. 479, 510 and *Girdlestone v. Brighton Co.*, 4 Ex. D. 107; Phip. Ev., 4th Ed., p. 375. **G**

1.—“A final judgment, order or decree of a competent Court.”—(Contd.).

(17) Judgment ‘in rem’—Relevancy in criminal cases.

(a) “A judgment *in rem* of a competent Court is strong *prima facie* evidence in a criminal case, for the person in whose favour such judgment was given. Tay. Ev., 10th Ed., S. 1618, p. 1210. H

(b) “A judgment of this kind was, at one time, thought to be conclusive evidence in such person’s favour and could not be impeached even on the grounds of fraud or collusion.” Tay. Ev., 10th Ed., S. 1680, p. 1210. I

(c) But it is *now* not conclusive. Tay. Ev., 10th Ed., S. 1680, p. 1210. J

(d) A criminal conviction is not conclusive in a subsequent proceeding of the facts essential to be proved to procure the conviction; the same rules of evidence are applicable to it as to an ordinary judgment *inter partes*; indeed, such a judgment would not seem to be a judgment *in rem* at all except, perhaps, in so far as a conviction for felony amounts to a judgment that the person convicted is a felon. Tay. Ev., 10th Ed., S. 1674, p. 1205. K

(e) A judgment *in rem* will, however, under this section, be conclusive in a criminal equally as in a civil proceeding—a proposition about which there is some doubt in English Law. See Field Ev., 6th Ed., p. 181 and A.A. and W. Ev., 4th Ed., p. 275. See, also, Tay. Ev., 10th Ed., S. 1680, p. 1210. L

(18) Conflicting judgments—Effect.

The effect of there being conflicting judgments *in rem* is to set the whole matter at large again. *R. v. Wye*, 7 A. and E. 770 and *It v. Hutchings*, 6 Q.B.D. 300; Phip. Ev., 4th Ed., p. 378. M

(19) Rule as to judgments ‘in rem’ results from nature of proceedings—Considerations in applying doctrine to India.

The rule as to judgments *in rem*, excepting some peculiar cases, results from the nature of the proceedings, and before attempting to apply to this country the doctrine of decrees *in rem*, a careful consideration must be given to the question whether there are Courts so proceeding as to warrant the application of the doctrine. 2 M.H.C. 276 (288). N

(20) Existence of Courts capable of delivering judgment ‘in rem’ doubtful.

It is extremely doubtful whether there exists in India, exclusive of the particular jurisdictions which are exercised by the High Courts in matters of probate and the like, and which, in the case of war, might be exercised in matters of prize, any ordinary Court capable of giving, what can be called technically, a judgment *in rem*. 14 M.I.A. 367 (374). O

(21) Scope of section.

(a) Ss. 41 and 44 of the Evidence Act were undoubtedly meant to make the decrees which they refer to conclusive except in a very restricted class of cases. 22 A. 270 (281) (F.B.). P

(b) Ss. 41 and 44 of the Evidence Act recognise that, given the competency of the Court, even error or irregularity in the decision is a less evil than the total absence of finality, which would be the only alternative. 22 A. 270 (281) (F.B.). Q

1.—“A final judgment, order or decree of a competent Court.”—(Contd.).

- (c) The principle that, wherever a decision is wrong in law or violated a rule of procedure, the Court must be held incompetent to deliver it, is opposed to the language of Ss. 41 and 44 of the Evidence Act. 22 A. 270 (271) (F.B.). **R**
- (d) If the intention had been to make such decrees questionable on the ground of any legal defect or irregularity, very different expressions would have been used, and it would be inaccurate to describe such decrees as constituting conclusive proof. 22 A. 270 (281) (F.B.). **S**
- (e) Ss. 41 and 44 were intended to prevent the insecurity of titles and of status arising from the adoption of such a principle. 22 A. 270 (281) (F.B.). **T**
- (f) S. 41 admits judgments *in rem* as evidence in all subsequent suits where the existence of the right is in issue, whether between the same parties or not. 6 C. 171 (191). *Per Garth, C.J.* **U**
- (g) S. 40 simply renders admissible judgments which operate as pleas in bar of the action of the kind known as pleas of *res judicata* or otherwise under some other rule of law. That section has nothing to do with questions of evidence beyond the admissibility of the judgments, because a plea of *res judicata* is not a plea as a matter of evidence, but only a plea barring the action as a matter of procedure as distinguished from the rules of evidence. 12 A. 1 (44); *per Mahmood, J.* **Y**

(22) Examples.

- (a) Where a company sued a person for unpaid premium and calls, a special case being stated in the Court of Common Pleas, he obtained judgment on the ground that he never was a shareholder. The company being wound up in the Court of Chancery, he applied for the re-payment of the sum he had paid for premium and calls. The decision that he never was a shareholder was *held* to be conclusive as between him and the company that he never was a shareholder, and he was held to be entitled to recover the sums he paid. *Bank of Hindustan, &c., Alison's case*, L.R. 9 Ch. App. 24; Steph. Dig., 7th Ed., Art. 41, pp. 53-4. **W**
- (b) On the question whether C, a pauper, was settled in parish A or parish B, the statement, in an order not appealed against whereby D the mother and E the father of C, and several of their children were removed from A to B before the question as to C's settlement arose, that D was the wife of E, was *held* to be conclusive as between A and B. *R. v. Harington Middle Quarter*, 4 K. and B. 780; Steph. Dig., 7th Ed., Art. 41, p. 53. **X**
- (c) A decision by a competent Court that a Hindu family was joint and undivided, or upon a question of legitimacy, adoption, partibility of property, rule of descent in a particular family, or upon any other question of the same nature in a suit *inter partes* or more correctly speaking in an action *in personam*, is not a judgment *in rem* or binding upon strangers, or, in other words, upon persons who were neither parties to the suit nor privies. 7 W.R. 338 (341). **Y**
- (c1) A decree, in such a case, is not and ought not to be admissible at all as evidence against strangers. 7 W.R. 336 (341). **Z**

I.—“A final judgment, order or decree of a competent Court.”—(Contd.).

(d) A District Judge was held to be wrong in holding that his action as a Civil Judge would proceed on the result of a criminal trial, inasmuch as the finding or judgment of the Criminal Court in that case would not be relevant, that is, admissible in evidence, in a case before the Civil Court. 4 C.W.N. clxxvi. **A**

(e) By a decree in a suit brought by A against a widow as heiress of her husband to set aside alienations by her and establish A's right as reversioner, it was declared that A was reversioner. Subsequently B, (who was not a party to the former suit), sued to have it declared that he, and not A, was the person legally entitled to succeed on the widow's death. Held that the judgment in the former suit was not, (upon the ground of its having been made in a suit brought against the widow when holding the estate as heiress), admissible as evidence against the plaintiff B in the second suit. 7 W.R. 338 (345). **B**

(f) No judgment of a mofussil Court can be *in rem*. 7 W.R. 338 (345). **C**

(g) Where a woman was prosecuted for bigamy in marrying B during the life time of C, her husband, a decree in a former suit brought in an ecclesiastical Court by her against C for jactitation of marriage, which was obtained on the ground that C was not her husband, was held to be not admissible to disprove the former marriage. *R. v. Duchess of Kingston*, 20 How. St. Tr. 537—545; Phip. Ev. 4th Ed., p. 379. See, also, 7 W.R. 210. **D**

(h) A decree in a former suit was held, not to be a judgment *in rem*, but one *inter partes*. 14 M.I.A. 367 = 17 W.R. 104 (P.C.) = 11 B.L.R. 244. **E**

(i) A plaintiff having failed in a former suit to recover possession of a *raj* with property from his older brother, on the ground of the latter's illegitimacy, sued again, not only on that ground but also on that of priority of right by reason of the superior nature of the marriage of his own mother. As to whether the judgment in the former case was not one *in rem*, the Privy Council held that it could not be treated as one of that nature upon any principles, whether derived from English Law or the law and practice of India. 17 W.R. 104 (P.C.) = 11 B.L.R. 244 (P.C.) 14 M.I.A. 367. **F**

(j) Where probate in any form of a will of personalty is granted, it is a decision *in rem*, and generally it is conclusive evidence, till it is revoked, against all persons of the appointment of the executor and of the validity of the will, and its execution in conformity with the law of the testator's domicile. *Whichev v. Hume*, 7 H.L.C. 124 and *Concha v. Concha*, 11 App. Cas. 541. See Phip. Ev., 4th Ed., p. 401. **G**

(23) Foreign judgments.

(a) Courts in this country have little to do with foreign judgments. 7 W.R. 338 (349). **H**

(b) “A foreign judgment *in rem* is generally conclusive against strangers only upon questions of prize, where the ground of condemnation is plainly stated; or of marriage and divorce, where the marriage was solemnised and the parties domiciled in the foreign country; or of bankruptcy as to contracts made in such country; or of probate, administration, and guardianship to a limited extent.” Phip. Ev., 4th Ed., p. 377 and see, also, Steph. Dig., 7th Ed., Art. 47, p. 59. **I**

1.—“A final judgment, order or decree of a competent Court.”—(Contd.).

(c) Foreign judgments include judgments, whether strictly of record or not, proceeding from Irish, Scotch, Colonial or foreign tribunals. See Phip. Ev., 4th Ed., p. 376. **J**

(d) They may be also similarly impeached as not being final. *Nouvion v. Freeman*, 15 App. Cas. 1; Phip. Ev., 4th Ed., p. 376. **K**

(e) Or as having been made without jurisdiction. *Pemberton v. Hughes*, 1 Ch. 781; Phip. Ev., 4th Ed., p. 376. **L**

(f) Or as being fraudulent. *Abouloff v. Oppenheimer*, 10 Q.B.D. 295; *Vadala v. Lawes*, 25 Q.B.D. 319, and *Codd v. Delap*, 92 L.T. 510; Phip. Ev., 4th Ed., p. 376. **M**

(g) Or as being against natural justice. *Pemberton v. Hughes*, cited *supra*. Phip. Ev., 4th Ed., p. 376. **N**

(h) But they cannot be impeached for mistake of fact or of foreign or English Law. See Phip. Ev., 4th Ed., p. 376 and Tay. Ev., 10th Ed., S. 1729, pp. 1254-5. **O**

(24) Distinction between judgments ‘in rem’ and in ‘personam.’

(a) “There is no distinction between a judgment *in rem* and a judgment *in personam* excepting that, in the one, the point adjudicated upon (which in a judgment *in rem* is always as to the status of the *res*) is conclusive against all the world as to that status; whereas, in the other, the point, whatever it may be, which is adjudicated upon, it not being as to the status of the *res*, is only conclusive between parties and privies.” *Ballantyne v. Mackinnon*, 2 Q.B. 455 (462); Tay. Ev., 10th Ed., S. 1674, p. 1204. **P**

(b) “Judgments *in personam* are the ordinary judgments between parties in cases of contract, tort, or crime.” Phip. Ev., 4th Ed., p. 378. **Q**

(c) “Judgments not *in rem* are said to be judgments *in personam*.” Best. Ev., 9th Ed., S. 593, p. 492. **R**

(d) A suggestion is made that the term *inter partes* would be a more correct description to distinguish them from those adjudications *in rem* which bring about personal status, but, as most judgments *in rem* are also *inter partes*, little advantage would result from it. Phip. Ev., 4th Ed., p. 378. **S**

(25) Judgments ‘in personam,’ nature and extent of evidence of.

(a) “A judgment *in personam* is no proof of the truth either of the decision or of its grounds as between strangers, or a party and a stranger, except on questions of public and general interest; in bankruptcy, administration, divorce and patent cases to a certain extent; when so operating by contract, admission or acquiescence.” Phip. Ev., 4th Ed., p. 395. See, also, Tay. Ev., 10th Ed., Ss. 1682-3 and 1694, pp. 1212-3 and 1223. **T**

(b) But a judgment *in rem* is, as between strangers, proof of the truth of its actual decision. See Phip. Ev., 4th Ed., p. 396. **U**

(c) “Judgments *inter partes*, or, judgments *in personam* are not,—with one exception—admissible either for or against strangers as evidence of the facts adjudicated.” Tay. Ev., 10th Ed., S. 1682, p. 1212. **Y**

1.—“A final judgment, order or decree of a competent Court.”—(Contd.).

- (d) “They are not admissible against them, on the principle that no man ought to be bound by proceedings to which he was a stranger, and over the conduct of which he could, therefore, have exercised no control; or, to express the same in technical language, *res inter alios actae necere non debet*.” Tay. Ev., 10th Ed., S. 1682, p. 1212. • W
- (e) They are not admissible in favour of strangers even as against a party thereto, because it is thought, with very questionable propriety, that a rule that they should afford any evidence might cause injustice, unless its operation were mutual.” *Smith v. Lummons*, 1 Camp. 9; *Hathaway v. Barrow*, 1 Camp. 151; *Blackmore v. Glamorganshire, &c.*, Co., 1835, 2 C.M. and R. 133; Tay. Ev., 10th Ed., S. 1682, pp. 1212-3. X
- (f) “The one exception, that judgments are not admissible against strangers, arises in the case of adjudications upon subjects of a public nature, like customs, prescriptions, tolls, boundaries between parishes, counties or manors, rights of ferry, liabilities to repair roads or sea-walls, moduses and similar things.” Tay. Ev., 10th Ed., S. 1683, p. 1213. See, also, S. 42, *infra*. Y
- (g) Evidence of reputation being in such cases admissible, adjudications,—which, for this purpose, are regarded as a species of reputation—will also be admissible, whether the parties in the second suit be parties to the first, or be utter strangers thereto. Tay. Ev., 10th Ed., S. 1683, p. 1213. Z
- (h) Should the parties in the second suit be strangers to those in the first, the judgment, will not be conclusive. *Reed v. Jackson*, 1 East, 357 and *Croughton v. Blake*, 13 L.J. Ex. 78; Tay. Ev., 10th Ed., S. 1683, p. 1213. A
- (i) Should the parties be the same in both the suits, the result of the first suit will bind them in the subsequent suit. Tay. Ev., 10th Ed., S. 1683, p. 1213. B
- (j) “A judgment *inter partes* is always,—save in one rare case—relevant for or against parties or privies, where the same subject matter is a second time in dispute between the same parties or persons claiming under them, and this, whether it be a judgment in a contested case or a judgment by consent or by default.” Tay. Ev., 10th Ed., S. 1684, pp. 1213-4. C
- (k) Except where they are judgments *in rem*, or where they relate to public matters, judgments not *inter partes* have been always held to be not *res judicata*, but they cannot be wholly excluded for other purposes in so far as they explain the nature of possession, or throw light on the motives or conduct of parties or identify property. 24 B. 591 (599). D
- (l) A former judgment, which is not a judgment *in rem*, nor one relating to matters of a public nature, was not held to be admissible in evidence in a subsequent suit, either as a *res judicata* or as proof of the particular point which it decided, unless between the same parties or those claiming under them. 8 C. 171 (F.B). E
- (m) “The one rare case referred to above in which a judgment in a suit *inter partes* is not admissible in another suit against one who was a party to the original suit, arises in the unfrequent case of two suits being tried on principles which are different so far as relates to the admissibility of evidence.” Tay. Ev., 10th Ed., S. 1685, p. 1214. F

1.—“A final judgment, order or decree of a competent Court.”—(Conclud.).

- (n) In such a case, the judgment obtained in the first suit, whether it be one *inter partes* or *in rem*, cannot be admitted in evidence of the facts adjudicated thereby when they are again in dispute.” Tay. Ev., 10th Ed., S. 1685, p. 1214. **G**

(25-A) Competency of tribunal.

The authority of the tribunal delivering effective judgments *in rem* rests on the following grounds :—

- (i) the subject-matter should be within the lawful control of the state, under the authority of which the tribunal sits;
- (ii) the sovereign authority of that state should have conferred on the tribunal jurisdiction to decide as to the disposition of the thing; and
- (iii) the tribunal should act within its jurisdiction: *Castrigue v. Imrie*, L.R. 4 Ap. Cas. 414, 429; Best Ev., 9th Ed., S. 593, p. 492. **H**

2.—“In the exercise of probate.”

(1) Section applies to probate granted prior to Hindu Wills Act, 1870.

- (a) Where the contention was that, as a testator died before the Hindu Wills Act came into force, and as the executor of the will of a Hindu dying before that Act came into force was a mere manager having no title to the estate, the probate neither conferred a legal character nor declared the executor to be entitled to any legal character, *held*, S. 41 applied to the case. 14 C. 861 (875). **I**
- (b) It is quite true that a Hindu executor was, at any rate, until the passing of the Hindu Wills Act, only a manager, but, as such manager, he had certain powers over the estate, and for many purposes he represented the testator. 14 C. 861 (875). **J**
- (c) It may be that the probate did not confer upon the executor any legal character, but the effect of a probate is to declare the person to whom probate is granted to be entitled to the powers of an executor, whatever his powers as such may be. 14 C. 861 (875). **K**

2) Scope of section.

- (a) S. 41 of the Evidence Act provides that the finding of the Civil Court in such matters as the granting of probate is conclusive. 4 C.W.N. clxxvi. **L**
- (b) By S. 41 of the Evidence Act, a final judgment or order or decree of a Court of probate has the effect of a judgment *in rem*, and is conclusive proof, *inter alia* that any legal character which it takes away from any person ceased at the time when the judgment declares that it ceased. (16 M. 380, 383). **M**
- (c) Grants of probate and of letters of administration have been held to be conclusive upon third parties. 7 W.R. 338 (344). **N**
- (d) The Indian Succession Act (X of 1865), S. 242, points out expressly the effect which they are to have over property; and the extent to which they are to be conclusive. 7 W.R. 338 (344-5). **O**

2.—“*In the exercise of probate.*”—(Continued).(3) **Legal consequences of grant of probate.**

Where a probate is granted, it operates upon the whole estate and by S. 188, Succession Act, 1865, it establishes the will from the death of the testator, and renders valid all intermediate acts of the executor as such. The property vests in the executor by virtue of the will, not of the probate. The will gives the property to the executor. The grant of probate is the method which the law specially provides for establishing the will. So long as the probate exists, it is effectual for that purpose. 4 C. 360 (362). See 1 B.L.R. (O.C.), 24 and 2 B.L.R. (O.C.), 1. P

(4) **Grant of probate is a decree.**

The grant of probate is the decree of a Court which no other Court can set aside except for fraud or want of jurisdiction. 4 C. 360 (362). Q

(5) **Grant of probate will not affect rights of objector.**

The grant of probate to an executor in a case was held not to prejudice in any way the rights of an objector of the property which really belonged to him and not to the testatrix. 4 C. 1 (6). R

(6) **Grant of administration letters conclusive proof of grantee's representative title.**

An order granting letters of administration to a person is, under S. 41 of the Evidence Act and S. 59 of the Probate Act, conclusive proof of the representative title of the grantee against all debtors of the deceased and all persons holding property which belonged to the deceased. 25 C. 351 (369). S

(7) **Refusal to grant probate no proof of spuriousness of will.**

(a) Simply because the grant of probate under the Probate Act, 1881, is conclusive proof, so long as the grant remains unrevoked, of the title of executors and of the genuineness of the will admitted to probate, a similar consequence, but in an opposite sense, will not follow from the refusal of the Court to grant probate. 21 B. 563 (566). T

(b) The conclusiveness of the probate rests upon the declared will of the Legislature as expressed in Ss. 59 and 12 of the Probate Act; there is no section declaring that any corresponding result in an opposite sense shall flow from the refusal to grant it; from a refusal to grant probate, it does not follow that the Court thinks the will propounded not to be the testator's genuine will. It may be based on entirely different grounds. 21 B. 563 (566). U

(8) **Nor will such refusal bar fresh application for probate**

A finding that, on the evidence on the record, the due execution of a will had not been proved should not be treated as a final decision upon the genuineness or otherwise of the will and will not preclude a fresh application on the part of the executors, when they are in a position to support it with more complete proof. 21 B. 563 (567). Y

(9) **Judgment of Probate Court cannot be barred by judgment in proceeding *inter partes*.**

The judgment of a Probate Court granting or refusing probate is a judgment *in rem*, and, therefore, the judgment of any other Court in a proceeding *inter partes* cannot be pleaded in bar of an investigation in the Probate Court as to the factum of the will propounded in that Court. 16 M. 380 (353). V

2.—“*In the exercise of probate.*”—(Continued).(10) What judgment *res judicata* in Probate Court.

The only judgment that can be put forward in a Court of Probate in support of the plea of *res judicata* is a judgment of a competent Court of Probate. 16 M. 380 (384). X

(11) Letters of administration held to be no *res judicata* in subsequent proceedings.

(a) A proceeding, under the Probate and Administration Act, is not a suit properly so called, but takes the *form* of a suit according to the provisions of the Civ. Pro. Code. 20 C. 888 (895); (4 C.L.R. 1, R). Y

(b) The brothers of a testator applied to the Allahabad High Court for letters of administration, his widow opposed it, but the Court granted it. Subsequently, the widow brought a suit to recover the share which belonged to her husband and incidentally asked for a construction of the will, if true, which she denied. The judgment of the Allahabad Court deciding the defendants, in the widow's suit, to be residuary legatees was contended to be a judgment *in rem*, conclusive as to the legal character which the Court found the defendants entitled to, and was pleaded in bar of the suit. Held that the judgment of the Allahabad High Court was no *res judicata*. 20 C. 888 (895). Z

(c) An order granting letters of administration to the defendant was held to be no bar to the appointment of the plaintiff as *shebait*, though the grant of administration was not revoked which would be by the decree in the suit. 25 C. 354 (369). A

(d) The attaching creditor of a testator's son might apply for the revocation of the probate of a will obtained at variance to his interest. 6 C. 429 (432), confirmed on appeal by the Privy Council in 10 C. 19=10 I.A. 80=13 C.L.R. 314. See, also, 4 C. 360 followed in the case. B

(12) Proceedings under Guardians and Wards Act held not to be *res judicata*.

Held, upon general principles, that the decision of a District Judge in certain proceedings under the Guardian and Wards Act did not operate to make the question of the genuineness of the will *res judicata*, so as to bar a subsequent application for probate. 16 M. 380 (383). C

(13) Court should not, in *bona fide* applications, consider questions of title or disposing power.

(a) Upon an application for probate of a will, as long as it is made *bona fide*, it is not the province of the Court to go into questions of title with reference to the property of which the will purports to dispose. 4 C. 1 (5). D

(b) In a proceeding upon an application for probate of a will, the only question which the Court is called upon to determine is whether the will is true or not, and it is not the province of the Court to determine any question of title with reference to the property covered by the will. 20 C. 888 (895). E

(c) It is for the Civil Court to find whether a will is genuine, and it is not open to any Criminal Court to find to the contrary or convict any person of having forged that will, in the face of that finding by a competent Court. 4 C.W.N. clxxvi. F

2.—“*In the exercise of probate.*”—(Continued).

(d) It would lead to the greatest confusion if the validity of the will could be questioned in the civil suit after the grant of probate. There might be any number of conflicting decisions as to the validity of the will. The executor would be exposed to endless litigation, and he would never be safe in dealing with the property of the deceased. 4 O. 360 (363), following 2 N.W.P. 268 (274). **G**

(e) And, on the application for probate, it is not the province of the Court to go into the question of title, with reference to the property of which the will purports to dispose, or the validity of such disposition. 12 B. 164 (166), referring to 4 C. 1. **H**

(f) Where an application for probate of a will is contested, and it is alleged that the property dealt with by the will was not the testator's or was not property over which he had a power of testamentary disposal, it is not the duty of the Court to try an issue raising this question. 19 A. 458 (460), referring to *Tharpe v. Macdonald*, L.R. 3 P.D. 76, 6 C.L.R. 173, 4 C. 1, 12 B. 164, 20 C. 898 and 18 B. 749. **I**

(g) On an application for probate, the Court will not enter on a question as to the title to the property which the testator by his will purports to leave. 23 B. 644 (646)—9 Bom. L.R. 966. **J**

(14) **Judge granting probate cannot institute criminal proceedings for forgery of will.**

Held that, in view of the facts that the District Judge was acting as a Civil Court while passing his order under S. 476, Crim. Pro. Code, and that the Civil Court, which had granted probate of the will, had refused to revoke that probate, the District Judge was not, as long as the probate of the will remained unrevoked, that is, so long as under his predecessor's finding the will was genuine, competent to institute criminal proceedings on a charge that it was a forged will, and his order under S. 476, Cr. P.C., was *ultra vires*. 4 C.W.N. clxxvi. **K**

(15) **Letters of administration, whether sufficient to prove disputed will.**

Letters of administration, with a copy of the will annexed, may be equivalent to probate, but neither is of itself sufficient to prove a will, the genuineness of which is contested. 8 W.R. 308. **L**

(16) **Probate—What it conclusively proves.**

(a) The probate is only conclusive as to the appointment of executors and the validity and the contents of the will. See *Williams on Executors*, p. 452 (4th Ed.). 12 B. 164 (166). **M**

(b) “ ‘ Probate of a will,’ it was said in the House of Lords, ‘ is also conclusive evidence that it was executed in due form according to the law of the country, where he (the testator) was domiciled at the time of his death. *Whicker v. Hume*, 7 H.L.C. 124.’ ” *Cun. Ev.*, 11th Ed., p. 114. **N**

(c) Under the section, the judgment of a Court of Probate or of any other of the Courts mentioned is not binding as to findings not necessary to the judgment. See *Cun. Ev.*, 11th Ed., p. 114, referring to *Concha v. Concha*, 11 A.C. 541. **O**

2.—“*In the exercise of probate.*”—(Continued).

- (d) “Where A and B each claimed administration to the goods of C, deceased, and administration was granted to B, the judgment declaring that, as far as appeared by the evidence, B had proved himself next of kin, and afterwards there was a suit between A and B for the distribution of the effects of C, the declaration in the first suit was *held* to be in the second suit conclusive proof as against A that B was nearer of kin to C than A.” *Barrs v. Jackson*, Steph. Dig., 7th Ed., Art. 41, p. 53. **P**
- (e) Where a person obtains probate of the will of a deceased person, in proceedings between strangers, the probate is neither conclusive nor admissible to show the genuineness of the will. *F. v. Buttery*, Rus. and Ry. 3442; *R. v. Gibson*, Rus. and Ry. 393n; Phip. Ev., 4th Ed., p. 379. See, also, Tay. Ev., 10th Ed., S. 1677, p. 1208. **Q**
- (f) The production of a probate will not prevent a party from showing in a Civil Court that the testator was insane, when he executed the will. *Marriot v. Marriot*, 1 Str. 671; Phip. Ev., 4th Ed. p. 379 and Tay. Ev., 10th Ed., S. 1677, p. 1208. **R**
- (g) A probate obtained by a person will neither be conclusive nor admissible between strangers to show the domicile of the testator. *Concha v. Concha*, 11 App. Cas. 541; *Whicker v. Hume*, 7 H.L.C. 124 and *Bradford v. Young*, 29 Ch. D. 617; Phip. Ev., 4th Ed., p. 379 and Tay. Ev., 10th Ed., S. 1677, p. 1208. **S**
- (h) In proceedings between strangers, a probate by a person of the will of another will neither be conclusive nor admissible to show the testator's death. Phip. Ev., 4th Ed., p. 379 and Tay. Ev., 10th Ed., S. 1677, p. 1208. **T**
- (i) But, if the object of this evidence were to impeach the title of the executor, it would be inadmissible. Tay. Ev., 10th Ed., S. 1677, p. 1208. **U**

(17) Rule as to proving fraud inapplicable to probate and divorce cases.

- (a) The rule, ‘that fraud can only be proved by an innocent party,’ is not applicable to probate cases. *Birch v. Birch*, 1902, p. 130; Phip. Ev., 4th Ed., p. 375. **Y**
- (b) Nor is the rule applicable to divorce cases. *Bonaparte v. Bonaparte*, 1892, p. 402; Phip. Ev., 4th Ed., p. 375. **W**

(18) Judge incompetent to refuse probate to executor named in will.

- (a) There is no provision in the Probate Act which gives the District Judge any discretion to refuse an application for probate by an executor named in the will and considered qualified by the testator to act as such on the ground that, in the opinion of the Judge, he is not a fit and proper person to be entrusted with that office. 21 C. 195 (189). **X**
- (b) S. 85 of the Probate Act, 1881, enacts that it is within the discretion of the Court to refuse to grant an application for letters of administration, but no such discretion is given in regard to an application for probate by a person selected by a testator for the administration of his estate. 20 A. 189 (191), following 21 C. 195. **Y**

(19) Powers regarding grant of probate of Moulmein Recorder's Court.

- (a) The Recorder's Court has the same powers in respect to the grant of probates to the estates of Natives as the High Court before and after the passing of the Indian Succession Act, i.e., it cannot grant probates of the will of a Hindu in any case in which, according to the Hindu Law of

2.—“In the exercise of probate.”—(Concluded).

Inheritance and Succession, the testator had no power to make a will, and, in dealing with the will, after probate has been granted, the Court cannot give effect to it so far as it is contrary to the Hindu Law of Inheritance. 11 W.R. 413. Z

- (b) It is a question whether the Recorder's Court has power to grant letters of administration, or such letters with a will annexed, to the estates and effects of a native of British India ; but, in all cases, it must be guided in granting them by the law of inheritance or succession of such native, and it cannot grant administration to the estate of a Hindu, Mahomedan, or Buddhist which would interfere with such law. (*Ibid*) A

3.—“Matrimonial.”

(1) Enactments conferring matrimonial jurisdiction on Indian Civil Courts other than High Courts.

- (a) Act IV of 1869 (Indian Divorce) relating to the divorce of persons professing the Christian religion ;
- (b) Act XV of 1865 relating to marriage and divorce among Parsis ;
- (c) Act XXI of 1866 (Native Convert's Marriage Dissolution) ;
- (d) Act XV of 1872 (Indian Christian Marriage) ; and,
- (e) Act III of 1872 relating to marriage between persons not professing the Christian, Jewish, Hindu, Mahomedan, Parsi, Buddhist, Sikh, or Jaina religion. B

(2) Suits for divorce a vinculo matrimonii.

- (a) Courts in this country have not as yet any suits for divorce *a vinculo matrimonii* so far as Christians are concerned, so that no question can arise as to the effect of judgments in such suits. 7 W.R. 338 (343). C
- (b) In divorce proceedings, a finding against the petitioner or respondent in a previous suit is admissible in evidence, though between different parties. *Ruck v. Ruck*, 1896, p. 152. See Phip. Ev., 4th Ed., p. 397 and Tay. Ev., 10th Ed., S. 1206. D
- (c) A wife set up adultery in answer to the petition of her husband. A decree in a previous suit where he was co-respondent only stating that the respondent had committed adultery with him but did not expressly state that he had committed adultery with her, though relevant, was held insufficient to prove his adultery. (*Ibid*). E

(3) Decrees dissolving marriage binding on third parties.

- (a) Decrees by Courts of competent jurisdiction for the absolute dissolution of marriages are no doubt binding upon third parties. 7 W.R. 338 (343). F
- (b) If a Court of competent jurisdiction decrees a divorce, or sets aside a marriage between Mahomedans or Hindus, it puts an end to the relationship of husband and wife, and is binding upon all persons that, from the date of the decree, the parties ceased to be husband and wife. 7 W.R. 338 (343-4). G
- (c) “A judgment of a matrimonial Court decreeing nullity of marriage or divorce is binding as to the status of the parties concerned.” Cun. Ev., 11th Ed., p. 114. H

3.—“*Matrimonial.*”—(Continued).

(4) Principle.

- (a) This is not on the principle that every one is presumed to have had notice of the suit, as *Holloway, J.*, appears to have thought in 2 M.H.C.R. 276. 7 W.R. 338 (344). I
- (b) For, if they had notice, they could not intervene or interfere in the suit, but upon the principle that, when a marriage is set aside by a Court of competent jurisdiction, it ceases to exist, not only so far as the parties are concerned, but as to all persons. (*Ibid*). J

(5) Effect of such decrees.

- (a) A valid marriage causes the relationship of husband and wife to exist, not only as between the parties to it, but also as respects all the world; a valid dissolution of a marriage, whether it be by the act of the husband, as in the case of a repudiation by a Mahomedan, or by the act of a Court competent to dissolve it, causes that relationship to cease as regards all the world. 7 W.R. 338 (344). K
- (b) The record of a decree in a suit for divorce or of any other decree is evidence that such a decree was pronounced; and the effect of a decree in a suit for a divorce *a vinculo matrimonii* is to cause the relationship of husband and wife to cease. (*Ibid*). L
- (c) It is conclusive upon all persons that the parties have been divorced, and that the parties are no longer husband and wife; but it is not conclusive or even *prima facie* evidence against strangers that the cause for which the decree was pronounced existed. (*Ibid*). M
- (d) For instance, if a decree of divorce between A and B were granted upon the ground of the adultery of B with C, it would be conclusive as to the divorce, but it would not be even *prima facie* evidence against C that he was guilty of adultery with B, unless he were a party to the suit. (*Ibid*). N
- (e) So, if a marriage between Mahomedans were set aside upon the ground of consanguinity or affinity, as, for instance, in the case of a Mahomedan, that the marriage was with the sister of another wife then living, the decree would be conclusive that the marriage had been set aside, and that the relationship of husband and wife had ceased, if it ever existed; but it would be no evidence as against third parties, for example, in a question of inheritance, that the two ladies were sisters. (*Ibid*). O
- (f) Where a wife obtains a decree of judicial separation from her husband on the ground of cruelty and desertion, proved by her own evidence, and subsequently her husband sues her for dissolution of marriage on the ground of adultery, in which suit neither of them can give evidence, and the wife charges the husband with cruelty and desertion, the decree in the first suit is irrelevant in the second. *Strats v. S.*, 2 Swa. and Tri. 223 (“but both would now be competent witnesses in each suit”) Steph. Dig., 7th Ed., Art. 41, p. 54. P
- (g) A decree of divorce not only describes the marriage but makes the wife a *feme sole*. Phip. Ev., 4th Ed., p. 378. Q

3.—“*Matrimonial.*”—(Concluded).(6) **Conclusive proof of such decrees how avoided**

The effect of such conclusive proof can only be avoided by showing that the High Court was not “a competent Court,” within the meaning S. 41, or was a “Court not competent to deliver” the decree within the meaning of S. 44. Unless that can be shown, the decree is conclusive, till fraud or collusion is suggested. 22 A. 270 (279) (F.B.). See, also, *Cun. Ev.*, 11th Ed., p. 114. R

(7) **Affirmation by High Court of nullity decree before limitation period, whether valid.**

A decree by a High Court, confirming a decree of nullity of marriage passed by the Court of the Judicial Commissioner of Oudh, even though it ought not to have confirmed the Judicial Commissioner's decree, was held to be a final decree of the kind specified in S. 41 of the Evidence Act, made in the exercise of matrimonial jurisdiction, declaring a certain woman not to be the wife of another; if it was the decree of a competent Court, then, however, erroneous or irregular it may have been, it is under the section conclusive proof that the woman's previous marriage was a nullity. 22 A. 270 (279) (F.B.) S

4.—“*Admiralty.*”(1) **Statutory provisions regarding Admiralty jurisdiction.**

As to the Admiralty jurisdiction of the High Courts, see S. 82 of the Letters Patent of 1865 for the Calcutta High Court, and the corresponding sections of the other Letters Patent for the other High Courts and the Colonial Courts of Admiralty Act, 1890. As to the Admiralty jurisdiction of the Mofussil Courts, see 12 and 13 Vict. cap. 88. T

(2) **Subject on which questions of Admiralty jurisdiction arise.**

“It is with reference to vessels condemned as prizes more especially that questions concerned with Admiralty jurisdiction arise; such a sentence of condemnation by a competent Court being usually conclusive upon all the world. The last para of this section applies to such judgments of condemnation.” See *Field Ev.*, 6th Ed., p. 181 and *A.A.W.*, 4th Ed., p. 278. U

(3) **Effect of sentence of Prize Court.**

- (a) “A sentence in a prize Court not merely declares the vessel prize, but vests it in the captor.” *Phip. Ev.*, 4th Ed., p. 378. Y
- (b) There was a practice “of treating the judgment of a prize Court condemning a vessel as being the property of the enemy as not only conclusive evidence that the vessel was condemned, but also as conclusive evidence that the vessel was not neutral.” *Per Blackburn, J*; *Castrique v. Imrie*, L.R. 4 H.L. 434. See, also, *Cun. Ev.*, 11th Ed., p. 115. W

(4) **Suits in High Court's Admiralty jurisdiction answer to actions *in rem*.**

There are no suits in this country, with the exception of those in the High Court in the exercise of Admiralty and Vice-Admiralty jurisdiction, which answer to the actions *in rem* of the Civil Law, and none corresponding with the *actiones prejudiciales*. 7 W.R. 338 (343). X

(5) **Suits for condemnation of goods in Exchequer—Applicability.**

Suits in the Exchequer for the condemnation of goods are not applicable to this country. 7 W.R. 338 (343). Y

4.—“*Admiralty.*”—(Concluded).(6) **Suit in Admiralty Court not technically judgment *in rem*.**

“An ordinary suit in an Admiralty Court is called a proceeding *in rem*, but the judgment is not a judgment *in rem* in the technical sense.”
Cun. Ev., 11th Ed., p. 115. Z

(7) **Judgment in Salvage suit.**

“A judgment in a Salvage suit does not declare a right or title to property so as to make this section applicable.” Cun. Ev., 11th Ed., p. 115. A

(8) **Other cases where judgment as to status of person relevant.**

(a) “Besides the cases above mentioned, there are cases in which a judgment as to a person's status or condition is admissible in evidence against third person, although not conclusive.” Cun. Ev., 11th Ed., p. 115. B

(b) “Thus, a commission finding the executant of a bond lunatic at the time of execution has been held *prima facie* evidence against the plaintiff suing on the bond.” Cun. Ev., 11th Ed., p. 115. C

(c) “And again an order of a master in lunacy reciting that the defendant was of unsound mind (though not so found by inquisition) is admitted as *prima facie* evidence on an application to set aside an *ex parte* judgment.” Cun. Ev., 11th Ed., p. 115, citing *Harvey v. The King*, A.C. 601. D

(d) “In an action against the ship-owner, an order under S. 470 of the Merchant Shipping Act could not be used as evidence to prove the negligence of the master.” Cun. Ev., 11th Ed., p. 115, citing *Hill v. Clifford*, 2 Ch. 236. E

(e) A certificate of guardianship is not even relevant to show the minority of the person affected by it. 17 C. 849 (851). F

5.—“*Or insolvency jurisdiction.*”(1) **Insolvency jurisdiction, enactments on.**

“For the law regulating the Insolvency jurisdiction of the High Courts, see the 11 and 12 Viet., cap. 21; and for the Calcutta High Court, S. 18 of the Letters Patent of 1865; and for the other High Courts the corresponding sections of their respective Letters Patent. Such Insolvency jurisdiction, as can be exercised by the Mofussil Courts, is regulated by chapter XX of the Civ. Pro. Code, Act XIV of 1882.”
Field Ev., 6th Ed., p. 181 and A.A. and W. Ev., 4th Ed., p. 278. G

(2) **Effect of adjudication in Bankruptcy.**

“An adjudication in Bankruptcy not only declares, but makes the debtor a bankrupt. Phip. Ev., 4th Ed., p. 378. H

(3) **Orders on contributory under Indian Companies Act, 1882.**

(a) “Another class of orders, which are conclusive as against all the world, are orders made upon a contributory under the Indian Companies Act, 1882.” Cun. Ev., 11th Ed., p. 116. I

(b) “By S. 155 of the Indian Companies Act, such an order is conclusive evidence that the moneys ordered to be paid are due, and all other pertinent matters stated in such order are to be taken as truly stated as against all persons and in all proceedings whatsoever.” (*Ibid.*) J

(4) **Courts-martial not expressly mentioned in section.**

“The section does not expressly mention Courts-martial; but it will be remembered that Native Courts-martial are included in the operation of the Act.” Field Ev., 6th Ed., p. 181. K

6.—“Which confers upon or takes away from any person any legal character...relevant.”

(1) “Legal character,” meaning and scope of.

- (a) The expression “legal character” is not anywhere defined, but it is quite clear that it is intended to include the case of an executor. 14 C. 861 (875). **L**
- (b) The fact that this section has been frequently applied to cases of persons dying after the Hindu Wills Act came into force shows this. 14 C. 861 (875). **M**
- (c) The only legal character which the Probate Court declares a person to be entitled to is that of executor. 14 C. 861 (875). **N**
- (d) It confers the character of administrator. It does not declare it. 14 C. 861 (875). **O**
- (e) So the section would be meaningless unless “legal character” included the office of an executor. 14 C. 861 (875). **P**
- (f) The circumstance that in the particular case the powers of the executor may be limited makes no difference in the construction of the section. 14 C. 861 (875). **Q**

(2) Effect of refusal of Probate Court to grant probate on legal character of executors.

The judgment of a Probate Court, refusing probate, takes away from the executors named in the will their legal character of executors, and from the legatees and beneficiaries their legal character, as such, and this result is final as against all persons interested under the will. 16 M. 380 (383). **R**

Relevancy and effect of judgments, orders or decrees, other than those mentioned in section 41.

42. Judgments, orders or decrees, other than those mentioned in section 41 are relevant if they relate to matters of a public nature relevant to the enquiry; but such judgments, orders or decrees are not conclusive proof of that which they state.

Illustration.

A sues B for trespass on his land. B alleges the existence of a public right of way over the land, which A denies.

The existence of a decree in favour of the defendant, in a suit by A against C for a trespass on the same land, in which C alleged the existence of the same right of way, is relevant, but it is not conclusive proof that the right of way exists.

(Notes).

(1) Scope of section.

- (a) S. 42 admits all judgments not as *res judicata*, but as evidence, although they may not be between the same parties, provided they relate to matters of a public nature relevant to the enquiry. *Per Garth, C.J.* 6 C. 171 (191) (F.B). **S**
- (b) By S. 42, judgments relating to matters of a public nature are declared relevant, whether between the same parties or not. 6 C. 171 (174). *Per Mitter, J.* **T**

(Notes)—(Continued).

(c) S. 42 relates to the relevancy of judgments relating to matters of a public nature relevant to the enquiry. 12 A. 1 (44). *Per Mahmood, J.* U

(d) Since the group of sections relating to judgments is prefaced by the title, "Judgments of Courts of Justice when relevant," that is a good reason for thinking that, as far as the Act goes, the relevancy of any particular judgment is to be allowed or disallowed with reference to those sections. 6 C. 171 (184). *Per Pontifex, J.* V

(2) But the judgments, though relevant, are not conclusive.

Though judgments or verdicts upon the question directly in issue, in matters of public or general interest, where reputation is evidence are *prima facie* proof of the matter decided between strangers or a party and a stranger, yet they are not conclusive. See Phip. Ev., 4th Ed., p. 396 and cases therein cited. W

(3) Judgments relevant on public matters may be between other parties.

(a) On subjects of a public nature, previous judgments between other parties are admissible in evidence. 2 Agra 120 (121). X

(b) Except in matters of general interest or public rights, a verdict in a previous suit, to be admissible, must be between the same parties or parties through whom the parties actually in litigation claim. 6 W.R. 232 (233). Y

(c) Judgments not *inter partes* are relevant, when they concern questions of custom, which is a matter of public interest. 173 P.R. 1889. Z

(4) Rule making former judgments relevant not to be strictly applied to this country.

The rule which makes judgments in former suits relevant on questions of public interest was held to be not applicable in all its strictness to the Courts of this country. 6 W.R. 232 (233). A

(5) Reason of relevancy on public matters.

In matters of public right, the new party to the second proceeding, as one of the public, has been virtually a party to the former proceeding. 6 C. 171 (183). *Per Pontifex, J.* B

(6) Case where section held inapplicable.

Where, in a suit, the question was whether a former judgment as to whether a person was or was not the heir of another was admissible in evidence, held that S. 42 did not apply, as that section is concerned with matters alien to those involved in the suit. 12 A. 1 (22) (F.B.). C

(7) A difficulty.

It is difficult to conceive why, under S. 42, judgments, though not between the same parties, should not be declared admissible so long as they related to matters of a public nature, if those very same judgments had already been made admissible under S. 13, whether they related to matters of a public nature or not. 6 C. 171 (192). *Per Garth, C.J.* D

(8) Whether former judgments relevant on public questions as exception to *res inter alios acta*.

(a) These proceedings are good evidence in a matter of public interest, such as the existence of a custom of pre-emption and such a case forms a well-known exception to the usual rule which excludes *res inter alios acta*. See Tay. Ev., S. 1496. 7 W.R. 210. E

(Notes)—(Continued).

- (b) The decrees of competent Courts are good evidence in matters of public interest, such as the existence of customs of succession in particular communities. 23 B. 53 (57). **F**
- (c) And such decisions form an exception to the general rule which excludes *res inter alios actae*. 20 B. 53 (58); referring to 7 W.R. 210. **G**
- (d) The rule has been assumed as falling within the broader rule which excludes so-called hearsay evidence, or else as resting upon the same grounds as the rule which requires identity of parties when a previous judgment is relied on as concluding the question in dispute and as a bar to all further enquiry. 6 W.R. 232 (233). *Per Markby, J.* **H**
- (e) The considerations applicable to the admissibility of the evidence of former judgments differ from those relating to the admissibility of hearsay evidence on the one hand and the finality of a *res judicata* on the other. 6 W.R. 232 (233). **I**
- (f) The technical considerations by which the rule as to *res judicata* is narrowed lose all their force when it is considered whether the judgment may be used, not as a bar, but as evidence. Nor is there any comparison between the probative force of a solemn enquiry followed by the decree of a competent Judge, and such evidence as usually passes under the name of hearsay. 6 W.R. 232 (233). **J**
- (9) Former judgments are of the nature of reputation.
They are in the nature of reputation and admissible to prove custom, tolls, boundaries, etc. Tay. Ev., S. 1419. 2 Agra 120 (121). **K**
- (10) Condition of admissibility.
But then it ought to appear clearly from them that the question of custom was determined, and it should always be borne in mind that, although admissible as evidence, they are not conclusive evidence. 2 Agra 120 (121). **L**
- (11) Proof of reputation.
A single instance is not sufficient to establish a reputation. 2 Agra 120 (121). **M**
- (12) Judicial records evidence of custom.
- (a) Judicial records in England not between the same parties have been admitted as evidence of the existence of local customs. 10 A. 585 (586). **N**
- (b) The most satisfactory evidence of an enforcement of a custom is a final decree based on the custom. 10 A. 585 (586). **O**
- (c) The most cogent evidence of a custom is not that which is afforded by the expressions of opinions as to the existence of, but by the enumeration of the instances in which, the alleged custom has been acted upon, and by the proof afforded by judicial or revenue records or private accounts and receipts that the custom has been enforced. 1 A. 440 (441). *Referred to in* 10 A. 585 (586). **P**
- (d) Where a custom is in dispute, judicial decisions recognising such customs are good evidence of their existence. 16 A. 379 (381). **Q**
- (e) Judicial decisions recognising the existence of a disputed custom amongst the Jains of one place are very relevant as evidence of the existence of the same custom amongst the Jains of another place, unless, of course, it is shown that the customs are different. 27 C. 379 (391). **R**

(Notes)—(Continued).

(13) Conflicting decisions will not establish custom.

Conflicting decisions of the subordinate Courts were held not to establish that the custom of the right of pre-emption under the Mahomedan Law prevailed among the Hindus of Chittagong: 1 W.R. 234 (235). **S**

(14) Limit of scope of enquiry regarding custom.

There is nothing to support the view that the scope of the enquiry should be limited to the particular locality in which the persons setting up the custom reside. 27 C. 379 (391). **T**

(15) Oral evidence of custom.

Oral evidence of the same kind is equally admissible. 27 C. 379 (391). **U**

(16) Proof of custom.

For a case where proof of a custom, whereby a zemindar was entitled to a fourth of the purchase-money whenever a house was privately sold in the village, was held not to be the same thing as proving a custom in respect of public sales by auction under a decree, see G A. 47 (48) (F.B.), cited under S. 13. *supra*. See, also, 1 A. 373 (374). **V**

(17) Award, evidence of.

(a) Awards are, till set aside, conclusive evidence of the points decided as between parties and privies. This rule is applicable also to the construction of a deed by an arbitrator. *Gueret v. Audouy*, 62 L.J.Q.B. 633; Phip. Ev., 4th Ed., p. 403. **W**

(b) Awards are not admissible between strangers even as evidence of reputation. *Evans v. Lees*, 10 A. and E. 151; Phip. Ev., 4th Ed., p. 403. **X**

(18) Judgments held admissible and inadmissible under section.

(a) Suit for recovery of certain villages from the defendants on behalf of a temple and to declare the *sunnad* on which the defendant based his title to be a recent forgery. A former judgment, in a suit in which the cousin of a former manager sued him for partition of certain villages, included in this suit, where it was decided that the manager was, not owner, but manager was held to be admissible as being a decision upon a question of public right, which is, as reputation, admissible in evidence, though not conclusive. 7 M.H.C.R. 306 (308). **Y**

(b) The proceedings before a Settlement officer recording a custom in accordance with which certain cesses were leviable were held to be important evidence, though not of a conclusive nature. 2 A. 49 (52). See, also, 7 A. 880 (883). **Z**

(c) Decrees in suits relating to property in the town by which a right of pre-emption was recognised and enforced were held to be the most satisfactory evidence, being the result of decisions where one party alleged the custom and the other denied it; and not being between the same parties, they were not conclusive, but they were excellent evidence to show that the right was asserted and recognised by legal tribunals. 10 A. 585 (586); [6 C. 171, D; 5 Rev. Qiro. and Cr. Rep. 290, N.W.P. (1868), p. 138 and 1 A. 440, R.] **A**

(d) A former decree, though it was only a judgment *inter partes*, was held, as against such of the later defendants as were not parties to the former suit, to be cogent evidence of the existence and validity of a custom. 2 M.H.C.R. 1 (6). **B**

(Notes)—(Continued).

- (e) On the question whether certain incomes were due to a temple, *held that* judgments in other proceedings against different persons in which such rights were decreed were relevant as decisions which relate to matters of a public nature, within the meaning of S. 42, Evidence Act. 12 M. 9 (13); *referring to* 6 C. 171 and 3 B. 3. **C**
- (f) Though a decree in a former appeal did not operate as a *res judicata* between the parties in a later suit, it was held to be admissible as a piece of evidence under S. 42, Evidence Act, throwing light on the ownership of certain villages in dispute. 15 B. 625 (635); *overruled* by 20 B. 721, *q.v.* **D**
- (g) The proceedings in two former suits, where, under similar circumstances, though the exercise of the right was disputed on other grounds, the right of pre-emption was admitted to exist, may be received in evidence in support of the custom. 7 W.R. 210. **E**
- (h) For a case where it was considered that a right to property could not be proved merely by witnesses, but that some documentary evidence must be produced in support of it, or some decree or decision of a competent authority establishing the custom, see 9 W.R. 97 (98). **F**
- (i) Judgments not between the parties were taken into consideration, where the nature of certain kind of tenures, *viz.*, ghatwali tenures in Birbhum, and the effect of the permanent settlement upon them (matters of public interest) were in question. 9 C. 187, 200, 201 *et seq.* 9 I. A. 174. **G**
- (j) Where a landlord attempted to avoid the sale of an occupancy holding in a particular village belonging to a certain pergunnah, a judgment of the High Court in a former case, where the transferability of tenures in an adjoining village of the same pergunnah was in question, was held to be admissible in evidence, under S. 42, as evidence of usage. 23 C. 127 (430). **H**
- (k) Old bills and answers in Chancery suits brought by the plaintiff's ancestors are admissible, not as evidence of the facts recited, but as evidence of a pending suit and as assertions of ownership submitted to, though by strangers in title to the defendant. *Malcolmsou v. O'Dea*, 10 H.L.C. 519; *Philp. Ev.*, 4th Ed., p. 113. **I**
- (l) A verdict and judgment, obtained against a tenant of neighbouring lands for trespass in taking seaweed from a person's foreshore, are admissible against another tenant of adjoining lands, who claimed to remove seaweed in the exercise of an alleged public right. *Mulholland v. Killin*, I.R. 9 Eq. 471 and *Hemphill v. McKenna*, 8 Ir. L.R. 48; *Philp. Ev.*, 4th Ed., p. 398. **J**
- (m) In an action for trespass, a judgment convicting the plaintiff for a nuisance by obstructing a highway on the spot alleged to have been trespassed upon was held at least to be relevant on the question whether the place was a public highway and ("is possibly conclusive.") *Petrie v. Nuttall*, 11 Ex. 569; *Steph. Dig.*, 7th Ed., Art. 44, p. 57. **K**
- (n) Where a township was prosecuted for not repairing a highway, the record of an indictment against a neighbouring township for not repairing a different part of the same road, which was submitted to, was held to be relevant. *R. v. Brightside*, 13 Q.B. 993; *Philp. Ev.*, 4th Ed., p. 114 and p. 144. **L**

(Notes)—(Concluded).

- (o) Where a former conviction is in existence against the inhabitants of a certain district in the parish for non-repair, it is admissible to rebut the presumption that the *whole* parish is responsible for the repair. *R. v. Lordesmere*, 16 Cox. 65; Phip. Ev., 4th Ed., p. 398. **M**
- (p) The Privy Council admitted as evidence a certain *razinama* made between the tenants and acted upon by the landlord and held it to bind the landlord in a subsequent suit, though the plaintiff was not a party to the previous *razinama*. 4 C. 633 (640) (P.C.) = 6 I.A. 38. **N**
- (q) But where a plaintiff preferred a claim to pre-emption by right of vicinage and the decree was made in his favour in pursuance, and by virtue, of a compromise, it was held that this could not be cited as any judicial decision of the existence of the custom, or any admission by the defendant in that suit of the existence of such a custom. 2 Agra 120 (121). **O**
- (r) Where the plaintiff sought a perpetual injunction restraining the defendants from importing or selling any watches similar in appearance to the watches he sold and with the same design, a certified copy of a judgment of a Swiss Court against a third party was tendered in evidence. Held that the judgment was inadmissible under S. 42. 25 B. 433 (441) = 3 Bom. L.R. 1. **P**
- (s) Where the plaintiff sought a perpetual injunction restraining the defendants from importing or selling any watches similar in appearance to the watches he sold and with the same design, a certified copy of the judgment of a Swiss Court was tendered in evidence. Held that the statement of opinion in the judgment could not, within the meaning of the concluding words of S. 32, cl. 4, be regarded as made before any controversy as to such matter had arisen. 25 B. 433 (441) = 3 Bom. L.R. 1. **Q**
- (t) Where a master sued his servant for negligence in injuring C's horse, a judgment recovered by C against the master for such injury is not relevant on the question of the negligence of the servant. *Green v. New River Co.*, 4 T.R. 590; Phip. Ev., 4th Ed., p. 398. See, also, Tay. Ev., 10th Ed., Ss. 624 to 626, pp. 442-4. **R**
- (u) Where the question was whether a person had a private right of common over a certain land, a verdict in a previous action between strangers regarding such right was held to be inadmissible as evidence of reputation. *Williams v. Morgan*, 15 Q.B. 782; Phip. Ev., 4th Ed., p. 398. **S**
- (19) Whether judgment is 'transaction' within S. 13, Evidence Act.
- "Whether a judgment, order or decree of a Court is a transaction within the meaning of S. 13 of the Act has been much disputed. S. 41 seems to suggest that they are not: because, it would be useless to say that they were admissible if of a 'public nature,' when another section made them admissible without that qualification." Mark. Ev., p. 38; see, also, cases noted under S. 13, *supra*. **T**
- 43.** Judgments, orders or decrees, other than those mentioned in sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provision of this Act.
- Judgments, &c., other than those mentioned in sections 40 to 42, when relevant.

Illustrations.

(a) A and B separately sue C for a libel which reflects upon each of them. C in each case says that the matter alleged to be libellous is true, and the circumstances are such that it is probably true in each case, or in neither.

A obtains a decree against C for damages on the ground that C failed to make out his justification. The fact is irrelevant as between B and C.

(b) A prosecutes B for adultery with C, A's wife.

B denies that C is A's wife, but the Court convicts B of adultery.

Afterwards, C is prosecuted for bigamy in marrying B during A's lifetime. C says that she never was A's wife.

The judgment against B is irrelevant as against C.

(c) A prosecutes B for stealing a cow from him. B is convicted.

A, afterwards, sues C for the cow, which B had sold to him before his conviction. As between A and C, the judgment against B is irrelevant.

(d) A has obtained a decree for the possession of land against B. C, B's son, murders A in consequence.

The existence of the judgment is relevant, as showing motive for a crime.

(e) A is charged with theft and with having been previously convicted of theft. The previous conviction is relevant as a fact in issue.

(f) A is tried for the murder of B. The fact that B prosecuted A for libel, and that A was convicted and sentenced is relevant under section 8 as showing the motive for the fact in issue.

(Notes).**(1) Scope of section.**

(a) The different chapters of the Act deal *seriatim* with the relevancy and consequent admissibility of the different kinds of evidence; and, upon this principle, Ss. 5 to 16 deal with the admissibility of facts, whilst Ss. 40 to 45 deal expressly with judgments. 6 C. 171 (189) (F.B.). U

(b) Except in the case of judgments *in rem* and judgments relating to matters of a public nature, which are governed by a different principle, no man ought to be bound by the decision of a Court of Justice, unless he, or those under whom he claims, were parties to the proceedings in which it was given. 6 C. 171 (189). Y

(c) S. 40 merely enacts that the existence of any judgment, order or decree, which, by the provisions of S. 13, Civ. Pro. Code, constitute *res judicata* is a relevant fact. 31 B. 143 (152); *per Beaman, J.* W

(d) S. 40 is admittedly limited to judgments, etc., which constitute a *res judicata*, and to do that they must be *inter partes*. 31 B. 143 (152); *per Beaman, J.* X

(e) S. 41, without attempting any precise or exhaustive definition, aims at, and probably does let in, all judgments *in rem* proper. 31 B. 143 (152); *per Beaman, J.* Y

(f) S. 42 provides that judgments, orders or decrees, other than those mentioned in S. 41, are relevant, if they relate to matters of a public nature relevant to the enquiry. 31 B. 143 (152); *per Beaman, J.* Z

(g) S. 43 declares all judgments, orders or decrees, other than those specified in Ss. 40, 41, 42 to be irrelevant, unless the existence of the judgment is itself a fact in issue, or is relevant under some other section of the Act. 31 B. 143 (152); *per Beaman, J.* A

(Notes)—(Continued).

- (h) Under S. 43, a judgment, which does not come within S. 40 or S. 41 or S. 42, is irrelevant, unless either the existence of the judgment is in issue in the case, or the existence of the judgment is relevant under some other provision of the Act. 12 A. 1 (12) (F.B.). **B**
- (i) That is, so far as S. 43 is concerned, it is the existence of the judgments, which must be a fact in issue or relevant fact under some other provision of the Act. (*Ibid.*). **C**
- (j) S. 43 declares that judgments, orders and decrees, other than those mentioned in Ss. 40, 41 and 42, are, of themselves, irrelevant, that is, in the sense that they can have any such effect or operation as mentioned in those recited sections *qua* judgments, orders and decrees, but it must not be taken to make them absolutely inadmissible, when they are the best evidence of something that may be proved *aliunde*. 12 A. 1 (25) (F.B.). **D**
- (k) S. 43 expressly contemplates cases in which judgments could be admissible under other sections of the Act, which are not admissible under Ss. 40, 41 or 42. 6 C. 171 (192) (F.B.); *per Garth, C.J.* **E**
- (l) But the cases so contemplated by S. 43 are those where a judgment is used not as *res judicata* or as evidence more or less binding upon an opponent by reason of the adjudication which it contains, (because judgments of that kind had already been dealt with under one or other of the immediately preceding sections). 6 C. 171 (192) (F.B.); *per Garth, C.J.* **F**
- (m) But the cases referred to in S. 43 are such, as the section itself illustrates, *viz.*, when the fact of any particular judgment having been given is a matter to be proved in the case. 6 C. 171 (192) (F.B.); *per Garth, C.J.* **G**
- (n) As for instance, if A sued B for slander, in saying that he had been convicted of forgery, and B justified upon the ground that the alleged slander was true, the conviction of A for forgery would be a fact to be proved by B, like any other fact in the case, and quite irrespective of whether A had been actually guilty of the forgery or not. This would be one of the many cases alluded to in S. 43. 6 C. 171 (192) (F.B.). **H**
- (o) The sole object, for which it was sought to use the former judgment in 6 C. 171, was to show that, in another suit against another defendant, the plaintiff had obtained an adjudication in his favour on the same right, and it was held that the opinion expressed in the former judgment was not a relevant fact within the meaning of the Evidence Act, but the case is clearly different where the previous judgment is produced, not in order to prove an adjudication between third parties, but in order to prove a statement made by a predecessor in title of the party against whom the document is sought to be used. See 18 M. 73 (77-8). **I**
- (p) To have the effect of *res judicata*, a judgment *inter partes* alone can be admitted in evidence, but for other purposes, where judgments are sought to be used to show the conduct of the parties, or show particular instances of the exercise of a right, or admissions made by ancestors, or how the property was dealt with previously, they may be used under S. 11 or 13, as exceptions recognised under S. 43, as relevant evidence. 24 B. 591 (599), *referring to* 15 M. 12; 3 B. 3; 12 A. 1; 18 M. 73; 24 W.R. 470 and 22 W.R. 457. **J**

(Notes)—(Continued).

- (q) Whether a judgment of a conviction under S. 323, I.P.C., can be said to be legal evidence in order to prove, for the purposes of S. 514, Crim. Pro. Code, that a bond to keep the peace has been forfeited, has to be decided with reference to S. 43 of the Evidence Act. 9 C.P.L.R. 8 (12) (Gr.). K

(1-A) Purpose for and extent to which judgments are admissible under section.

- (a) If judgments are admissible under Ss. 43 and 13 of the Evidence Act, they are admissible only as the simplest proof of a transaction or an instance within the meaning of the latter section; it follows that the proof cannot be taken beyond the thing to be proved and the thing to be proved is no more than that there was an assertion or a denial, not the grounds upon which a Judge held that the assertion or the denial was good or bad in law. 31 B. 143 (158). L

- (b) If judgments are admissible only under Ss. 43 and 13, then they must be rigidly restricted to proving the transaction or the instance meant by the section. Where the case is not of the kind really contemplated by that section, their use thus logically restricted is innocuous; it does no good, but it can do no harm; for, a transaction or an instance of that kind, in such a case, cannot possibly be of any probative value. 31 B. 143 (158). M

(1-B) Nature of judgments brought in under section.

Judgments brought in under S. 43 and S. 13 must be either transactions or instances. 31 B. 143 (157). N

(1-C) Illustration (d) of S. 43.

Now the decree referred to in illustration (d) can only be relevant under Ss. 7, 8 or 11 of the Act. In all those sections, the word used is 'fact'; consequently, it follows that the word 'fact,' as defined in the Act itself, includes decrees and judgments. Besides, the definition itself is comprehensive enough to include them. 6 C. 171 (181); *per Mitter, J.O*

(1-D) Test of admissibility under section.

Under S. 43 the question is, "is the existence of the judgment and decree a fact in issue, or is it relevant under some other provision of the Evidence Act?" 12 A. 1 (22). P

(2) Relevancy in civil proceedings of judgment in criminal proceedings and *vice versa*.

- (a) A judgment in a criminal case cannot be received in a civil action to establish the truth of the facts upon which it is rendered, and a judgment in a civil action cannot be given in evidence for such a purpose in a criminal prosecution. 23 C. 610 (613). Q

- (b) A judgment in a civil case is not admissible against the same person in a criminal proceeding, nor *vice versa*; since, the parties are necessarily different in both the proceedings; besides, the *onus* of proof is not the same; the defendant in the criminal proceedings cannot take advantage of the admissions of the plaintiff in the civil one, and the jury in the latter may decide upon a mere preponderance of evidence. *Tay. S. 1693, referring to Castrique v. Imrie, L.R. 4 H.L.p. 484; per Lord Blackburn. See, also, Phip. Ev., 4th Ed., p. 382.* R

(Notes)—(Continued).

- (c) The conviction in a criminal case is not conclusive in a civil suit for damages in respect of the same Act. 5 W.R. 27. **S**
- (d) A plea of guilty in the Criminal Court may, but a verdict of conviction cannot, be considered in evidence in a civil case. 10 W.R. 56. **T**
- (e) In a suit for damages, on account of a charge brought in a Criminal Court, the plaintiff must prove that there was no reasonable cause for the accusation; and the proceedings in the Criminal Court are not evidence in the Civil Court. 14 W.R. 339. **U**
- (f) A proceeding of a Criminal Court is not admissible as evidence; a Civil Court is bound to find the facts for itself. 9 W.R. 77. **V**
- (g) A Civil Court cannot rely on evidence taken in the Criminal Court, but is bound to record its own evidence, and come to a determination on the evidence taken before it, as to the fact found by the Criminal Court. 12 W.R. 477. **W**
- (h) A Civil Court is not bound to adopt the view of a Magistrate as to the genuineness or otherwise of a document. 5 W.R. 26. **X**
- (i) In a suit for damages for an assault, the previous conviction of the defendant in a Criminal Court is no evidence of the assault. The *factum* of the assault must be tried in the Civil Court. 4 B.L.R. App. 31. **Y**
- (j) Whatever the nature of the decision of a Civil Court may be, a Magistrate ought to decide the question of the petitioner's criminality for himself and would not be bound blindly to follow the decision in the Civil suit. See 23 C. 610 (613). **Z**

(3) Instances where criminal judgments held irrelevant in civil proceedings and vice versa.

- (a) In deciding a suit for damages arising from a malicious prosecution, the Judge treated the judgment of the Magistrate and the evidence given before the Magistrate, in the prosecution complained of, as evidence in the case. And looking at the judgment of the Magistrate as being a record of the facts found, the Judge came to the conclusion that the plaintiff was not present at the time when the alleged offence was committed; and decreed the plaintiff's claim.

Held that it was not permissible to the Judge to utilise the judgment of the Magistrate in the way he did; and that S. 43, 13 or 11 of the Evidence Act did not apply to the case. 9 Bom. L.R. 1134. **A**

- (b) A suit for money forcibly taken from the plaintiff by the defendant is maintainable in the Civil Court and the fact of the defendant's having been acquitted on the charge of robbery does not at all affect the case. 6 W.R. Civ. R. 26. **B**
- (c) In a suit by a father for compensation for the loss of his daughter's services in consequence of her abduction, against the person who abducted her, it was held that the judgment of the Criminal Court, convicting the defendant of abduction, did not operate to prevent the Civil Court from determining the question, whether or not the defendant did abduct the plaintiff's daughter as alleged. 4 A. 97 (99). **C**

(Notes)—(Continued).

- (d) Though a mother, who murders her son, is not beneficially entitled to succeed to his estate, yet her having been acquitted or convicted is not relevant in a Civil Court on the question whether she had committed the wrongful act imputed to her, and, if so, whether by such act she has forfeited her rights of inheritance. 14 M.L.J. 297 (308). **D**
- (e) In a civil suit upon a *kistbundhi* bond, the Munsiff, before whom the case was tried, was of opinion that the signatures on the bond were forgeries, and he dismissed the suit at the same time directing a prosecution for forgery, and for using the document as genuine, knowing it to be forged. At the trial by the Criminal Court, the judgment of the Munsiff was admitted in evidence, and the substance of his judgment referred to by the Judge in his charge to the jury. Held that the judgment of the Munsiff was inadmissible in evidence. 7 C.L.R. 74—6 C. 247. **E**
- (f) A judgment of conviction under S. 323, I.P.C., cannot be said to be legal evidence in order to prove, for the purposes of S. 514, Crim. Pro. Code, that a bond to keep the peace has been forfeited. Ss. 40, 41 and 42 of the Act do not apply. Illustrations (c) and (f) of S. 43 are the most apposite for the purpose. The existence of the judgment of conviction not being a fact in issue, which is the breach of the condition of the bond, the existence of the judgment is not relevant under some other provision of the Act, *e.g.*, for the purpose of showing motive and the like. 9 C.P.L.R. 8 (12). **F**
- (g) In an action against B by C to whom A had transferred a bill of exchange, for forging, which A had been convicted, A's conviction was held to be not admissible to establish the forgery. *Castrique v. Imrie*, L.R. 4 H.L. 434 and *Parsons v. Lond. County Council*, 9 T.L.R. 619; Phip. Ev., 4th Ed. p. 387. **G**
- (h) A certificate of acquittal on a charge of rape was held to be inadmissible to disprove the rape, in a divorce suit based upon the rape. *Virgo v. Virgo*, 69 L.T. 460; Phip. Ev., 4th Ed., p. 387. **H**
- (i) Where A pleaded not guilty to a crime, but was convicted, the record of judgment upon this plea was held to be not relevant against A in a civil suit, as an admission to prove his guilt. *R. v. Warden of the Fleet*, 12 Mod. 339; Phip. Ev., 4th Ed., p. 399. **I**
- (j) For a case in which a civil judgment was rejected in a criminal case, see *R. v. Fontaine Moreau*, 11 Q.B. 1028; Phip. Ev., 4th Ed., p. 387. **J**
- (k) Where a person has been acquitted of a crime, for which he was tried, the record in the criminal trial is no proof of the malice of the defendant, or the absence of reasonable and probable cause, in a suit for damages for malicious prosecution. *Purcell v. Macnamara*, 1 Camp. 200, and *Inledon v. Berry*, 1 Camp. 203n.; Tay. Ev., 10th Ed., S. 1667, p. 1198, and see, also, Phip. Ev., 4th Ed., p. 373. See, also, *Green v. New River Co.*, 4 T.R. 589 and *Pritchard v. Hitchcock*, 6 M. and Gr. 165, cited under S. 41, *supra*. **K**

(Notes)—(Continued).

(4) Cases where criminal judgments held relevant in civil cases and *vice versa*.

- (a) In a suit for damages for a malicious prosecution, the plaintiff's having been convicted by a competent Court, though he might subsequently have been acquitted on appeal, is relevant evidence, when un rebutted, against the plaintiff's necessary plea of the want of a reasonable and probable cause. 21 A. 26 (29). L
- (b) In a case for damages for malicious prosecution, it was held that the only way in which the judgment of the Criminal Court dealing with the prosecution could be used was to prove the fact whether or not there had been an acquittal in the case. 9 Bom. L.R. 1134 (1136). M
- (c) "If a party indicted for any offence has been acquitted, and sues the prosecutor for malicious prosecution, the record is conclusive evidence for the plaintiff to establish the fact of acquittal, although the parties are necessarily not the same in the action as in the indictment; but, it is no evidence whatever that the defendant was the prosecutor, even though his name appear on the back of the bill, or of his malice, or of want of probable cause; and the defendant, notwithstanding the verdict, is still at liberty to prove the plaintiff's guilt." A.A. and W., cited in 9 Bom. L.R. 1134 (1137). N
- (d) Where A pleads guilty to a crime and is convicted, the record of judgment upon this plea is relevant against him in a civil suit as a solemn judicial confession of the fact. See *R. v. Fontaine Moreau*, 11 Q.B. 1028 (1033); Phip. Ev., 4th Ed., p. 399. O
- (e) Where A sues B for interrupting his right to take water from B's water-course, B may adduce in evidence a former conviction against a servant of A, who had, by the latter's orders, diverted B's water, from which conviction A did not appeal, for the purpose of showing that A did not enjoy this easement as of right. *Eaton v. Swansea Water Works*, 17 Q.B. 267; Phip. Ev., 4th Ed., p. 399. P
- (f) In an action for malicious prosecution, the record is only conclusive proof of the fact of acquittal. *Legatt v. Tollervey*, 14 East 302; Phip. Ev., 4th Ed., p. 373; Tay. Ev., 10th Ed., S. 1667, p. 1198 and Steph. Dig., 7th Ed., Art. 40, p. 52. Q
- (g) On the question whether a conviction by a Magistrate, who has jurisdiction over the subject-matter, is, if no defects appear on the face of it, conclusive evidence of the facts stated in it, see 6 M.H.C.R. 423 and *Brittain v. Kinnaird*, 1 B. and B. 482, therein considered. R

(5) Stay of criminal proceedings pending civil suit.

- (a) As a general rule, a proceeding in a Criminal Court should not be stayed pending the decision of a civil suit in regard to the same subject-matter; but, ordinarily, it is not desirable, if the parties to the two proceedings are substantially the same and the prosecution before the Magistrate is but a private prosecution and the issues in the two Courts are substantially identical, that both the cases should go on at one and the same time; and that it is quite open to the Magistrate having regard to the facts of the case before him, to consider whether it is not desirable that the proceedings in his Court should be stayed till the decision of the civil suit, or for a limited period of time; and it is also quite open to him to put the defendant on terms as to appearance or otherwise, if he does stay proceedings. 23 C. 610 (621). S

(Notes)—(Continued).

- (b) It is not an invariable rule that criminal proceedings, arising out of a civil suit, should be stayed during the pendency of the litigation. 18 B. 581; *apparently overruling* 16 B. 729. T
- (c) Criminal proceedings arising out of a civil suit should not, as a rule, go on during the pendency of the litigation. 16 B. 729; *referred to in* 23 C. 618. U
- (d) The High Court has no power to direct that criminal proceedings should be stayed until the disposal of a civil appeal in which the question at issue in these criminal proceedings shall have been decided. B.L.R. (F.B.), 426, *referred to in* 23 C. 618. Y

(6) Instances of judgments held relevant.

- (a) The plaintiff, landowner, sued the defendants, his cultivators, for grazing dues, basing his claim, *inter alia*, upon decrees formerly obtained by him for similar dues against some of the defendants. In the regular Settlement of 1847, the residents of the village were specially exempted, and this provision remained in force till 1856, when a revision was made imposing the dues. *Held* that the decrees in former suits were relevant evidence under S. 43 of the Evidence Act, but not sufficient to bind those who were not parties to the suit, though they established the right of the plaintiff as *res judicata* against those defendants, who were parties thereto. 61 P.R. 1875. W
- (b) In a suit for the custody of a wife, the defence was cruelty. The only evidence taken was a judgment decreeing maintenance (under S. 536, Act X of 1872) to the wife, and showing that she had left A owing to his cruelty. *Held* that, if the judgment was admissible in evidence, it was not conclusive. (But, *quære* whether the judgment was admissible). The record of the criminal case might be inspected under S. 138, Act VIII of 1859. 32 P.R. 1874. X
- (c) Where, on a charge of receiving stolen goods, a witness for the prosecution, who had said that he was the principal and had stolen the goods, admitted, on cross-examination, that he had been acquitted of the theft, *held*, that his acquittal, though not conclusive, was a fact which might properly be left to the jury, together with the fact of his subsequent statement in Court. *R. v. M' Cue*, Jebb, C.C. 120 (Ir.); Tay. Ev., 10th Ed., S. 1693, p. 1222. Y
- (d) Evidence of previous convictions is relevant, where the existence of the judgment of conviction is itself a fact in issue or relevant, under some other provision of the Evidence Act (*vide* S. 43), such as S. 14 or S. 8, and possibly certain other sections referring to the relevancy of facts. 7 P.R. 1895 (Cr.). Z
- (e) A record, as where goods were purchased at a sale by a sheriff upon an execution, may be proved against a person who was no party to it. *Wilmer v. Schlatter*, 2 Rawle, 359; *Jackson v. Wood*, 3 Wend. 27, 34 (Am.); *Fowler v. Savage*, 3 Conn. 90 (96) (Am.); Tay. Ev., 10th Ed., S. 1668, p. 1199. A
- (f) A record, as where a deed was made under a decree in Chancery, may be proved as against a person who was no party to it. *Barr v. Grata*, 4 Wheat. 213 (Am.); Tay. Ev., 10th Ed., S. 1668, p. 1199. B

(Notes)—(Continued).

- (g) In a suit by a widow, belonging to the agricultural tribe of the Ferozepur District, claiming succession to her deceased husband's estate, judgments convicting her paramour of adultery with her are admissible in evidence, under S. 43 read with Ss. 9 and 11 (3) of the Evidence Act. 24 P.L.R. 1903. C
- (h) *Held* that, in a suit for pre-emption where the defence set up by the defendants-mortgagors was that the defendants mortgagees themselves were co-sharers in the village and therefore the mortgage to them gave no right of pre-emption to the plaintiff, a judgment obtained in a previous litigation between the present plaintiff on the one hand and the defendants mortgagees on the other, declaring the present defendants to be co-sharers in the village was a piece of evidence in his favour, the effect of which could only be annulled by rebutting evidence, showing either that the judgment had been set aside or had otherwise become inefficacious. 8 A.W.N. 212. D
- (i) Where an adoption was in issue, it was objected that the pleadings did not include an allegation that the person alleged to have adopted, being a *unhang*, could not adopt and that the Court should not have relied on orders, recorded in a suit not *inter partes*, showing that X, whom the defendant's witnesses described as having taken a prominent part in the adoption ceremony or later, was already dead before that ceremony. *Held*, that the fact that X died was relevant under S. 11 of the Evidence Act, and, if he was treated as dead, in a civil suit to which he was a party, the Court's order was good evidence of a fact that may be proved otherwise. (See S. 43, Evidence Act.) 4 N.L.R. 129 (194). E
- (j) In a suit for recovery by partition of a share in joint family property, the defence was that the plaintiff had relinquished his share by release. The existence of a judgment declaring that a partition deed set up by the second and third defendants was fraudulent, colourable and void as against the creditors of the first defendant, was held to be relevant in a case where the assignee of the first defendant sued and the second and third defendants set up the same deed as a defence to the action, a result provided for by S. 43, as deducible from 19 A. 277. See 24 R. 591 (593). F
- (k) Where, prior to the execution-sale of a joint family property for their father's debt under Mitakshara Law, the sons have objected to it on the ground of the nature of the debt being such as would not bind them, upon which they were referred to a regular suit, the purchaser must be taken to have had actual or constructive notice of the objection to the binding nature of the debt and to have purchased the properties subject to the result of the suit by the sons. 5 C. 148 (P.C.)=4 O.L.R. 226=6 I.A. 88. See, also, 14 B.L.R. 189=22 W.R. 187=1 I.A. 335 and 23 W.R. 260 and 424. G
- (l) A lessor sued to recover his rent from his lessees as well as from a third party on the allegation that his lessee and such third party were partners and that the lease had been acquired for the purposes of the partnership business, in proof whereof he relied on a decree passed on an arbitration award made in a suit for the dissolution of the partnership between the lessee and the third party, declaring, *inter alia*, that the lease was acquired for partnership purposes. It was also proved that

(Notes)—(Concluded).

in a suit by the lessee to recover some of the outstanding dues, the third party, relying on the award, had claimed and recovered a share of the money sued for. The judgment passed upon the award was relevant in this case upon the question whether the lease was acquired by the lessee for his own benefit or as partnership property. 9 C.W.

N. 402. *Per Ghose, J.* H

- (m) Neither the award nor the conduct of the third party in the subsequent suit was admissible as evidence in this case to prove that the third party was liable to the plaintiff for rent. 9 C.W.N. 402. *Per Geidt, J.* I

(7) Instances of judgments held not relevant.

- (a) A judgment finding that a particular person was not of a sound mind, based on a letter of a medical man, is not admissible, either under S. 13 or S. 43 of the Evidence Act, in a subsequent suit to prove that the person whose mental condition is in question was not of a sound mind, where the previous suit was not between the same parties and no formal deposition on oath of the medical man was recorded. 154 P.L.R. 1901. J

- (b) Suit for the recovery of a minor's share of the consideration paid for a *mourosee* lease granted by the minor's co-proprietors on their own behalf and as his guardians, in order to raise money required for the expenses of the joint estate, which lease was cancelled (on the suit of the minor when he came of age) so far as his share was concerned. *Held* that the plaintiff was not entitled to recover without proof of fraud and that the evidence tendered by the plaintiff (namely, the record of the case instituted by the minor for the cancellation of the lease) was not admissible to prove the allegation of fraud. 5 W.R.S. C. Ref. 23. K

- (c) Where an action was instituted by a person for damages for malicious prosecution, and the Court of first instance found that he had failed to prove either malice or want of probable cause by any reliable evidence, the lower appellate Court upset the finding stating, "when the plaintiff has been acquitted by the Fouzdari Court, what doubt can there remain as to the plaintiff's having been maliciously charged with theft?" *Held*, the proceeding of the Fouzdari Court was not admissible as evidence. 9 W.R. 77. L

- (d) The existence of a decree against the father is not sufficient evidence of the necessity for his selling his son's interest in ancestral property. 9 W.R. 469. M

- (e) A person accused another with having forged a pro-note and denied having ever executed one himself. A judgment obtained by him on that note would, according to S. 43, have been inadmissible, unless that section is construed as widely as it was contended that S. 13 should be construed. See 11 B.H.C.R. 90 (96). See, also, under S. 13, *supra*. N

- (f) For a case where copies of judgments and decrees were held to be inadmissible with reference to 6 C. 171, see 11 M. 116. O

- (g) In the absence of an agreement, a judgment against a principal will not bind his surety. *Parker v. Lewis*, 8 Ch. App. 1035; *Ex parte Young, re Kitchin*, 17 Ch. D. 668; *Philp. Ev.*, 4th Ed., p. 384. P

44. Any party to a suit or other proceeding may show that any judgment, order, or decree, which is relevant under section 40, 41, or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it ¹, or was obtained by fraud ² or collusion ³.

Fraud or collusion in obtaining judgment, or incompetency of Court, may be proved.

(Notes).

"General."

(1) Scope of section.

(a) "This section deals with a most difficult question, and it was a rash thing to attempt to dispose of it in this summary manner. The question—how far, by whom, and under what circumstances, the final decision of a Court of law can be impeached upon the ground that it was obtained by fraud—is one which does not properly belong to evidence at all: and in any case, it is impossible to accept this section as an adequate statement of the law. For example, it must not be supposed that, if A had obtained a decree of divorce against his wife B, anybody, A and B included, could, in a subsequent suit, get rid of the effect of this decree by proving that some one in the case had been guilty of something which might be called fraud. Stephen in his Digest (Art. 46) states the law more cautiously, but still not cautiously enough. A great deal depends upon the sort of fraud which has been practised." Mark. Ev., p. 39.

(b) This section lays down not only a rule of law relating to evidence, but also a rule of procedure. 27 C. 11 (21)=3 C.W.N. 660.

(2) Section explained.

This section provides that a party to a *suit or other proceeding* may shew that a judgment, order or decree which is relevant, under S. 40, that is, which would, as a judgment *inter partes*, operate as *res judicata*, or which is relevant under S. 41, that is, which is evidence as a judgment *in rem*, or which is relevant under S. 42, that is, which is evidence as judgment relating to a public matter, and *which is proved by the adverse party*, was passed by a Court which had no jurisdiction to pass it or obtained by fraud or collusion. 27 C. 11 (20)=3 C.W.N. 660.

(3) Grounds on which judgments may be impeached—English Law.

(a) Domestic judgments, when tendered to prove the truth of the finding may, in general, be impeached on the following grounds:—

(i) That such judgments were not final. *Scott v. Pilkington*, 2 B. and S. 11; *For v. Star Co.*, 1900 A.C. 19; 12 App. Cas. 256; *Kelly v. Hammond*, 2 T.L.R. 804; *Thomas v. Exeter Post*, 19 Q.B.D. 822; Phip. Ev., 4th Ed., p. 375

(ii) That such judgments were not on the merits of the case, *e.g.*, obtained on some technical objection or default of pleading. *Re Orrell*, 12 Ch. D. 681; Phip. Ev., 4th Ed., p. 375.

(iii) That the Court which pronounced them had no jurisdiction over the subject-matter of the suit. *Knowles v. Gaslight Co.*, 19 Wall 69; *Child v. Powder Works*, 45 N.H. 547; *Pelton v. Platner*, 13 Ohio 209; Best Ev., 8th Ed., p. 550; Phip. Ev., 4th Ed., p. 375.

(General)—(Continued).

- (iv) That the Court had no jurisdiction over the parties to the suit. *State v. Fleak*, 54 La. 429; *Easterly v. Goodwin*, 35 Conn. 273; *Napton v. Leaton*, 71 Mo. 358; *Hill v. Mendenhall*, 21 Wall. 453. Best Ev., 8th Ed., p. 550; Phip. Ev., 4th Ed., p. 375. W
- (v) That such judgments were obtained by fraud. *Priestman v. Thomas*, 9 P.D. 210; Phip. Ev., 4th Ed., p. 375; Best Ev., 8th Ed., p. 550. X
- (vi) That they were obtained by collusion. *Bandon v. Beacher*, 3 Cl. and Fin. 479, 510; *Girdlestone v. Brighton Co.*, 4 Ex. D. 107; Phip. Ev., 4th Ed., p. 375; Best Ev., 8th Ed., p. 550. Y
- (vii) That such judgments were forged. *Noell v. Wells*, 1 Sid. 359; Best Ev., 8th Ed., S. 595, p. 547. Z
- (b) "A party may at all times in a Court of competent jurisdiction—competent as to the subject-matter of the suit itself—where he appears as an actor, object to a decree made in another Court upon which decree his adversary relies, and he may, either as actor or defender, object to the validity of that decree, provided it was pronounced through fraud, contrivance or covin of any description or not in a real suit, or, if pronounced in a real and substantial suit, between parties who were really not in contest with each other." *Per Lord Brougham in Bandon v. Beacher*, 3 Cl. and Fin. 479, cited in 26 A. 272 (282). A

(4) English Law.

"Whenever any judgment is offered as evidence under any of the articles hereinbefore contained, the party against whom it is so offered may prove that the Court which gave it had no jurisdiction, or that it has been reversed, or if he is a stranger to it, that it was obtained by any fraud or collusion, to which neither he nor any person to whom he is privy was a party. Steph. Dig., 7th Ed., Art. 46, p. 58. B

(5) English Law—Action in English Court to enforce judgment of foreign Court.

If an action is brought in an English Court to enforce the judgment of a foreign Court, and probably if an action is brought in an English Court to enforce the judgment of another English Court, any such matter as aforesaid may be proved by the defendant, even if the matter alleged as fraud was alleged by way of defence in the foreign Court and was not believed by them to exist. *Abouloff v. Oppenheimer*, 10 Q.B.D. 295; Steph. Dig., 7th Ed., Art. 46, p. 58. C

(6) English and Indian Law—Difference.

"In England, a party to a suit would not be allowed to defeat a judgment by showing, that, in obtaining it, he had practised an imposition upon the Court. Under the Evidence Act, however, there is no such restriction, S. 44 as now worded permitting any party to a suit or other proceeding to show that a judgment was obtained by his own fraud or collusion." *Whitley Stokes*. Vol. II, p. 829; see, also, *Tay. Ev.*, 10th Ed., S. 1713, p. 1240; 6 B. 703 (719); 3 C.W.N. 670=26 C. 891; 3 C.W.N. 660=27 C. 11; 11 B. 708 (718). D

N.B.—Even in India a party may be precluded from avoiding a decree on the ground of his own fraud; but this is not based on any rule of evidence, but on the general principles of justice which prohibit a person to plead his own fraud. 27 C. 11 (22)=3 C.W.N. 660. E

(General)—(Continued).

(7) Foreign judgments on what grounds may be impeached—English Law.

Foreign judgments may be impeached on the following grounds:—

- (i) Non-finality. *Nouvion v. Freeman*, 15 App. Cas. 1; Phip. Ev., 4th Ed., p. 376. See, also, S. 13, Civ. P.C. (1908); 8 B.H.C. (O.C.J.), 200; 15 W.R. 500. F
- (ii) Fraud. *Abouloff v. Oppenheimer*, 10 Q.B.D. 295; *Valada v. Lawes*, 25 Q.B.D. 319; *Codd v. Delap*, 92 L.T. 510; Phip. Ev., 4th Ed., p. 376. See, also, 4 W.R. 107 (108); 8 B.H.C. (O.C.J.), 200; 7 M. 164 (166), 15 W.R. 500; 2 P.R. 1899; S. 13, Civ. Pro. Code, 1908. G
- (iii) Collusion. See S. 13, Civ. P. C. (1908); 4 W.R. 107; 8 B.H.C. (O.C.J.), 200; 7 M. 164 (166); 15 W.R. 500; 2 P.R. 1899. Phip. Ev., 4th Ed., p. 376. H
- (iv) Want of jurisdiction. *Pemberton v. Hughes*, 1 Ch. 781; Phip. Ev., 4th Ed., p. 376. See, also, S. 13, Civ. P.C. (1908); 4 W.R. 107 (108); 8 B.H.C. (O.C.J.), 200; 7 M. 164; 15 W.R. 500; 2 P.R. 1899. I
- (v) It being contrary to natural justice. *Pemberton v. Hughes*, 1 Ch. 781; Phip. Ev., 4th Ed., p. 376; S. 13, Civ. P.C. (1908). J
- (vi) But mistake of fact or of foreign or English law will not be a ground on which foreign judgments may be impeached. Piggott, *Foreign Judgments*, 106-7. Phip. Ev., 4th Ed., p. 376; 2 Smith L.C., 11th Ed., 785-830; Tay. Ev., S. 1729; Ros. N.P. 209-211. K

(8) Foreign judgments, how impeached—Indian Law.

- (i) The foreign judgment shall be conclusive, as to any matter thereby directly adjudicated upon, between the same parties or between parties under whom they or any of them claim, litigating under the same title, except:—
 - (a) where it has not been pronounced by a Court of competent jurisdiction;
 - (b) where it has not been given on the merits of the case;
 - (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of British India in cases in which such law is applicable;
 - (d) where the proceedings in which the judgment was obtained are opposed to natural justice;
 - (e) where it has been obtained by fraud;
 - (f) where it sustains a claim founded on a breach of any law in force in British India. See S. 13, Civ. P.C. (1908). L
- (ii) Courts in British India will, as regards foreign judgments, be guided by the same principles as are adopted by the Courts of England. 20 M. 112 (114); 6 M. 273 (276). M

(9) Judgments by consent.

Judgments by consent are binding, provided they proceed upon a compromise of the cause of action and not upon some merely technical default. *Serrao v. Noel*, 15 Q.B.D. 549; *Shaw v. Herefordshire*, 2 Q.B. 282; *Majnus v. National Bank of Scotland*, 57 L.J. Ch. 902; Phip. Ev., 4th Ed., p. 375. M1

(General)—(Concluded).

(10) Compromise sanctioned by the Court.

So also is a—binding on the parties. *Worman v. Worman*, 43 Ch. D. 296 ;
Phip. Ev., 4th Ed., p. 375. **N**

(11) As to the proper construction of this section.

See § B. 703.

(12) Gambling Act, 1867, Ss. 3, 4 and 15—Previous conviction—Legal extension of Act to particular locality.

See 41 P.R. 1885 (Cr.).

I.—“ Was delivered by a Court not competent to deliver it.”

(1) Principle of section—Want of jurisdiction.

Every species of judgment will be rendered inadmissible in evidence on proof given that the Court which pronounced it had no jurisdiction. *R. v. Bp. of Chester*, 1 W. Bl. 25 (Lee, C. J.) ; *R. v. Washbrook*, 4 B. and C. 732 ; *Mann v. Owen*, 4 B. and C. 732 ; *Briscoe v. Stephens*, 2 Bing. 213 ; *Abp. of Dublin v. Ld. Trimleston*, 12 Ir. Eq. R. 251 ; *Linnell v. Gunn*, L.R.I.A. and E. 363 ; *Tay. Ev.*, 10th Ed., S. 1714, p. 1241 ; see, also, 27 C. 11 (20) = 3 C.W.N. 660 ; 25 B. 205 ; *Steph. Dig.*, Art. 46 ; 21 W.R. 361. **O**

(2) The following have been rendered inadmissible in evidence in English Law on the ground of want of jurisdiction.

(i) Sentences of visitors. *R. v. Bp. of Chester*, 1 W. Bl. 25 (Lee, C.J.). *Tay. Ev.*, 10th Ed., S. 1714, p. 1241. **P**

(ii) Awards by public commissioners. *R. v. Washbrook*, 4 B. and C. 732 ; *Tay. Ev.*, 10th Ed., S. 1714, p. 1241. **Q**

(iii) Sentences of courts-martial. *Mann v. Owen*, 4 B. and C. 732 ; *Tay. Ev.*, 10th Ed., S. 1714, p. 1241. **R**

(iv) “ A probate or administration might formerly have been defeated by showing that the metropolitan, and not the ordinary who purported to do so, had jurisdiction to grant it, though it cannot now be defeated on this ground ” 20 and 21 V. c. 77 (The Court of Probate Act, 1857) 86, 20 and 21 V. c. 79, 91 ; *Tay. Ev.*, 10th Ed., S. 1714, p. 1241 ; *Marriot v. Mairiot*, 1 Str. 671 ; *Tay. Ev.*, 10th Ed., S. 1714, p. 1241. **S**

(v) “ But it may still be defeated by proving that the supposed testator or intestate is alive, since, in this event, the Probate Division can have had no jurisdiction, nor its sentence any effect.” *Allen v. Dundas*, 3 T.R. 129 ; *Tay. Ev.*, 10th Ed., S. 1714, p. 1241. **T**

(vi) “ If a prisoner be tried before quarter Sessions, on a day to which the Court was not duly adjourned, his acquittal or conviction would be no bar to a future indictment for the same offence, because accused never stood in peril upon the former proceedings which were a mere nullity.” *R. v. Bowman*, 6 C. and P. 342 ; *Tay. Ev.*, 10th Ed., S. 1714, p. 1241. **U**

(vii) “ So also if he be tried for an offence which the Judge is restricted by statute from trying, the acquittal or conviction would be no bar to a future indictment for the same offence.” Act 5 and 6 V. c. 38 ; *Tay. Ev.*, 10th Ed., S. 1714, p. 1241. **Y**

1.—“Was delivered by a Court not competent to deliver it.”—(Continued).

(3) Recitals in judgments of facts conferring jurisdiction.

- (a) Every order made in pursuance of a statutory authority must contain, on the face of it, a statement of all facts which are requisite to show jurisdiction. *Christie v. Unwin*, 3 P. and D. 204; *Taylor v. Clemson*, 11 Cl. and Fin. 610 (H.L.); Tay. Ev., 10th Ed., S. 1715, p. 1244; see, also, Best Ev., 8th Ed., p. 550. **W**
- (b) “Thus the proceedings of inferior tribunals have been treated as nullities on the ground that they did not set forth sufficient facts to found jurisdiction upon in the following cases:—
- (i) Where justices had jurisdiction only if the servant was a servant in husbandry, an order of justices discharging a servant from her service was held bad, because it did not state that she was a servant in husbandry.” *R. v. Hulcott*, 6 T.R. 583; Tay. Ev., 10th Ed., S. 1716, p. 1244. **X**
- (ii) “Where Magistrates only possess jurisdiction over a dispute when the applicant is a member of a friendly society, if these facts be not mentioned in it, an order as to the dispute was held to be bad.” *Day v. King*, 5 A. and E. 359; Tay. Ev., 10th Ed., S. 1716, p. 1245. **Y**
- (iii) “Inquisitions have on several occasions been quashed where certain preliminary notices which it was the duty of the sheriff or the trustees to give, did not appear on the face of the proceedings to have been given.” *R. v. May of Liverpool*, 4 Burr. 2244; *R. v. Bayshaw*, 7 T.R. 368; *R. v. Norwich Road Trustees*, 5 A. and E. 563; Tay. Ev., 10th Ed., S. 1716, p. 1245. **Z**

(4) Effect of such recitals in such judgments.

- (a) The judgment may itself recite matters which establish or confer jurisdiction. *Wyatt v. Rambo*, 29 Ala. 510; *Penobscott R. R. v. Weeks*, 52 Me. 456; *Coll v. Haven*, 30 Conn. 190, 197; Best Ev., 8th Ed., p. 550. **A**
- (b) Such recitals will probably bind domestic tribunals and forbid a collateral attack. *Wilcher v. Robertson*, 78 Va. 616; Best Ev., 8th Ed., p. 550. **B**
- (c) But it is also said that recitals are conclusive as to jurisdiction in interstate judgments. *Thompson v. Emmert*, 4 McLean, 96; *Pritchett v. Clark*, 4 Harr. (Del.), 280; Best Ev., 8th Ed., p. 550. **C**
- (d) Jurisdiction is only *prima facie* established by the recitals. *Comstock v. Crawford*, 70 N. Y. 253; *Price v. Ward*, 25 N.J.L. 225; *Pennoyer v. Neff*, 95 U.S. 714, 730; Best Ev., 8th Ed., p. 550. **D**

(5) Competency—Meaning.

- (a) The words “not competent” in this section refer to a Court acting without jurisdiction. 12 M. 228 (230), cited and followed in 21 B. 205 (212). **E**
- (b) They do not mean, in a case where that right exists, the coming to a correct conclusion upon any question of law or fact arising in that matter. 21 B. 205 (212); [*Ex parte Coates*, 5 Ch.D. 980 and *Brittain v. Kinnaird*, 1 Br. and Bing. 432 = 21 R.R. 680 (688), *F.*]. **F**
- (c) The “competency” of a Court and its “jurisdiction” are synonymous terms. They mean the right of a Court to adjudicate in a given matter. 21 B. 205 (212); [*Ex parte Coates*, 5 Ch.D. at p. 980 and *Brittain v. Kinnaird*, 1 Br. and Bing. 432; 21 R.R. 680 (688), *F.*]. **G**

1.—"Was delivered by a Court not competent to deliver it."—(Concluded).

(d) Thus a decree of a Court in a suit which should have been dismissed as barred by S. 244 of the Civ. Pro. Code (1882), though wrong, could not be treated as passed by a Court not competent to pass it. 12 M. 228 (230), *cited and followed* in 21 B. 205 (212). **H**

(e) In Art. 46 of Sir James Stephen's Digest of the Law of Evidence, the rule of English Law corresponding with this section is stated to be, that, whenever a judgment is offered as evidence, the party against whom it is so offered may prove that the Court which gave it had no jurisdiction. 21 B. 205 (212). **I**

(6) Competency, on what depends.

(a) The competency of a Court does not depend on whether a point which it decides, has been raised or argued by party or by counsel. 1 A.L.J. 217 (222)=26 A. 552. **J**

(b) It cannot be said that wherever a decision is wrong in law or vitiates a rule of procedure, the Court must be held incompetent to deliver it. 1 A.L.J. 217 (222)=26 A. 552. **K**

(c) It has never been and could not be held that a Court, which erroneously decrees a suit which it should have dismissed as time barred or barred by the rule of *res judicata*, acts without jurisdiction and is not competent to deliver its decree. 1 A.L.J. 217 (222)=26 A. 552. See, also, 22 A. 270. **L**

(d) If a Court be competent to consider and decide the question, it cannot be supposed that the Court was competent to decide it in one particular way only. Even if the decision were erroneous or irregular, the Court is nevertheless competent to deliver it. 1 A.L.J. 217 (223)=26 A. 552. See, also, 22 A. 270. **M**

(e) If a Court is competent to hear a case it can decide it wrongly as well as rightly, and as long as the decision stands unreversed by a higher tribunal on appeal, it is a valid and binding decree. 1 A.L.J. 217 (222)=26 A. 552. **N**

(7) A Court's power to declare another Court to have acted without jurisdiction.

(a) Although one Court cannot set aside the proceedings of another Court for want of jurisdiction, yet when a matter arises before a Court in the ordinary course of its jurisdiction, and one of the parties relies on, or seeks to protect himself by, the proceedings of another Court, then in that way the jurisdiction of the Court whose proceedings are pleaded may be inquired into. 22 W.R. 361. **O**

(b) Accordingly in a suit in which plaintiff asked for a declaration of title, and a Revenue Court's want of jurisdiction appeared on the face of its decree, a Munsif was held to be justified in holding that the Revenue Court had no jurisdiction. 22 W.R. 361. **P**

(8) Acquittal—Retrial—Interference of the High Court.

(a) Where an offence is tried by a Court without jurisdiction, the proceedings are void under S. 530 of the Code of Criminal Procedure (Act X of 1882), and the offender, if acquitted, is liable to be retried under S. 408. 8 B. 307 (308). **Q**

(b) In such a case it is not necessary for the High Court to upset the acquittal before the retrial can be had. 8 B. 307 (308). **R**

2.—“Or was obtained by fraud.”

(1) Principle of section—Fraud.

- (a) The principle upon which judgments are set aside for fraud is tersely and forcibly stated by Lord Chief Justice de Grey in *the Duchess of Kingston's case*, 2 Ambler 756, thus:—“Fraud is an extrinsic collateral act which vitiates the most solemn proceedings of Courts of Justice.” *Per Wills, J.* in *Queen v. Saddlers Coy.*, 10 H.L. 404, 431, cited in 3 C.W.N. 670 (683)=26 C. 891. **S**
- (b) “A judgment, though conclusive evidence upon the Court, and is not to be impeached from within, yet, like all other acts of the highest judicial authority, it is impeachable from without. Although it is not permitted to show that the Court was mistaken it may be shown that they were misled.” *Per Lord Chief Justice de Grey in the Duchess of Kingston's case*, 11 St. Tr. 262; Best Ev., 8th Ed., S. 595, p. 547; 6 B. 148 (150). **T**
- (c) “In such cases of fraud and collusion the whole proceeding was *fabula non judicium*.” *Per Lord Chief Justice de Grey in the Duchess of Kingston's case*, 4 De G., M. and G. 148. See Macqueen, Law of Marriage, Divorce, and Legitimacy, 2nd Ed., p. 68; Best Ev., 8th Ed., S. 595, p. 547. **U**
- (d) “Where a judgment is offered in evidence against a stranger, he may avoid its effects, by furnishing distinct proof that it was obtained by fraud or collusion.” *Per Lord Chief Justice de Grey, in R. v. Duch. of Kingston*, 20 How. St. Tr. 541; *Brownsword v. Edwards*, 2 Ves. Sen. 246; *Philpson v. Lord Egremont*, 14 L.J.Q.B. 25; Tay. Ev., 10th Ed., S. 1713, p. 1240; Best Ev., 8th Ed., S. 595, p. 547; 6 B. 148 (150). **Y**
- (e) “This rule applies whether the judgment impugned has been pronounced by an inferior tribunal or by the highest Court of Judicature in the realm; but, in all cases alike, it is competent for every Court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud.” *Shedden v. Patrick*, 1 Macq. 535, cited and followed in 3 C.W.N. 670 (683)=26 C. 891; *Eyre v. Smith*, 2 C.P.D. 435; Tay. Ev., 10th Ed., S. 1713, p. 1240; 11 C.W.N. 579. **W**
- (f) “And this principle also applies to every species of judgment:—
- (i) As to judgments of Courts of exclusive jurisdiction. *Per Lord Chief Justice de Grey in the Duchess of Kingston's case*, *Meddowcraft v. Ilugenin*, 3 Curt. 403; Best Ev., 8th Ed., S. 595, p. 547. **X**
- (ii) To judgments *in rem*. *Per Lord Chief Justice de Grey in the Duchess of Kingston's case*, *In re Place* 8 Exch. 704, *per Parke B.* Best Ev., 8th Ed., S. 595, p. 547; 27 C. 11 (21)=3 C.W.N. 660. **Y**
- (iii) To judgments of foreign tribunals. *Per Lord Chief Justice de Grey in the Duchess of Kingston's case*, *Bank of Australasia v. Nias*, 16 Q.B. 717; Best Ev., 8th Ed., S. 595, p. 547. **Z**
- (iv) And to judgments of the House of Lords. *Per Lord Chief Justice de Grey in the Duchess of Kingston's case*, *Shedden v. Patrick*, 1 Macq. Ho. Lo. Cas. 535; Best Ev., 8th Ed., S. 595, p. 547. **A**

2.—"Or was obtained by fraud."—(Continued).

- (g) A Court of inferior jurisdiction is competent to declare a decree of a superior Court to be a nullity on the ground of fraud, if otherwise it has jurisdiction to entertain the suit. 11 C.W.N. 579. **B**
- (h) "Whether an innocent party would be allowed to prove in one Court that a judgment against him in another Court was obtained by fraud is a question not equally clear, as it would be in his power to apply directly to the Court which pronounced the judgment to vacate it." *Prudham v. Phillips*, 2 Ambl. 763, cited in 6 B. 703 (711); *R. v. Duch. of Kingston*, 20 How. St. Tr. 544; Tay. Ev., 10th Ed., S. 1713, p. 1240, cited in 27 C. 11 (27)—3 C.W.N. 660; see, also, 3 C.W. N. 670 (682)=26 C. 891. **C**
- (i) "But a guilty party would not be permitted to defeat a judgment, by showing that, in obtaining it, he had practised an imposition on the Court." *Prudham v. Phillips*, 2 Ambl. 763, cited in 6 B. 703 (711); *Dev v. Roberts*, 2 B. and Ald 367; Tay. Ev., 10th Ed., S. 1713, p. 2140. But see also 6 B. 703 (715); 27 C. 11—3 C.W.N. 660. **D**
- (j) For it would be an outrage to justice and common sense, if a person could thus avoid the consequences of his own fraudulent conduct. *Prudham v. Phillips*, 2 Ambl. 763; *Dev v. Roberts*, 2 B. and Ald 367; Tay. Ev., 10th Ed., S. 1713, p. 1240. **E**

(2) Principle of section—Act XXIII of 1861, S. 11.

- (a) It is always competent to any Court to vacate any judgment or order, if it be proved that such judgment or order was obtained by manifest fraud. 6 B. 118 (150). **F**
- (b) And in the case of orders made in execution, S. 11 of Act XXIII of 1861 (- S. 244 of Act X of 1877), excludes all other remedy. 6 B. 148 (150). **G**
- (c) A decision set aside by a superior Court, as made without jurisdiction, cannot have any probative force whatever between the parties. 19 W.R. 284. **H**

(3) Scope of section—Fraud.

- (a) The section makes the same provision for impeaching on the ground of fraud judgments *inter partes*, and judgments *in rem*, or judgments relating to public matters. 27 C. 11 (21)=3 C.W.N. 660. **I**
- (b) A stranger to a judgment *in rem* or a judgment relating to a public matter against whom such judgment is used in evidence under S. 41 can impeach it on the ground of fraud in the suit in which it is so used. 27 C. 11 (21). See, also, Tay. Ev., 9th Ed., S. 1713, cited in 27 C. 11 (21)=3 C.W.N. 660. **J**
- (c) The language of this section is wide enough to allow a party to the suit in which the judgment was obtained to aver that it was obtained by the fraud of his antagonist, though the judgment stands unreversed. 6 B. 703 (715). **K**
- (d) This section clearly covers a wide area. The difficulty is to say what it does not cover. 6 B. 703 (715). **L**
- (e) This, indeed, has sometimes been thought to be the English rule; but I do not think that the contention can be successfully maintained, having regard to the recent authorities. See Tay. Ev., Vol. II, S. 1522; *Huffer v. Allen*, 2 L.R. Ex. 15; both cited in 6 B. 703 (715). **M**

2.—“Or was obtained by fraud.”—(Continued).

(f) It is also wide enough to allow a party to set up his own fraud or collusion in procuring the former judgment in order to defeat it, certainly a startling proposition. 6 B. 703 (716). N

(g) No doubt the section refers to the admissibility, not the weight of the evidence allowed thereby to be given; still it is hard to suppose that the Legislature contemplated that evidence should be admitted from which no result could follow. 6 B. 703 (716). O

(h) Possibly the Courts may hereafter read “fraud or collusion” as equivalent to “fraud and collusion,” as denoting what Mr. Farran happily termed bilateral, as distinct from unilateral, fraud. 6 B. 703 (716). P

(i) And, no doubt, in many of the English decisions the term “fraud” is used where collusion is plainly meant. 6 B. 703 (716). Q

(j) “But whatever we may conjecture I do not feel it incumbent on or proper for me in this case to attempt to interpret the section.” *Per Latham, J.*, in 6 B. 703 (716). R

(4) Impeaching judgments on the ground of fraud—English and Indian Law—Difference.

See Whitley Stokes' Anglo-Indian Codes, Vol. II, p. 829, noted *supra*.

(5) Fraud—Definition.

(a) “Fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of Courts of justice.” *Duchess of Kingston's case*, 2 Sm. L.C. 593 (601), cited in 21 C. 612 (617); Tay. Ev., 10th Ed., S. 1713, p. 1240; Best Ev., 8th Ed., S. 595, p. 547. S

(b) “Lord Coke says, it avoids all judicial acts ecclesiastical or temporal.” *Duchess of Kingston's case*, 2 Sm. L.C. 593 (601), cited in 21 C. 612 (617); Tay. Ev., 10th Ed., S. 1713, p. 1240; Best Ev., 8th Ed., S. 595, p. 547. T

(5-A) Fraud—Definition in Contract Act.

“Fraud” means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract :—

- (1) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;
- (2) the active concealment of a fact by one having knowledge or belief of the fact;
- (3) a promise made without any intention of performing it;
- (4) any other act fitted to deceive;
- (5) any such act or omission as the law specially declares to be fraudulent.

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech. (See S. 17 of the Contract Act). U

2.—“Or was obtained by fraud.”—(Continued).

(6) Kind of fraud contemplated by this section.

- (a) The fraud spoken of above must clearly be actual fraud, such that there is on the part of the person chargeable with it the *malus animus*, the *mala mens*, putting itself in motion and acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him. *Per* Lord Cairns, L.J., in *Patch v. Ward*, L.R. 3 Ch. 203, cited and followed in 21 C. 612 (617). Y
- (b) The fraud must be fraud which the Court can explain and define upon the face of a decree. *Per* Lord Cairns, L.J., *Patch v. Ward*, L.R. 3 Ch. 203, cited in 21 C. 612 (617). W
- (c) And a mere irregularity, or the insisting upon rights which, upon a due investigation of those rights, might be found to be overstated, or overestimated, is not the kind of fraud which will authorise the Court to set aside a solemn decision which has assumed the form of a decree signed and enrolled. *Per* Lord Cairns, L.J., L.R. 3 Ch. 203, cited in 21 C. 612 (617). X

(7) Perjury, if constitutes fraud.

- (a) The principle upon which these decisions rest is, that, where a decree has been obtained by a fraud practised upon the other side, by which he was prevented from placing his case before the tribunal, which was called upon to adjudicate upon it, in the way most to his advantage, the decree is not binding upon him, and that the decree may be set aside by a Court of justice in a separate suit, and not only by an application made in the suit in which the decree was passed to the Court by which it was passed. 21 C. 612 (619). Y
- (b) But it is not the law that because a person, against whom a decree has been passed, alleges that it is wrong and that it was obtained by the perjury committed by, or at the instance of the other party, which is of course fraud of the worst kind, that he can obtain a re-hearing of the questions in dispute in a fresh action by merely changing the form in which he places it before the Court, and alleging in his plaint that the first decree was obtained by the perjury of the person in whose favour it was given. 21 C. 612 (619). Z
- (c) To so hold would be to allow defeated litigants to avoid the operation, not only of the law which regulates appeals, but that of that which relates to *res judicata* as well. 21 C. 612 (619). A
- (d) “Where is litigation to end if a judgment obtained in an action fought out adversely between two litigants *sui juris* and at arm’s length could be set aside by a fresh action on the ground that perjury had been committed in the first action or that false answers had been given to interrogatories, or a misleading production of documents, or of a machine, or of a process had been given? There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting, and must be on one side or other wilfully and corruptly perjured. In this case, if the plaintiffs had sustained on this appeal the judgment in their favour the present defendants, in their turn, might bring a fresh action to set that judgment aside on the ground of perjury of the principal witness and subornation of perjury; and so the

2.—“Or was obtained by fraud.”—(Continued).

parties might go on alternately *ad infinitum*. *Per James, L.J.*, in *Flower v. Lloyd*, L. R. 10 Ch. D. 327, cited in 21 C. 612 (618); also cited in 3 C.W.N. 670=26 C. 891. **B**

- (e) The Court ought to pause long before it establishes a precedent which would or might make, in numberless cases, judgments supposed to be final, only the commencement of a new series of actions. 21 C. 612 (618). **C**

- (f) Perjuries, falsehoods, frauds when detected, must be punished and punished severely, but in their desire to prevent litigant parties from obtaining any benefit from such foul means, the Court must not forget the evils which may arise from opening such new series of litigation, amongst such evils not the least being that it would be certain to multiply indefinitely the mass of those very perjuries, falsehoods, and frauds. 21 C. 612 (618). **D**

(8) Plea of fraud, to whom available—English Law.

- (a) “A plea of fraud can in general only be taken advantage of by any stranger to the judgment who is in no way privy to the fraud and not by a party, since, if the latter were innocent, he might have applied to vacate the judgment, and if guilty, he cannot escape the consequences of his own wrong.” *Philp. Ev.*, 4th Ed., p. 375; *Tay. Ev.*, S. 1713; *Steph. Dig.*, Art. 16, cited in 26 C. 891=3 C.W.N. 670 (684). **E**
- (b) The rule that fraud can only be proved by an innocent party does not apply to probate cases. *Birch v. Birch*, 1902, p. 130; *Philp. Ev.*, 4th Ed., p. 375. See, also, under S. 41, *supra*. **F**
- (c) Nor does the rule apply to divorce cases. *Bonaparte v. Bonaparte*, 1892, p. 402; *Philp. Ev.*, 4th Ed., p. 375. See, also, under S. 41, *supra*. **G**
- (d) If both parties colluded it was never known that one of them could vacate it. *Pruitham v. Phillips*, 2 Amole 763, cited in 11 B. 708 (720). **H**
- (e) As against a third party, a judgment can be refused recognition on the ground of fraud. *West v. Ship*, 1 Ves. Sen., 214, *Notes to Tynne's case*, 1 S.L.C. 1, cited in 11 B. 708 (720). **I**

(9) Parties, how far bound by decree obtained by fraud.

- (a) It is clear that a guilty party would not be permitted to defeat a judgment by showing that in obtaining it he had practised an imposition on the Court. 3 C.W.N. 670 (682)=26 C. 891; 11 B. 708; 3 C.W.N. 660=27 C. 11 (23); see, also, *Bandon v. Peachey*, 3 Cl. and Fin. 79, cited in 3 C.W.N. 670=26 C. 891; also cited in 30 C. 369 (382)=7 C.W.N. 353; *Queen v. Saddler's Co.*, 10 H.L.C. 404, cited in 30 C. 369 (382)=7 C.W.N. 353. **J**
- (b) “Relief is not granted where both parties are truly in *pari delicto*, unless in cases where public policy would thereby be promoted.” *Story Eq. Juris*, S. 298, cited in 11 B. 708 (718). **K**
- (c) Where the party seeking relief is the sole guilty party, or where he has participated equally and deliberately in the fraud; or where the agreement, which he seeks to set aside, is founded in illegality, immorality, or base and unconscionable conduct on his part; in such cases, Courts of Equity will leave him to the consequences of his own iniquity; and will decline to assist him to escape from the toils which he had studiously prepared to entangle others. *Story Eq. Juris*, S. 697, cited in 11 B. 708 (718). **L**

2.—“Or was obtained by fraud.”—(Continued).

- (d) Where a conveyance has been made without real delinquency, under a misconception of the law, the Courts do not set themselves to guard a law which was merely imagined, not really existent, and in such a case they decree a reconveyance. *Davies v Otty*, 34 L.J.Ch. 252 and *Manning v. Gill*, L.R. 13 Eq. 485, cited in 11 B. 708 (719). **M**
- (e) “Whether parties to a suit may set up fraud, has been a subject of conflicting opinion.” 27 C. 11 (23). See, also, Bigelow on Estoppel, p. 208, cited in 27 C. 11 (23)=3 C.W.N. 660. **N**
- (f) If a party is precluded from avoiding a decree on the ground of his own fraud he is precluded, not by any rule of evidence, but by the general principles of justice which prohibit a person to plead his own fraud. 27 C. 11 (22)=3 C.W.N. 660. **O**
- (g) But there is a material difference between the relief obtainable by a suit for setting aside a decree obtained by fraud and that which a party can have by showing as a defendant in an action in which such a decree is used as evidence against him that it was obtained by fraud. 27 C. 11 (23)=3 C.W.N. 660. **P**
- (h) It is laid down generally that a man cannot set up an illegal or fraudulent act of his own, in order to avoid his own deed. 11 B. 708 (713); (May on Fraudulent Conveyances, p. 432), cited in 11 B. 708 (713). **Q**
- (i) Thus if A in order to defraud C allows B to acquire the legal ownership of his property, A will not be generally aided by equity in undoing his own act or avoiding his own submission. 11 B. 708 (713); see *In re Mapleback*; *Ex parte Caldecott*, L.R. 4 Ch. Div. 150, cited in 11 B. 708 (713). **R**
- (j) Where in order to defeat an execution by the judgment-creditor, a judgment-debtor invited his landlord to distrain and sell, for rent not really due, the tenant, it was held, could not be assisted by the Court in recovering the money realized by the sale. *Sims v. Tuffs*, 6 Carr. and P. 207, cited in 11 B. 708 (713). **S**
- (k) The *particeps criminis* stands on a quite different footing from an innocent third party. 11 B. 708 (713). **T**
- (l) A pretended mortgage might be set aside at the suit of a real vendee, even though it had been successfully sued on as against the original owner. 3 B. 30, cited in 11 B. 708 (713). **U**
- (m) In a suit by A against B, for khas possession of a tank, the plaintiff put in a decree based on a compromise in a previous suit between him and the defendant, to prove his right to khas possession. The defence (*inter alia*) was that the decree was a fraudulent one. Held, that under this section the defendant could show that the decree was obtained by fraud. 27 C. 11=3 C.W.N. 660; see, also, 26 C. 981=3 C.W.N. 670. **V**

(10) Right of party to fraud to show the real nature of transaction.

- (a) Parties are not precluded from showing what was the real nature of the transaction, although it might have been entered into for the purpose of setting up against creditors an apparent ownership different from the real ownership. In many of these cases the object of a benami transaction is to obtain what may be called a shield against a creditor;

2.—“Or was obtained by fraud.”—(Continued).

but notwithstanding this, the parties are not precluded from showing that it was not intended that the property should pass by the instrument creating the benami, and, that, in truth, it still remained in the person who professed to part with it. *Per R. Couch, J.* in 21 W.R. 424, cited in 11 B. 708 (714). **W**

- (b) Although no doubt, it is improper that transactions of this kind should be entered into for the purpose of defeating creditors, yet the real nature of the transaction is what is to be discovered, the real right of the parties. If the Courts were to hold that persons were concluded under such circumstances, they would be assisting in a fraud, for they would be giving an estate to a person when it was never intended that he should have it. *Per R. Couch, J.*, in 21 W.R. 424, cited in 11 B. 708 (714). **X**

- (c) An act done by a party with the view of defeating a claim made against him does not estop him from disputing afterwards the validity of that act. *Per Markby, J.*, in 13 M.I.A. 588, cited in 11 B. 708 (715). **Y**

- (d) The Courts refuse to aid a violation of the Common Law rule against fraud. 11 B. 708 (715). See Kerr on Fraud, p. 307, cited in 11 B. 708 (715). **Z**

- (e) Although when “a contract or deed is made for an illegal or immoral purpose, a defendant against whom it is sought to be enforced may, not for his own sake, but, on grounds of general policy, show the turpitude of both himself and the plaintiff, it is otherwise when a decree has been obtained by the fraud and collusion of both the parties. *Holman v. Johnson*, Cowpor, 343, 6 B. 703, cited in 18 M. 378 (385). **A**

- (f) There is a great preponderance of authority in support of the proposition, that, in a case where a voluntary deed is made without the knowledge of the grantee, when it is made for a special purpose for which it was never required to be made use of, and when it has been kept in the hands of the grantor without ever being acted on, a Court of Equity will not relieve upon it. *Cecil v. Butcher*, 2 Jac. and W. 565 at pp. 573, 574, 578, cited in 11 B. 708 (717). **B**

(11) Persons other than parties to the suit, how far bound by decree obtained by fraud—Such persons classified.

- (i) Persons other than parties to a suit in which a decree or judgment has been obtained may be divided into three classes with reference to their position as affected by such judgment. 6 B. 708 (709). **C**

- (ii) The three classes of persons other than parties to the suit are :—

- (a) Persons who, in the language of Civil Procedure Code (X of 1877), S. 13, claim under the parties to the former suit or, in the language of English law, *privies* to those parties. 6 B. 708 (709). **D**

N.B. 1.—Privies are, according to Coke, of three kinds :—

Privies of blood, Privies of estate, Privies in law. *Whittingham's case*, Coke's Rep., Part VII, 42-b (Vol. IV, p. 224, ed. by Thomas and Fraser), cited in 6 B. 703 (709). **E**

N.B. 2.—In Wharton's Law Lexicon, p. 764, there is six-fold division of privies.

- (i) Privies in blood; (ii) Privies in representation, the executor or administrator to his testator or intestate; (iii) Privies in estate; (iv) Privies in respect of contracts; (v) Privies in respect of estate and contract; (vi) Privies in law. See 6 B. 703 (709). **F**

2.—“Or was obtained by fraud.”—(Continued).

(b) Persons who though not claiming under the parties to the former suit were represented by them therein; such as, persons interested in the estate of a testator or intestate in relation to the executor or administrator 6 B. 703 (709). (

(c) Strangers, neither privies to nor represented by the parties to the former suit. 6 B. 703 (710). F

(12) Effect of fraudulent decree on each of the above three classes of persons not parties to the suit.

(a) In the first place the judgment may be an honest one, obtained in a suit conducted with good faith on the part of both plaintiff and defendant. In such a case the previous judgment is clearly binding both on class (a) and class (b). Class (c) (strangers to the former suit) will be in no way affected by the judgment if it be *inter partes*; but if it be one *in rem* passed by a competent Court, they will be bound by and cannot controvert it. 6 B. 703 (710).

(b) In the second place the judgment may be passed in a suit really contested by the parties thereto, but may be obtained by the fraud of one of them as against the other. There has been a real battle, but a victory unfairly won. In this case again class (a) and class (b), and, as regards judgments *in rem*, class (c) are in one and the same position which is that of the parties themselves. The judgment is binding on them so long as it remains in force, but it may be impeached for fraud and set aside if the fraud is proved. 6 B. 703 (710). J

(c) In the third place the previous judgment may have been obtained by the fraud and collusion of both the parties to the former suit. In this case there has been no battle, but a sham fight. As between the parties to such a judgment it is binding. 6 B. 703 (710). K

(d) It is also binding on the privies, except, probably, when the collusive fraud has been on a provision of the law enacted for the benefit of such persons. 6 B. 703 (711). L

(e) But as regards class (b), persons represented by but not claiming through the parties to the former suit, and (where a judgment *in rem* is in question) class (c) strangers, I think, that any member of either class may, in any subsequent proceeding, whether as plaintiff or defendant, treat a previous judgment so obtained by fraud or collusion as a mere nullity, provided of course that he has clearly established the fact of the fraud and collusion. 6 B. 703 (710). M

(f) If both parties colluded, it was never known that one of them could vacate it. *Prudham v. Phillips*, 2 Ambler, 763, cited in 6 B. 703 (711). N

(g) It is not easy to reconcile all the opinions expressed in the various cases, but the general principles above laid down seem to me borne out by the authorities. See Mitford on Equity Pleadings, 5th Ed., 98 (113); 1 Daniel Chancery Practice, 5th Ed., p. 837, cited in 6 B. 703 (711). O

(h) In the case of a decree being obtained by fraud, there always was power and there still is power in the Courts of law in this country to give adequate relief. *Per James, L.J.*, in *Flower v. Lloyd*, 6 Oj. Div. 297, cited in 6 B. 703 (711). P

2. —“Or was obtained by fraud.”—(Continued).

- (i) The House of Lords have discharged its own order as having been obtained by suppression and misrepresentation. *Huffer v. Allen*, 2 L. R. Ex. 15; *Patch v. Ward*, 3 L. R. Ch. 208; *Brooke v. Lord Mostyn*, 2 De. G. J. & S. 373; *Tomney v. White*, 4 H.L. Ca. 313, all cited in 6 B. 703 (711). Q
- (j) “Although in any question decided by this House upon appeal the matter is finally settled between the litigant parties, all the commonest principles of justice compel this House, as they must compel any other tribunal, to interfere to prevent its own decisions from being made the machinery for effecting the fraud.” *Tomney v. White*, 4 H.L. Ca., 313 (334), cited in 6 B. 703 (711). R
- (k) “A collusive suit is not a real judgment, but something obtained by fraud from the Court which is not binding.” *Meddowcroft v. Huguenin*, 4 Moore P. C. 386, cited in 6 B. 703 (712). S
- (l) “A sentence may be refused the respect which would otherwise be due to it, if it can be shown, as it may be shown, that the sentence was obtained by fraud and collusion.” *Perry v. Meddowcroft*, 10 Beav. 122 (137), cited in 6 B. 703 (712). T
- (m) In one case the Court of appeal in Chancery held the appellant to be the lawful issue of a marriage which had been declared to be null and void by the Consistory Court of the Bishop of Winchester,—Turner, L.J., saying, “that this sentence, if obtained without fraud and collusion, would bind the question and establish the invalidity if the marriage was not disputed on the part of the appellants; but it was contended on their part that the sentence was obtained by fraud and collusion, and that a sentence so obtained could have no valid or binding effect. To this latter proposition I have no difficulty in assenting.” *Harrison v. Mayor of Southampton*, 4 De. G. M. and G. 137, cited in 6 B. 703 (712). U
- (n) If the decree has been obtained by fraud it shall avail nothing for or against the parties affected by it, to the prosecution of a claim or to the defence of a right. *Per Lord Brougham in The Earl of Bandon v. Beacher*, 3 Cl. and Fin. 497, cited in 6 B. 703 (712). Y
- (o) On a *scire facias* against the defendant a shareholder in a company under 7 Wm. IV and 1 Vic. C. 75, on a judgment obtained by the plaintiff in a previous action against the registered officer of the company, the Court held good a plea that “the registered officer fraudulently and deceitfully and by connivance with the plaintiff suffered the judgment in order to charge the defendant.” *Phillyson v. Earl of Egremont*, 6 Q. B. 587, cited in 6 B. 703 (713). See, also, *Fowler v. Rickerby*, 2 M. and G. 776; *Bradley v. Eyre*, 11 M. and W. 450 and *Bradley v. Urquhart*, 11 M. and W. 460, cited in 6 B. 703 (713). W
- (p) “The judgment or decree obtained by fraud upon a Court binds not such Court nor any other Court; and its nullity upon this ground, though it has not been set aside or reversed may be alleged in a collateral proceeding.” *The Queen v. Saddler's Company*, 10 H. B. Ca., p. 431, cited in 6 B. 703 (714). See, also, *Bandon v. Beacher*, 3 Cl. and Fin. 497; *Phillyson v. Earl of Egremont*, 6 Q. B. 587. X

2.—“Or was obtained by fraud.”—(Continued).

(q) There is no dispute that a stranger to a judgment against whom it is used as evidence, either as a judgment *in rem* or as a judgment relating to a public matter, may impeach it on the ground of fraud in any case in which it is so used. 27 C. 11 (23)=3 C.W.N. 660. Y

(r) Whether an innocent party would be allowed to prove in one that a judgment against him in another Court was obtained by fraud is not equally clear, as it would be in his power to apply directly to the Court which pronounced the judgment to vacate it. 27 C. 11 (27). See, also, Tay. Ev., S. 1713, cited in 27 C. 11 (27)=3 C.W.N. 660. Z

(s) It is clear that by the words of the Act, as by the English Law, a person not an actual party to the fraud may set up fraud as an answer to a decree either of an English or any foreign Court. *Cole v. Langford*, 2 Q.B. 36, cited in 23 M. 216 (219). See, also, 3 C.W.N. 660=27 C. 11; 3 C.W.N. 670=26 C. 891. A

(t) A decree fraudulently obtained may be challenged by a third party, who stands to suffer by it either in the same or in any other Court. *Ferner v. Smith*, 2 Co. p. 202; C. R. Part III, 78a; see Story Eq. Plg. Secs. 794, 426, 428 (424), cited in 11 B. 708 (713). B

(13) Fraudulent decree, how far binds legal representatives.

(a) In cases of fraud the legal representative of a party committing the fraud stands in a better position. *Mathew v. Hanbury*, 3 Vern. 187; but, see, *Ayerst v. Jenkins*, L.R. 16 Eq. 281, cited in 18 M. 378 (386). C

(b) It is a general rule that a Court of Justice will not interpose actively in favour of a party who has been *particeps criminis* in an illegal or fraudulent transaction, and this rule ordinarily applies to persons who are privies in estate. 26 A. 272 (282). D

(c) But the rule that the privy in estate cannot set aside a decree on the ground of fraud is not of general application. 26 A. 272 (283). E

(d) There are cases which form an exception to it, such as cases in which the act in which the parties concur is against the principles of morality or public policy. In such cases the Court sees the necessity of supporting the public interest, however blameable the parties themselves may be. (*Ibid*). F

(e) Cases such as marriage brokerage bonds, contracts in restraint of trade may also be given as illustrations. (*Ibid*). G

(f) The rule, which prevents a person who is a party to such contrivance from pleading the illegality of his act, ought not to hold good as against persons claiming through such party if they are the parties sought to be defrauded. *Doe Dem Williams v. Lloyd*, 5 Bing. N. C., 741, cited in 26 A. 272 (285). H

(g) In English Law if both parties to the suit collude, it was never known that one of them could vacate it. *Pruitham v. Phillips*, 2 Ambler 763, cited in 26 A. 272 (284). I

(h) Where by means of a fraud practised on the Court the owner of certain property caused a decree to be passed against himself, as defendant in a collusive suit, upholding a fictitious *waqfnamah*, by which it was intended to tie up the property in perpetuity for the benefit of the direct descendants of the *waqif*, to the exclusion of his collateral heirs, it was held on suit by such heirs to recover possession of their share by

2—"Or was obtained by fraud."—(Continued).

inheritance that the plaintiffs were not prevented from setting up the plea that the previous decree had been obtained by fraud, by the fact that the person who practised such fraud was their predecessor in title. 26 A. 272 (26 C. 891, 27 C. 11, 6 B. 703, R). J

(14) Executors allowing judgment to be passed against them by collusion with the plaintiff.

Where an executor pleads that he has no assets *ultra a judgment* which, in truth, was recovered against him upon an unjust or fictitious debt, the plaintiff (creditor) may rely that the judgment was had and obtained by fraud and connivance between the executor and the creditor (the plaintiff in the former suit); but he cannot traverse the averment that the debt for which the judgment was had, was a just and true debt. 2 Williams on Executors, 8th Ed., p. 197; 6 B. 703 (714). See, also, *Williams v. Fowler*, 1 Strange, 410; See also Williams on Executors, Vol. 2, p. 1587 and *Robinson v. Corbett*, 1 Lutw. 662. K

(15) Right of an innocent party to a decree obtained by fraud in one Court to impeach that decree in another Court of concurrent jurisdiction in a subsequent proceeding.

(a) An innocent party to a decree obtained in one Court may impeach that decree in a subsequent proceeding in another Court of concurrent jurisdiction with the Court which pronounced the decree, on the ground that such decree was obtained by fraud. 3 C.W.N. 670; 26 C. 891. L

(b) A Court can treat as a nullity a decree of another Court of concurrent jurisdiction, if such decree has been obtained by fraud. (*Ibid*). M

(c) It is clear that a guilty party would not be permitted to defeat a judgment by showing that in obtaining it he had practised an imposition on the Court. 3 C.W.N. 670 (682)=26 C. 891. N

(d) But can an innocent party who may apply directly to the Court which pronounced the judgment to vacate it apply to another Court to set it aside. The author of Taylor on Evidence suggests a doubt as to this. Tay. on Evi., 9th Ed., p. 1133, cited in 3 C.W.N. 670 (682)=26 C. 891. O

(e) A judgment or decree obtained by fraud upon a Court binds not such Court nor any other; and its nullity upon this ground, though it has not been set aside or reversed, may be alleged in a collateral proceeding. 3 C.W.N. 670 (683)=26 C. 891. P

(f) In applying this rule, it matters not whether the impeached judgment has been pronounced by an inferior tribunal or by the highest Court of judicature in the realm; but in all cases alike it is competent for every Court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud. *Shedden v. Patrick*, 1 Macq. H.L.C. 607, cited in 3 C.W.N. 670 (683); 26 C. 891. Q

(16) Decree obtained by fraud, setting aside of—High Court.

The original side of the High Court, under cl. 12 of the Letters Patent, has jurisdiction to entertain a suit to set aside, on the ground of fraud, a decree passed by any other Court of concurrent jurisdiction, where the cause of action has arisen either wholly, or, in case the leave of the Court has been first obtained, in part, within the local limits of its Ordinary Original Civil Jurisdiction. 7 O.W.N. 353=30 C. 869. (*Allen v. Macpherson*, 1 H.L. Cas. 191=5 Beav. 469, R). R

2.—“Or was obtained by fraud.”—(Concluded).

(17) Decree upon mortgage obtained by fraud and collusion—Liability of property in hands of subsequent purchaser.

Even though mortgaged property might have been purchased by a person from the mortgagor, subsequently to a decree obtained by the mortgagee in a suit upon the mortgage, the purchaser would not be precluded from showing that the mortgage-decree had been obtained by fraud and collusion, and that consequently the mortgaged property in his hands would not be liable to satisfy the decree. 12 C. 156, followed in 27 C. 11 = 3 C.W.N. 660 (13 W.R. 157 = 5 B.L.R. 321, D). S.

(18) Fraud—*Res judicata*.

(a) S. 18 of the Code of 1882 (= S. 11 of Act V of 1908) is not exhaustive of the effects of the principle of *res judicata*, but, under this section, a party to a proceeding is never disabled from showing that a judgment or order has been obtained by the adverse party by fraud. 19 B. 821 (826). [6 B. 715 and 11 B. 537 (540), H'.] T

(b) There is no question of *res judicata* if the plaintiff can prove that the decree in the former suit was obtained by fraud and collusion. 16 M. 198 (200). U

(19) Fraud—Pleading.

(a) Fraud must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts. *Davy v. Garrett*, 7 C.D. p. 489; cited in A.P. for (1908), p. 243. Y

(b) “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice.” *Wallingford v. Mutual Society*, 5 App. Cas. p. 697, cited in A.P. for (1908), p. 243. W

(c) “Any charge of fraud or misrepresentation must be pleaded with the utmost particularity.” It is only fair play between man and man that the plaintiff should know what is charged against him.” *Per Fry, J.*, in *Redgrave v. Hurd*, 20 C.B. p. 6, cited in A.P. (1908), p. 258. X

(d) “In every pleading a certain amount of detail is necessary to ensure clearness, and to prevent the other party from being taken by surprise. Pleadings are of no use unless they define clearly the questions at issue between the parties; and for this purpose each party must state his case with precision.” See the remarks of Jessel, M.R., in *Thorp v. Holdsworth*, 3 C.D. p. 639, and of Cotton, L.J., in *Speeding v. Fitzpatrick*, 38 C. D. pp. 413, 414, cited in A. P. for (1908), p. 241. Y

(e) On the other hand, the issue may be obscured by too much detail. A party who pleads with unnecessary particularity may thereby fetter his hand at the trial. *James v. Smith*, (1891) 1 Ch. 384, cited in A.P. for (1908), p. 241. Z

(f) By such procedure he may lay on himself an increased burden of proof. *West v. Baxendale*, 9 C.B. 141, cited in A.P. for (1908), p. 241. A

(20) Fraud—Burden of proof.

(a) It is an elementary principle that a person who charges another with fraud must himself prove the fraud. 21 C. 612 (621). B.

(b) And it is very certain that the plaintiff is not relieved from this obligation because the defendant has himself told an untrue story. (*Ibid*). C

3.—“*Or collusion.*”(1) **Collusion—Meaning.**

(a) Collusion implies what is called “no battle but a sham fight.” 6 B. 703 (711), *cited and followed* in 21 B. 205 (216). **D**

(b) “It implies an agreement or arrangement that the position of the parties to the action, apparently hostile, shall be friendly, that the action and judgment which purport to be an attack on, shall in fact be a protection to, the defendant, an agreement that the reality shall be different from what is represented.” *Girdlestone v. The Brighton Aquarium Company*, 4 Ex. D. p. 112, *cited and followed* in 21 B. 205 (216). **E**

(2) **Fraud and collusion—Distinction.**

The distinction between fraud and collusion lies in this, that a party alleging fraud is to the obtaining of a decree against him is alleging matter which he could not have alleged in answer to the suit, whereas, a party charging collusion is not alleging new matter. He is endeavouring to set up a defence which might have been used in answer to the suit and that he cannot be allowed to do consistently with the principle of *res judicata*. 20 M. 333 (338). **F**

(3) **Parties, how far bound by collusive decree.**

(a) As to the parties themselves to a collusive decree, the general principle has been long received, that neither of them can escape its consequences. 10 M. 17, *cited* in 11 B. 708 (713). **G**

(b) A party to a collusive decree cannot escape its consequences. *Prudham v. Phillips*, 2 Amb. Rep. 763, 6 B. 703, and 10 M. 17, *cited* in argument in 11 B. 708 (711). **H**

(c) A plaintiff who obtains a decree by fraud cannot afterwards repudiate it when he finds it prejudicial to his interests. *Kerr on Fraud*, 327, *cited* in argument in 11 B. 708 (711). **I**

(d) There can be no fraud as against a colluding party. 11 B. 708 (720). **J**

(e) An arrangement in fraud of creditors is binding between the parties. *Bossey v. Windham*, 14 L.J.Q.B. p. 7; and *Bowes v. Foster*, 2 H. and N. 779, *cited* in argument 11 B. 703 (711). **K**

(f) It is very doubtful whether, in a case in which the maxim *in pari delicto* would otherwise apply, any exception arises by reason that the illegal purpose has not been carried out. *Kearley v. Thompson*, 24 Q.B.D. 742; 23 C. 460, *cited* in 20 M. 333 (338). **L**

N.B.—See also cases under “Parties, how far bound by fraudulent decree.”

(4) **Strangers, whether bound by collusive decree.**

Strangers, no doubt, may falsify a decree by charging collusion. *Prudham v. Phillips*, 2 Ambler 763, *cited* in 20 M. 333 (338). **M**

N.B.—For further cases, see under “Persons other than parties to suit, how far bound by decree obtained by fraud.”

3.—“*Or collusion.*”—(Continued).PROCEDURE TO SET ASIDE DECREE OBTAINED BY
FRAUD OR COLLUSION.

(1) Procedure to set aside decree obtained by fraud or collusion.

- (a) The most natural course for a party to a judgment who seeks to impeach it for fraud, is to apply to the Court which pronounced the judgment to set it aside. 27 C. 11 (23) = 3 C.W.N. 660; 13 B.L.R. App. 11, *cited* and *followed* in 10 C. 612 (615). N
- (b) But in addition to that course a party may also institute a suit directly to set aside a judgment obtained against him by fraud. 27 C. 11 (24) = 3 C.W.N. 660. O
- (c) He may also avoid its effect in any suit in which it is used as evidence, by showing in that suit that it was obtained by fraud. 27 C. 11 (24) = 3 C.W.N. 660; 24 A. 242; (26 C. 891 = 3 C.W.N. 670, F). But see 20 A. 370. P
- (d) The validity of a decree may be challenged either by an application for review or by a suit to set it aside. 2 C.L.J. 508 = 10 C.W.N. 529. Q
- (e) If a decree be obtained under such circumstances as may justify the Court in considering it as a nullity, it may, in some cases, be got rid of by motion or petition. *Morison v. Morison*, 4 My. and Cr. 215 (228), *cited* in 13 B. 137 (141). R
- (f) But if the decree be regular in itself, no error it may contain can be set right in that manner: and even if it were obtained by fraud, it can only be set aside by a bill. *Morison v. Morison*, 4 My. and Cr. 215 (228), *cited* in 13 B. 137 (141). S
- (g) As to the time within which the party should seek his remedy, see 13 B.L.R. (App.). 11. T

(2) Practice—Whether suit to set aside decree necessary.

- (a) Where a subsisting judgment, order or decree, which is relevant under Ss. 40, 41 or 42 of the Evidence Act, is set up by one party to a suit as a bar to the claim of the other party, it is not necessary for the party against whom such judgment, order or decree is set up to bring a separate suit to have the same set aside. 24 A. 242. (26 C. 891 = 3 C.W.N. 670, 27 C. 11 = 3 C.W.N. 660, F; 20 A. 370, D.) U
- (b) But it is open to such party in the same suit in which such judgment, order or decree is sought to be used against him, to show that the judgment, order or decree relied upon by the other side was delivered by a Court not competent to deliver it, was obtained by fraud or collusion. 24 A. 242; (26 C. 891 = 3 C.W.N. 670; 27 C. 11 = 3 C.W.N. 660, F; 20 A. 379, D). Y

(3) Decree on compromise out of Court—How to be set aside.

- (a) A decree on a compromise come to out of Court can be set aside in one of the two ways:—
- (i) by suit; or
- (ii) by review of the judgment sought to be set aside, which is the more regular method. 10 C. 612 (615); (6 B.L.R. 649; 13 B.L.R. App. 11, and *Gilbert v. Ender*, L.R. 9 Ch. D. 259, F.) See also 2 C.L.J. 508 = 10 C.W.N. 529; 26 C. 891 (907) = 3 C.W.N. 670; 6 C.W.N. 82. W

3.—“Or collusion.”—(Continued).

PROCEDURE TO SET ASIDE DECREE OBTAINED BY
FRAUD OR COLLUSION—(Continued).

- (b) It is competent to a person, by way of an application for review of judgment, to ask the Court to set aside the decree that has been made upon a compromise, on the ground that the compromise was entered into on his behalf without his authority. *Per Bannerjee, J.*, in 6 C.W.N. 82. X

(4) Impeachment of decree by infant—Procedure.

- (a) An infant may impeach a decree on the ground of fraud or collusion by a bill of review. *Richmond v. Tayleur*, 1 P. and W. 734, cited in 13 B. 137 (141). Y
- (b) He may also impeach it by a supplemental bill in the nature of a bill of review, or by an original bill, which is the usual course. Chambers on Jurisdiction over Infants, p. 797; *Flower v. Lloyd*, 6 Ch. Div. 297, cited in 13 B. 137 (142). Z
- (c) In an application for hearing, on the ground of a fraudulent concealment of facts, the Court held it had no jurisdiction and that the remedy was by original suit to set aside the decree as obtained by fraud. See Jessel, M.R. in *Flower v. Lloyd*, 6 Ch. Div. 297, p. 299, cited in 13 B. 137 (142). A

(5) Fraudulent withdrawal of suit by next friend—Courses open to minor.

- (a) Where a minor's next friend fraudulently withdraws the suit, without obtaining leave to bring a fresh suit, thereby imposing on the minor a statutory prohibition from bringing a fresh suit, the minor plaintiff might relieve himself from the consequences of the fraud in one of the three ways :—
- (i) by an application to the Court in the suit in which the withdrawal took place,
- (ii) by a regular suit to set aside the judgment founded upon the withdrawal, or
- (iii) by bringing a fresh suit for the same cause, and setting up the fraud as an answer to the statutory bar. 10 C. 357. See, also, 21 C. 605; 13 B. 137 (142); 12 M. 503; 26 C. 391=3 C.W.N. 670. B.
- (b) The only ways in which a minor can avoid the consequences of his guardian's compromise are those pointed out in 10 C. 357 (noted above). 12 M. 503. C.
- (c) Whether the decree sought to be set aside was obtained by fraud or not is a question of fact, which it will be for the lower appellate Court to decide. 21 C. 605; 10 C. 357. D.
- (d) If it finds that the decree was fraudulently obtained, a suit would lie to set aside the decree. But if it does not find that the decree is tainted by fraud, then the suit will not be maintainable. 21 C. 605. See, also, 10 C. 357. E.

3.—“*Or collusion.*”—(Concluded).

PROCEDURE TO SET ASIDE DECREE OBTAINED BY FRAUD OR COLLUSION—(Concluded).

(6) *Interlocutory application to set aside decree obtained by fraud—When to be made.*

(a) “When the application is made after the lapse of years, it seems to me especially desirous that the matter should not be dealt with as an interlocutory application, and decided on affidavits.” See Macpherson on Infants, p. 430; cited in 13 B. 137 (142). F

(b) This view is strongly supported by the observations of the Master of the Rolls in *Pratt v. Clay*, where he is clearly of opinion that an original bill is the proper course, unless the application is made immediately. See Macpherson on Infants, p. 430. See also Simpson on Infants; Daniell’s Chancery Practice; 10 C. 357; *Pratt v. Clay*, cited in 13 B. 137 (141). G

(7) *Negligence.*

Fraud and negligence are on the same footing, the plaintiff has the same relief in case of negligence as in case of fraud. 22 C. 8. H

(8) *Effect of fraudulent decree as against party until set aside by proper procedure.*

When there is a subsisting decree in a previous suit, which, as regards the subject-matter of a subsequent suit, would take effect as *res judicata*, it is not open to the party whose rights are affected by such decree, to question in the subsequent suit, the validity of such decree, though it might have been open to such party in a separate suit to get the decree set aside. 20 A. 370 (373). (13 B. 137, R.) But see also 24 A. 242 (245). I

N.B. 1.—But it must be noted that, in the above case, the provisions of S. 44 of the Evidence Act were not brought to the notice of the learned Judges who decided it. 24 A. 242 (245). J

N.B. 2.—Nor is there in the report any reference to this section. 24 A. 242 (245). K

Opinions of third persons, when relevant.

45. When the Court has to form an opinion upon a point of foreign law², or of science³ or art⁴, or as to identity of handwriting⁵ or finger impressions⁶, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions are relevant facts. Such persons are called experts.

Illustrations.

(a) The question is, whether the death of A was caused by poison.

The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant.

(b) The question is, whether A, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.

(c) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.

The opinions of experts on the question whether the two documents were written by the same person or by different persons are relevant.

(Notes).

1.—“*Opinions of experts.*”

(1) Heading to the section “*Opinions of third persons.*”

“The heading to this section speaks of ‘third persons.’ I am not sure who are the other two.” Mark Ev., p. 40. L

(2) Scope and explanation of Ss. 45 to 50.

“The opinion of a competent person is always relevant, and would be admissible under Ss. 7 and 11. But, as in the case of ‘hearsay,’ there is an unexpressed rule forbidding its admission. The rule may be stated as follows.—

No one called as a witness is allowed to express an opinion that a fact which is being inquired into exists. he can only give an account of his own sensations with regard to it.

There is not the least doubt that this rule, though it nowhere appears in the Act, exists in India, and Ss. 45–50 are exceptions to it.” Mark Ev., p. 40. M

(3) General rule as to exclusion of opinion evidence.

(a) As a general rule opinion evidence is not admissible in proof of material facts. The ground of this exclusion is sometimes stated to be that such evidence partakes of the nature of hearsay. *Per* Parke, B. in *Wright v. Tatham*, 7 A. and E. 385-9; *Philp. Ev.*, 4th Ed., p. 353; *Wigm. Ev.*, 5th Ed., S. 1919, p. 2553; *Ros. Cr. Ev.*, 13th Ed., p. 121. N

(b) Another ground on which such evidence is rejected is that opinions, “in so far as they may be founded on no evidence, or illegal evidence, are worthless, and in so far as they may be founded on legal evidence, tend to usurp the functions of the tribunal whose province alone it is to draw conclusions of law or fact.” *Best Ev.*, S. 511; *Powell*, 7th Ed., p. 91; *Philp. Ev.*, 4th Ed., p. 353. O

(c) The principle on which opinion evidence is generally excluded is simply that such evidence is superfluous. “The true principle of exclusion of such evidence is not one of testimonial qualifications, but is one of auxiliary policy.” *Wigm. Ev.*, 5th Ed., S. 1918, p. 2549. P

(d) “It is opinion which, if rightly formed, could only be drawn from the same premises from which the Court and the jury were to determine the cause; and therefore it is improper and irrelevant in the mouth of a witness.” *Per* Mansfield, L.C.J., in *Carter v. Boehm*, 3 Burr. (1905), 1918; *Wigm. Ev.*, 5th Ed., S. 1918, p. 2550. Q

(e) “It is an elementary rule that, where the Court or jury can make their own deductions, they shall not be made by those testifying. In all cases, therefore, where it is possible to inform the jury fully enough to enable them to dispense with the opinions or deductions of witnesses from things noticed by themselves or described by others, such opinions or deductions should not usually be received.” *Per* Campbell, J., in *Evans v. People*, 12 Mich. 35; *Wigm. Ev.*, 5th Ed., S. 1918, p. 2551. R

1.—“Opinions of experts.”—(Continued).

- (f) “It is a general rule that a witness cannot be allowed to express an opinion upon the exact question which the jury are required to decide.” *Per Elliot, J.*, in *Yost v. Conroy*, 92 Ind. 471; Wigm. Ev., 05 Ed., S. 1921, p. 2556. **S**
- (g) “The witness is not to substitute his opinion for that of the jury.” *Phillips v. Kingfield*, 19 Me. 379; Wigm. Ev., 05 Ed., S. 1921, p. 2556. **T**
- (h) “The use of witnesses being to inform the tribunal respecting facts, their opinions are not in general receivable as evidence. If the opinions offered by experts are founded on no evidence, or on illegal evidence, they ought not to be listened to; if founded on legal evidence, that evidence ought to be laid before the jury, whom the law presumes to be at least as capable as the witnesses of drawing from them any inferences that justice may require.” *Peake Ev.*, 5th Ed., 195, Ph. and Am. Ev. 899; 1 *Phill. Ev.*, 10th Ed., 520; 1 *Greenl. Ev.*, 7th Ed., S. 440; 3 *Burr.* 1918; 5 B. and Ad. 846 (847), *Heinec. ad.*, Pand. pars. 4, S. 144; *Best Ev.*, 9th Ed., S. 511, p. 426. **U**
- (i) “It is no satisfaction for a witness to say that he *thinks or persuadeth himself*, and this for two reasons. First, because the Judge is to give an absolute sentence, and for this ought to have a more sure ground than *thinking*. Secondly, the witness cannot be sued for perjury.” *Dyer*, 53 h.pl. 11, in *Marg. Ed.* 1688; *Best Ev.*, 9th Ed., S. 511, p. 426. But see also *R. v. Pedley*, 1 *Lea. C. C.* 325; *Folkes v. Chadd*, 3 *Doug.* 157, *Miller's case*, 3 *Wills.* 427; *Tay. Ev.*, 10th Ed., S. 1416, p. 1021. **Y**
- (j) “When it is said that opinion evidence is generally excluded what is meant is that a witness is not permitted to substitute his judgment for that of the Judge on facts reported by himself or by another witness.” *Cun. Ev.*, 11th Ed., p. 122. **W**

(4) This section embodies an exception to the above rule.

- (a) This section is an exception to the rule as regards the exclusion of opinion evidence. That rule, being based on the presumption that the tribunal is at least as capable of forming a judgment on the facts as the witness, it follows that when there are circumstances that rebut such a presumption, the rule naturally gives way. Thus, “the opinion of witnesses possessing peculiar skill is admissible whenever the subject-matter of the inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance; in other words, when it so far partakes of the nature of a science as to require a course of previous habit or study, in order to the attainment of a knowledge of it.” *Co. Litt.* 70 b.; *Co. Litt.* 25 a; 4 *Co.* 29 a; *Broom's Maxims*, 6th Ed., 825; *per Lord Ellenborough*, *Beckwith v. Sydebotham*, 1 *Camp.* 116; 10 *R.R.* 562; *Fenwick v. Bell*, 1 *C. and K.* 313; *Best Ev.*, 9th Ed., S. 513, p. 428; *Mark Ev.*, p. 40; *Tay. Ev.*, 10th Ed., S. 1418, p. 1024. **X**
- (b) “On some particular subjects, positive and direct testimony is often unattainable. In such cases, a witness is allowed to testify as to his belief or opinion, or even to draw inferences respecting the fact in question from other facts which are within his personal knowledge.” *R. v. Pedley*, 1 *Lea. C. C.* 325; *Miller's case*, 1772-3, 3 *Wils.* 427; *Folkes v. Chadd*, 3 *Doug.* 157; *Tay. Ev.*, 10th Ed., S. 1416, p. 1021; *Mark Ev.*, p. 40; *Ros. Cr. Ev.*, 13th Ed., p. 121. **Y**

1.—“*Opinions of experts.*”—(Concluded).

(5) Second exception to the rule about exclusion of opinion evidence.

(a) “Evidence of opinion is also recognised as proper, on the same ground of necessity, in cases where language is not adapted to convey those circumstances on which the judgment must be formed.” *Per* Johnson, J., in *Clark v. Baird*, 9 N.Y. 185; Wigm. Ev., 05 Ed., S. 1924. p. 2560. Z

(b) “Many cases exist in which it is impossible, by any description, however graphic, to explain things, so as to enable any one, but the witness himself, to see, or comprehend, them as they would have been seen, or comprehended, could the jury have occupied his position of observation.” *Per* Campbell, J. in *Evans v. People*, 12 Mich. 35; Wigm. Ev., 05 Ed., S. 1924, p. 2560. A

(c) “The subject matter to which the testimony relates cannot be reproduced or described to the jury precisely as it appeared to the witness at the time.” *Per* Endicott, J. in *Com. v. Sturtivant*, 117 Mass. 122; Wigm. Ev., 05 Ed., S. 1924, p. 2560. B

(d) Opinion evidence may be admitted where the facts are of such a character as to be “incapable of being presented with their proper force to any one but the observer himself, so as to enable the triers to draw a correct or intelligent conclusion from them without the aid of the judgment or opinion of the witness who has had the benefit of personal observation.” *Per* Peck, J. in *Dates v. Sharon*, 15 Vt. 481; Wigm. Ev., 05 Ed., S. 1924, p. 2560. C

(e) “Whenever the facts from which a witness received an impression are too evanescent in their nature to be recollected, or are too complicated to be separated and distinctly narrated, his impressions from these facts become evidence.” *Per* Gibson, J. in *Cornel v. Green*, 10 S. and R. 16 Wigm. Ev., 05 Ed., S. 1924, p. 2560. D

N.B.—See also under “*Opinions of unscientific witnesses, when and how receivable,*” *infra*.

(6) English and Indian Law—Difference—Questions of sanity.

“The opinion of experts only is admissible under the section as to questions of sanity. It is otherwise in England, at least in the Probate Court, where witnesses to a will may give their opinion as to the sanity of the testator.” *Tay. Ev.*, 10th Ed., S. 1416, p. 1022; Wigm. Ev., 05 Ed., S. 1936, p. 2570. E

(7) Expert, who is.

(a) A person who had studied finger impressions for five months in a training school and 13 months in the Office of the Inspector-General of Police and who had examined two or three lakhs of impressions and had himself taken thousands of impressions may be deemed an expert in comparing finger impressions. 9 C.W.N. 520 (523) = 32 C. 759 = 2 Cr. L.J. 259. F

(b) “All persons, I think, who practise a business or profession which requires them to possess a certain knowledge of the matter in hand are experts, so far as expertness is required.” *Per* Maule, J. in *Vander Donckt v. Thellusson*, 8 C.B. 112. G

(c) “Though the expert must be ‘skilled,’ by special study or experience, the fact that he has not acquired his knowledge professionally goes merely to the weight and not the admissibility of the evidence.” *R. v. Silverlock*, 2 Q.B. 766; *Phil. Ev.*, 4th Ed., p. 356.

I.—“*Opinions of experts.*”—(Continued).

(d) As to who are competent to testify on points of *foreign law*, see notes under 2.—“*Point of foreign law*,” *infra*. I

(e) As to who can testify on medical matters, see notes under 3.—“*Science*,” *infra*. J

(f) As to who are competent to testify about handwriting, see notes under 5.—“*Identity of handwriting*,” *infra*. K

(8) Who is expert—Duty of Judge to decide.

(a) It is the duty of the Judge to decide whether the skill of any person in the matter on which evidence of his opinion is offered is sufficient to entitle him to be considered as an expert. *Bristow v. Sequeville*, 6 Ex. 275; *Rouley v. L. and N.W. Railway*, L.R. 8 Ex. 221; In the goods of *Bennelli*, L.R. 1 P.D. 69; In the goods of *Dost Ali Khan*, L.R. 6 P.D. 6; Steph. Dig., Art. 49, p. 61. L

(b) This, however, is subject to the opinion of the appellate Court. (*Ibid*). M

(9) Expert evidence—Conditions of admissibility.

(a) “It is not sufficient to warrant the introduction of expert evidence that the witness may know more of the subject of inquiry and may better comprehend and appreciate it than the jury.” *Per* Earl, J, in *Ferguson v. Hubbell*, 97 N.Y. 513; Wigm. Ev., 05 Ed., S. 1922, p. 2558. N

(b) “But to warrant its introduction the subject of the inquiry must be one relating to some trade, profession, science or art in which persons instructed therein by study or experience may be supposed to have more skill and knowledge than jurors of average intelligence may be presumed generally to have.” *Per* Earl, J., in *Ferguson v. Hubbell*, 97 N.Y. 513; Wigm. Ev., 05 Ed., S. 1922, p. 2558. O

(10) Opinion evidence—Its nature and scope.

(a) “Opinions like other testimony are competent in the class of cases in which they are the best evidence, as when a mere description without opinion would generally convey a very imperfect idea of the force, meaning, and inherent evidence of the things described.” *Per* Doe, J. in *State v. Pike*, 49 N.H. 423; Wigm. Ev., 05 Ed., S. 1928, p. 2562; see also 1 B.H.C. (O.C.J.), 148 (155). P

(b) “Like other testimony, opinions are incompetent in the class of cases in which they are not the best evidence, as when they are founded on hearsay or on evidence from which the jury can form an opinion as well as the witness.” (*Ibid*). Q

(c) “The testimony of experts is of course not confined to opinion evidence; they may, and frequently do, testify to matters of fact as well.” *Phip. Ev.*, 4th Ed., p. 360. R

(d) “The Court is bound to defer to the opinion of what are called skilled witnesses upon a point where skill and experience alone render a person competent to judge.” *Wilson v. Townsend*, 3 Law Times, N.S. 352; 6 Jur. N. S. 1109; 1 Drew. and Sm. 324, cited in 1 B.H.C. (O.C.J.), 148 (155). S

1.—“*Opinions of experts.*”—(Continued).

(11) Expert evidence—Ordinary evidence—Difference.

The value of what may be called ordinary or non-expert oral evidence mainly rests on the credibility of the witness—his inclination and capacity for telling the truth; the value of expert evidence rests on the skill of the witness—the extent of his competency for forming a reliable opinion.

3 N.L.R. 1 (13).

T

(12) Impossibility of wholly excluding opinions.

(a) “It is impossible to prevent witnesses from having opinions or to frame questions and restrain answers so as to leave no inference as to what such opinions are. Whatever facts a witness states, under any form of interrogatory, are stated because he has formed an opinion in advance that they support one side or the other and prove sanity or insanity. The difficulty is inherent.” *Per* Colt, J. in 127 Mass. 423; Wigm. Ev., 5th Ed., §. 1934, p. 2569.

U

(b) “In one sense, all oral testimony as to things perceived by the senses is an expression of opinion, a statement of the impression made on the senses by the thing perceived; and when a witness does not qualify the statement of the fact by saying that he is stating his opinion about it, it is only because he feels very sure of his opinion.” *Cun. Ev.*, 11th Ed., p. 122.

Y

(c) “Thus where a witness says ‘I saw A coming along; he was drunk; he was a quarter of a mile off; there were over a hundred people there.’ It really means, ‘I saw a person coming along as to whom the impression created on my senses was that it was A; his appearance and demeanour were those of a drunken person; the distance was in my opinion a quarter of a mile; I estimate the crowd at over hundred.’” *Cun. Ev.*, 11th Ed., p. 122.

W

(d) “Such evidence is none the less admissible for what it is worth although the witness, feeling some hesitation about the correctness of the impression produced on him, qualifies his statement by using such words as ‘to the best of my belief’ or by refusing to pledge his oath.” *Cun. Ev.*, 11th Ed., p. 122.

X

(e) “When we say that we are of opinion that so and so is the case, we mean that, having exercised our judgment, we have come to this conclusion: and it is true, as has been observed, that the simplest sensations involve some judgments. Strictly, therefore, a witness not examined as an expert, but simply relating facts which have occurred, should only state the exact sensations which he felt.” *Mark Ev.*, p. 41.

Y

(13) Subjects on which expert testimony can be admitted.

(a) “The subjects to which this kind of evidence is applicable are not confined to classes and specified professions. It is applicable wherever peculiar skill and judgment, applied to a peculiar subject, are required to explain results or to trace them to their causes.” *Per* Bigot, C.B., in *M’Fadden v. Murdock*, 1 Ir. Rep. O.L. 211 (219); Wigm. Ev., 5th Ed., §. 1933, p. 2559.

Z

(b) “The true test of the admissibility of such testimony is not whether the subject-matter is common or uncommon, or whether many persons or few have some knowledge of the matter, but it is whether the witnesses

1.—“*Opinions of experts.*”—(Continued).

offered as experts have any peculiar knowledge or experience not common to the world, which renders their opinions founded on such knowledge or experience any aid to the Court or jury in determining the questions at issue.” *Per* Loomis, J., in *Taylor v. Monroe*, 48 Conn. 44; *Wigm. Ev.*, 05 Ed., S. 1923, p. 2559. A

- (c) “The subject must be one peculiar and exceptional, concerning which some explanation, such as peculiar knowledge alone can afford, is required in order to render it intelligible to the comprehension and understanding of ordinary men.” *Per* Foster, J., in *Ellingwood v. Bragg*, 52 N. H. 489; *Wigm. Ev.*, 05 Ed., S. 1923, p. 2559; see also 1 B.H.C. (O.C. J.), 148 (155). B

(14) Value of expert evidence.

- (a) Evidence of an expert should be approached with considerable care and caution specially where much depends upon such evidence. 1 C.L.J. 385 (387); 6 M.H.C. 85 (88). C

- (b) Expert evidence is generally not considered as high value, the reasons being:—

(i) That the expert is, though unwittingly, biased in favour of the side which calls him.

(ii) That there is a tendency in experts “to regard harmless facts as confirmation of preconceived opinions.”

(iii) That evidence supporting or opposing given theories can often be multiplied at will. See *Per* Lord Campbell, in *Tracy Peerage*, 10 C. and F. 191, *Tay. Ev.*, Ss. 58, 64; *Phil. Ev.*, 4th Ed., p. 357; see also 1 C.L.J. 385 (387); 6 M.H.C. 85 (88); *Best Ev.*, 9th Ed., S. 514, p. 430. D

- (c) “There is no evidence the value of which varies so immensely as the evidence of experts, and respecting which it is so difficult to lay down any rules beforehand.” *Best Ev.*, 9th Ed., S. 514, pp. 429, 430. E

- (d) “The most honest man manages to see what he thinks that he shall see.” *Per* Halloway, C.J., in 6 M.H.C. 85 (88). F

- (e) As to the value of expert evidence, the Court made the following observation:—

“What claims this witness Rafudin had to the character of an expert, does not appear. No question appears to have been asked on that subject, though without it his testimony was not properly admissible..... He commits himself to nothing whereby, should it be disproved, he would expose himself to punishment for false evidence. There is, indeed, no reason at all for suspecting him to be a dishonest witness. His qualified statements indicate veracity. But if such extremely loose and feeble evidence could be accepted as proving documents, it would be forthcoming in abundance whenever any purpose was to be served by its production. The law requires that there should at least be a profession of special qualifications on the part of a person who thus lying forward to depose to matters lying beyond common knowledge—though he need not in every case be strictly a professional expert.” 11 B. 89 (101); *Rowley v. London and North Western Railway Company*, L.R. 8 Ex. 221, cited in 11 B. 89 (101). G

I.—“*Opinions of experts.*”—(Continued).

- (f) “It would not be easy to overrate the value of the evidence given in many difficult and delicate enquiries, not only by medical men and physiologists, but learned and experienced persons in various branches of science, art and trade.” Best Ev., 9th Ed., S. 514, p. 430. **H**
- (g) “Every allowance must be made for the natural bias which witnesses usually feel in favour of causes in which they are engaged.” Best Ev., 9th Ed., S. 514, p. 430; see also 6 M.H.C. 85 (88). **I**
- (h) “Witnesses of this description are apt to presume largely on the ignorance of their hearers with respect to the subject of examination, and little dread prosecution for perjury,—an offence of which it is extremely difficult, indeed, almost impossible, to convict a person who only swears to his belief, particularly when that belief relates to scientific matters.” Best Ev., 9th Ed., S. 514, p. 430; but see *Folkes v. Chadd*, 3 Doug. 157; *R. v. Pedley*, 1 Lea. C.C. 325; Tay. Ev., 10th Ed., S. 1416, p. 1021; 11 B. 89 at p. 101. **J**
- (i) “On the other hand, however, mistakes have occasionally arisen from not attaching sufficient weight to scientific testimony. This arises chiefly where the knowledge of the tribunal and society in general are very much in arrear of the scientific knowledge of the witness.” Best Ev., 9th Ed., S. 514, p. 430. **K**
- (j) “One remarkable instance is cited by a modern author on the law of evidence. In the infancy of travelling by steam on land, a civil engineer of high reputation having deposed before a Parliamentary Committee that steam carriages might very possibly be expected to travel on rail roads at the rate of ten miles an hour, the interrogating counsel contemptuously bid him stand down, for he should ask him no more questions, and the weight of the evidence he had previously given was much impaired.” Gressl. Ev., in Eq. 369; Best Ev., 9th Ed., S. 514, p. 430. **L**
- (k) “Stephenson’s evidence, before the committee on the Liverpool and Manchester Railway Bill, was received with equal incredulity.” See Smilo’s Life of Stephenson, *in loc*; Best Ev., 9th Ed., S. 514, p. 431. **M**
- (l) “An expert is not like an ordinary witness, who hopes to get his expenses, but he is employed and paid in the sense of gain, being employed by persons who called him. Undoubtedly there is a natural bias to do something serviceable for those who employ him and adequately remunerate him.” *Per* Jessel, M.R. in *Abinger v. Ashton*, L.R., 17 Eq. 373 (374); 29 C. 32=6 C.W.N. 495 (501). **N**
- (m) In the case of an expert witness there exists a tendency to support the view which is favourable to the side which employs them so that it is difficult to get from them an independent opinion. 29 C. 32=6 C.W.N. 495 (501). **O**

(15) **Value of expert evidence—Practice—Judge and Jury.**

- (a) “The weight due to expert evidence, as well as to every other kind of evidence, is to be determined by the tribunal.” Best Ev., 9th Ed., S. 514, p. 429; Mark Ev., p. 41. **P**
- (b) “And the greatest care is always taken to narrow down the opinion to the question on which the expert has had special experience. On any other question he cannot give an opinion, but only state what he saw or heard.” Mark Ev., p. 41. **Q**

J.—“*Opinions of experts.*”—(Continued).

(c) And it is the duty of the Judge to call the attention of the jury to the fact that such evidence should be received with caution. 1 C.L.J. 385 (387). R

(d) “Where the jury accept the mere untested opinion of experts in preference to direct and positive testimony as to facts, a new trial may be granted.” *Poynton v. P.*, 37 Ir. L.T.R. 54; *Aithin v. McMeckan*, (1895) A.C. 310; *Phip. Ev.*, 4th Ed., p. 357. S

(e) As it is impossible to measure *a priori* the integrity of any witness, and equally so to determine the amount of skill which a person following a particular science, art, or trade may possess, the tribunal is under the necessity of listening to all such persons when they present themselves as witnesses.” *Best Ed.*, 9th Ed., S. 514, p. 430. T

(16) *Evils of opinion evidence.*

(a) “The possible evils of admitting opinion evidence are that such evidence lends itself towards :—

(i) “waste of time by marshalling an interminable multitude of opinions.”

(ii) and as a necessary consequence of the former, “a confusion of the real issues in the case.”

(iii) “and the possibility of forcing a verdict by mere preponderance of numbers and influential names.” *Wigm. Ev.*, 05 Ed., S. 1929, p. 2564. U

(b) “An example of this possibility for evils appears in the French trial of Captain Dreyfus and M. Zola, where the opinions of eminent generals were invoked to overwhelm the tribunal.” *Wigm. Ev.*, 05 Ed., S. 1929, p. 2564. Y

(16-A) *Matters affecting the credit of the expert.*

The following may be elicited in cross-examination as affecting the credit of the expert's testimony :—

(i) The state of the expert's mind showing that he was not in a fit state to form a proper opinion,

(ii) The state of his health affecting him similarly,

(iii) His interest in the cause,

(iv) Corruption,

(v) His having expressed an opposite opinion at other times, *etc.* *Alcock v. Royal Exchange Assur.*, 13 Q.B. 292; *Phip. Ev.*, 4th Ed., p. 357. W

(17) *Expert—Liability for perjury.*

“A man who swears positively to a belief or a fact which he knows to be untrue, is liable to be convicted of perjury.” *R. v. Pedley*, 1 Lea. C.C. 325; *Folkes v. Chadd*, 3 Doug. 167; *Miller's case*, 3 Wils. 427; *Tay. Ev.*, 10th Ed., S. 1416, p. 1021. But see *Dyer*, 53 b. pl. 11; *Best Ev.*, 9th Ed., S. 511, p. 426; 11 B. 89 (101). X

(18) *Expert evidence, on what materials to be based.*

(a) “An expert may give his opinions :—

(1) upon facts proved either by himself;

(2) facts proved by other witnesses in his hearing at the trial; Y

1.—“*Opinions of experts.*”—(Continued).

- (3) or upon hypothesis based upon evidence.” Phip. Ev., 4th Ed., p. 361; see also *R. v. Wright*, R. and R. 456; *R. v. Searle*, 1 M. and Rob. 75; Tay. Ev., 10th Ed., S. 1421, p. 1026; Ros. Cr. Ev., 13th Ed., p. 122; 9 C. 455 (461) = 11 C.L.R. 569. Z
- (b) “But the opinion of the expert is not admissible upon materials which are not before the jury, or which have been merely reported to him by hearsay.” *R. v. Staunton*, Times, Sept. 26, 1877; Wills, Circ. Ev., 16th Ed., pp. 140-141; Tidy’s Legal Medicine, 8, 17, 25; *Gardner-Pearage*, Le Merchant, 85-90; *Wright v. Tatham*, 5 C. and F. 670, 690; Phip. Ev., 4th Ed., p. 361. A
- (c) “Opinions as to facts stated out of Court, or hypothetical questions having no foundation in the evidence, have been excluded from evidence.” Greenleaf, 14th Ed., S. 440, note (b) to p. 531; Chamberlayne’s Best, note (f) to S. 511; Phip. Ev., 4th Ed., p. 361. B
- (d) “Expert evidence is admissible, not only where such evidence rests on the personal observation of the expert himself, and on facts within his own knowledge, but even where such evidence is merely founded on the case as proved by other witnesses at the trial.” *R. v. Wright*, R. and R. 456; *R. v. Searle*, 1 M. and Rob. 75; *Fennick v. Bell*, 1 C. and K. 313; *Beckwith v. Sydebotham*, 1 Camp. 117; *Collett v. Collett*, 1 Court. 687; Tay. Ev., 10th Ed., S. 1421, p. 1026; Ros. Cr. Ev., 13th Ed., p. 122. C

(19) Opinion evidence—Form of question.

- (a) The general rule as to expert evidence is that the questions must be put to the witness hypothetically (*i.e.*) put in this way:—“Assuming that such and such facts to be true, what is your opinion on the matter?” 9 C. 455 (461) = 11 C.L.R. 569. D
- (b) The form of question to be put to a medical witness is this:—“Assuming an injury of such and such a kind to have been inflicted, what is your opinion as to the nature of the weapon by which it was possibly or probably inflicted?” 9 C. 455 (461) = 11 C.L.R. 569. E
- (c) The facts thus hypothetically stated to the witness would be the facts which the evidence of the other witnesses in the case attempted to prove, and as to which it would be for the jury to find whether they had been proved or not. 9 C. 455 (461) = 11 C.L.R. 569. F
- (d) “It is settled law that an expert may not be asked purely speculative hypothetical questions having no foundation in the evidence (*i.e.*) before the expert witness is entitled to give evidence on the hypothesis, a sufficient foundation for it must be laid by due evidence *abundant* of the facts assumed.” *Storey v. Union Bank*, 34 Ala. 687; *Bush v. Long Island R. Co.*, 10 N.Y. App. Div. 535, cited in 10 Bom. L.R. 907 (913). G
- (e) A question which requires the witness to draw a conclusion of fact should be excluded. Rogers’ Expert Testimony, 60–64; A.A. and W. Ev., 4th Ed., p. 307. H
- (f) “A question should not be so framed as to permit the witness to roam through the evidence for himself, and gather the facts as he may consider them to be proved and then state its conclusions concerning them.” *Dols v. Morris*, 17 N.Y. Sup. Ct. 302. I

I.—“*Opinions of experts.*”—(Continued).

(19) “Although on questions of professional skill an expert may state in general form what would be the proper course to pursue under the circumstances proved, yet he may not be asked what his own conduct would have been under such circumstances.” *Sills v. Brown*, 9 O. and P. 601 (604); *Chapman v. Walton*, 10 Bing. 57; *Rick v. Pierpoint*, 3 F. and F. 35; *Collier v. Simpson*, 5 C. and P. 78; *Brethton v. Longman*, 2 Stark. 258; *Hatch v. Lewis*, 2 F. and F. 467 (475); *Ramadge v. Ryan*, 9 Bing. 333; *Philp. Ev.*, 4th Ed., p. 361. J

N.B.—For further cases see under “Limitations of expert evidence,” *infra*.

(20) Hypothetical question, what is a.

“A hypothetical question is a question which assumes as a hypothesis, the truth of the facts given in evidence by a particular party and embraced in the question. Such a question may be asked either simply as to facts given in evidence or as to relevant hypothesis arising on these facts, i.e., facts given in evidence.” *Rogers’ Expert Testimony*, 64 68; *A. A. and W. Ev.*, 4th Ed., p. 306. K

(21) Proper form of hypothetical question.

The—is this:—“If certain facts assumed by the question to be established should be found true by the jury what would be your opinion upon the facts thus found true, as to, &c.” *Per Shaw, C.J.*, in *Woodbury v. Obear*, 7 Gray, 467. L

(22) Example of an hypothetical question.

The following is an example of a hypothetical question which was propounded by the defence to the experts in the trial of Guiteau charged with shooting President Garfield (cited in *Rogers’ Expert Testimony*, 73): “Assuming it to be a fact that there was a strong hereditary taint of insanity in the blood of the prisoner at the bar; also that at or about the age of thirty-four years his own mind was so much deranged that he was a fit subject to be sent to an insane asylum; also that at different times after that date during the next succeeding five years, he manifested such decided symptoms of insanity, without simulation, that many different persons conversing with him and observing his conduct, believed him to be insane; also that in or about the month of June 1881, at or about the expiration of said term of five years, he became demented by the idea that he was inspired of God to remove by death the President of the United States; also that he acted on what he believed to be such inspiration; and, as he believed, so be in accordance with the Divine Will in the preparation for and in the accomplishment of such a purpose; also that he committed the act of shooting the President under what he believed to be a Divine Command which he was not at liberty to disobey, and which belief made out a conviction, which controlled his conscience, and overpowered his will, as to that act, so that he could not resist the mental pressure upon him; also that immediately after the shooting, he appeared calm and as if relieved by the performance of a great duty; also that there was no other adequate motive for the act than the conviction that he was executing the Divine Will for the good of his country—assuming all of these propositions to be true, state whether, in your opinion, the prisoner was sane or insane at the time of shooting President Garfield.” *Lawson’s Expert Ev.*, Rule 42, p. 221; *A. A. and W. Ev.*, 4th Ed., p. 305. M

1.—“*Opinions of experts.*”—(Continued).

(23) How far an expert may be asked the very question which the jury have to decide—Practice.

“The cases are conflicting as to—; but the weight of authority appears to be as follows:—

- (i) “Where the issue involves other elements besides the purely scientific, the expert must confine himself to the latter and must not give his opinion upon the legal or general merits of the case.” *Seed v. Higgins*, 8 H.L. Cas. p. 566; *Jameson v. Drinkald*, 12 Moore C.P. 148; *Campbell v. Richards*, 5 B. and Ad. 840; *Phip. Ev.*, 4th Ed., p. 361; see also *Ros. Cr. Ev.*, 13th Ed., p. 122. N
- (ii) “Where the issue is substantially one of science or skill merely, the expert may, if he has himself observed the facts, be asked the very question which the jury have to decide.” *Folkes v. Chadd*, 3 Doug. 157; *R. v. Layton*, 4 Cox. 149; *R. v. Richards*, 1 F. and F. 87; *Martin v. Johnston*, 1 F. and F. 122; *Lovatt v. Tribe*, 3 F. and F. 9; *Tay. Ev.*, S. 1411; *Phip. Ev.*, 4th Ed., p. 361. O
- (iii) “If, however, his opinion is based merely upon facts proved by others, such a question is improper, for it practically asks him to determine the truth of their testimony, as well as to give an opinion upon it.” *R. v. M’Naughten*, 10 C. and F. 200; *R. v. Francis*, 4 Cox. 57; *Phip. Ev.*, 4th Ed., p. 361; *Tay. Ev.*, 10th Ed., S. 1421, p. 1026; *R. v. Wright*, Russ. and Ry. 456; *Ros. Cr. Ev.*, 13th Ed., p. 122. P
- (iv) “But the correct course is to put such facts to himself hypothetically, not *en bloc*.” *R. v. Ferrers*, 19 How. St. Tr. pp. 942–944; *Phip. Ev.*, 4th Ed., p. 361. Q
- (v) “Where, however, the facts are not in dispute, it has been said that the former question may be put as a matter of convenience, though not as of right.” *R. v. M’Naughten*, 10 C. and F. 200; though this dictum was disapproved in *R. v. Francis*, 4 Cox. 57; *Phip. Ev.*, 4th Ed., p. 361. R

(24) Opinion evidence—Form of answer.

- (a) In giving out his opinion evidence as to finger impressions, the expert can only say that he was *of opinion* that the two impressions were made by the same finger. And with that opinion the boundary limit of his expert evidence is reached. He cannot go on, and assert his mere opinion or belief, as if it were a fact within his knowledge. In this respect an expert witness is in an entirely different position from a direct witness of fact. 3 N.L.R. 1 (13). But see also *Hardy v. Merrill*, cited *infra*; *Wigm. Ev.*, 5th Ed., S. 1934, p. 2569. S
- (b) Thus again, medical men cannot depose to the precise age of a person, or to the precise weapon or kind of weapon with which a particular injury was inflicted, as if these were facts within their personal knowledge, and not merely opinions based on scientific examination of the person or injury concerned. 3 N.L.R. 1 (14); and *Ibid.*. T
- (c) “The selection of the phraseology in which opinion evidence may be expressed, and that in which it cannot be uttered, depends on no legal principle, but on the mere whim of the Court. An arbitrary and senseless choice or rejection of terms in which to express an admis-

I.—“*Opinions of experts.*”—(Continued).

sible opinion is mere, sheer logomachy, a waste of precious time given us for better purposes, a verbal quibble unworthy of the law and calculated to bring it into contempt.” *Per* Foster, C.J., in *Hardy v. Merrill*, 56 N.H. 250; Wigm. Ev., 05 Ed., S. 1934, p. 2569; but see also 13 N.L.R. 1 (13) *cited, supra*. U

(25) Mode in which opinion evidence is to be given—Danger of excessive refinement.

“The Court would not allow Paul Schlegel to be asked whether the testator had capacity ‘to understand a will.’ The witness was allowed to answer, and did answer that he was ‘fit to make a will.’ We think that throughout this cause there was too much refinement of distinctions in raising and ruling questions of evidence on the part both of Counsel and of Court; and here is a remarkable instance of excessive nicety. What is the distinction between that mental condition which is competent to understand a will, and that which is fit to make a will? If a microscopic vision could detect a distinction, who has scales nice enough to tell how much it would weigh in the jury-box? The plaintiffs in error undertake to convince us that their cause was damaged by the witness testifying that the testator was fit to make a will, instead of testifying that he was competent to understand a will. We do not think the error, if error there was, did them any damage. We do not suppose the jury would have been swayed a hair’s breadth by one form of answer, more than by the other.” *Per* Woodward, J. in *Daniel v. Daniel*, 89 Pa. 191 (211); Wigm. Ev., 05 Ed., S. 1958, pp. 2603, 2604. Y

(26) Limitations of expert evidence.

(a) An expert cannot be asked his opinion respecting the very point which the jury are to determine.” *M’Naughten’s case*, 10 Cl. and Fin. 200; Tay. Ev., 10th Ed., S. 1421, p. 1026; *R. v. Wright*, Russ. and Ry. 456; Ros. Cr. Ev., 13th Ed., p. 122; see also Phip. Ev., 4th Ed., p. 361. W

(b) “Thus where the question was whether a particular act, for which a prisoner is on his trial, was an act of insanity, a medical man, conversant with that disease, who knows nothing of the facts, but has simply heard the trial, cannot be broadly asked his opinion as to the state of the prisoner’s mind at the time of the commission of the alleged crime; because, such a question involves the determination of the truth of the facts deposed to, as well as the scientific inference from those facts.” (*Ibid.*). X

(c) “The proper form of putting the question is to ask the witness whether, assuming such and such facts, the prisoner was sane or insane?” *R. v. Wright*, R. and R. 456; Tay. Ev., 10th Ed., S. 1421, p. 1026; 9 C. 455 (461); 11 C.L.R. 569; 15 C. 589. Y

(d) “It is then for the jury to say whether the assumed facts exist or not.” (*Ibid.*). Z

(e) “On a question of navigation, a nautical witness cannot be asked whether, after having heard the evidence, he thinks the ship was properly or improperly navigated.” *Sills v. Brown*, 9 C. P. 601; *Jameson v. Drinkald*, 12 Moo. (C.P.) 148; Tay. Ev., 10th Ed., S. 1421, p. 1026. A

I.—“*Opinions of experts.*”—(Concluded).

- (f) “The proper form is to ask his opinion on the subject, assuming the facts stated in evidence to be true.” *Fenwick v. Bell*, 1 C. and K. 312; *Malton v. Nesbit*, 1 C. and P. 70; Tay. Ev., 10th Ed., S. 1421, p. 1026. **B**
- (g) “Again, upon a question of seaworthiness, the proper form of putting the question is to ask the expert, assuming a ship to be in a state in which the one in question was sworn to be, whether she could have been seaworthy when the policy was effected.” *Beckwith v. Sydebotham*, 1 Camp. 117; *Thornton v. Roy Ex. Ass. Co.*, Pea. R. 25; Tay. Ev., 10th Ed., S. 1421, p. 1027. **C**

(27) Reference to text-books by experts.

- (a) “Where experts are called to pronounce their opinions on scientific questions, they may refresh their memory by referring to professional treatises.” Tay. Ev., 10th Ed., S. 1422, p. 1027; see also S. 159, *infra*; *Sussex Peerage*, 11 Cl. and Fin. at pp. 114-7; 8 Jur. 793; 65 R. and R. 11; Ros. Cr. Ev., 13th Ed., p. 122; Phip. Ev., 4th Ed., p. 362. **D**
- (b) “An expert may refer to text-books to refresh his memory or to correct or to confirm his opinion.” Phip. Ev., 4th Ed., p. 362. **E**
- (c) But, such treatises are, under the law of England, admissible in evidence. *Sussex Peerage*, 11 Cl. and Fin. at pp. 114-7; Ros. Cr. Ev., 13th Ed., p. 122; *Concha v. Murielta*, 40 Ch. D. 543; Phip. Ev., 4th Ed., p. 362. But see S. 38, *supra*. **F**
- (d) If, however, the witness describes particular passages as accurately representing his views, they may be read as part of his own testimony.” *Nelson v. Bridport*, 8 Beav. 527; *Concha v. Murielta*, 40 Ch. D. 543; Phip. Ev., 4th Ed., p. 362. **G**
- (e) “It is not open to counsel to read such books, etc., to the jury as part of his address.” *R. v. Crouch*, 1 Cox. 94; *R. v. Taylor*, 9 Cox. 77; Phip. Ev., 4th Ed., p. 362. **H**
- (f) “Thus an actuary was allowed to refer to ‘the Carlisle Tables,’ when called upon to give evidence respecting the value of an annuity on joint lives.” *Howley v. Lond. and N.W. Rail. Co.*, L.R. 8 Ex. 221; Tay. Ev., 10th Ed., S. 1422, p. 1027. **I**
- (g) “An architect may be permitted to refresh his memory with any price list of acknowledged correctness.” *Collier v. Simpson*, 5 C. and P. 74; Tay. Ev., 10th Ed., S. 1422, p. 1027. **J**
- (h) “So also the valuer may refer to price lists.” *Collier v. Simpson*, 5 C. and P. 74; Tay. Ev., 10th Ed., S. 1422; Phip. Ev., 4th Ed., p. 362. **K**
- (i) “A physician or doctor may refer to treatises which he considers to be works of authority.” *Collier v. Simpson*, 5 C. and P. 74; Tay. Ev., 10th Ed., S. 1422, p. 1027. **L**
- (j) “A medical man may, in explanation of the grounds of his opinion, state that his judgment was, in part, founded on the writings of his professional brethren.” (*Ibid*). **M**
- (k) “Also a foreign lawyer may refer to Codes, text writers, and reports.” *Cocks v. Perday*, 2 C. and K. 269; Tay. Ev., S. 1422; Phip. Ev., 4th Ed., p. 362. **N**

N.B.—For further notes see S. 51 and notes, *infra*.

2.—“Point of foreign law.”

(1) Proof of foreign law.

- (a) “Law being a science, the existence and meaning of the laws both written and unwritten, and of the usages and customs of foreign States, *may*, and indeed *must*, be proved by calling professional or official persons to give their opinions on the subject.” See Tay. Ev., 10th Ed., ss. 5, 9, 48 and 1423; but see also S. 38, *supra*. O
- (b) “Foreign unwritten laws, customs, usages may be proved, and, indeed, must ordinarily be proved, by parol evidence. The usual course is to make such proof by the testimony of competent witnesses instructed in the laws, customs, and usages under oath.” Story on the Conflict of Laws, 8th Ed., S. 642; Ros. Cr. Ev., 13th Ed., p. 122; but see also S. 38, *supra*. P
- (c) “Scottish Marriage Law has been so proved in English Courts.” *Dalrymple v. Dalrymple*, 2 Hag. Cons. 54; Tay. Ev., 10th Ed., S. 1423, p. 1027. J

(2) Foreign law—By whom can be proved.

(a) The following have been held competent to testify as experts in matters of foreign law:—

- (i) A foreign Judge, barrister or solicitor practising in the Courts of his own country. Tay. Ev., S. 1425; *Bristow v. Sequeville*, 5 Ex. 275; Phip. Ev., 4th Ed., p. 356. R
- (ii) An English barrister, who was familiar with, and had been employed by the Colonial Office in reference to questions concerning *Maltese law*. *Wilson v. W.*, (1903) P. 157; Phip. Ev., 4th Ed., p. 356. S
- (b) The following persons though not lawyers were held to be competent witnesses in matters of foreign law:—
- (i) A Governor-General of Hong Kong, as to the marriage law of that place. *Cooper-King v. C. K.*, (1900) P. 65; Phip. Ev., 4th Ed., p. 356. T
- (ii) A Colonial Attorney-general, as to the law of his Colony. Per Lord Brougham, in *Sussex Peerage*, 11 C. and F. 85; Phip. Ev., 4th Ed., p. 356. U
- (iii) A Russian, who was secretary to his father (who was a lawyer), as to a point of Russian law. *Carlin v. C.*, Times, March 14, 1906; Phip. Ev., 4th Ed., p. 356. Y
- (iv) A Roman Catholic bishop holding the office of coadjutor to a vicar apostolic in England, as to Roman marriage law. *Sussex Peerage*, 11 C. and F. 85; Phip. Ev., 4th Ed., p. 356. W
- (v) A French vice-consul in England, as to the commercial law of France. *Lacon v. Higgins*, 3 Stark 178; Phip. Ev., 4th Ed., p. 357. X
- (vi) A Persian ambassador, as to Persian law. *Re Dost Ali Khan*, 6 P.D. 6; Phip. Ev., 4th Ed., p. 357. Y
- (vii) A Belgian merchant and commissioner of stocks and bills of exchange, as to the British law affecting such bills. *Vander Doncket v. Thellusson*, 8 C. B. 812; Phip. Ev., 4th Ed., p. 357. Z
- (viii) A Chilean notary public as to Chilean Testamentary law. *Re Whitelegg*, (1899), P. 267; Phip. Ev., 4th Ed., p. 357. A
- (ix) An English merchant trading in Chili, as to the fact that a marriage register is required to be kept by Chilean law. *Abbott v. Abbott*, 29 L.J.P.M. and A. 157; Phip. Ev., 4th Ed., p. 357. B

2.—“Point of foreign law.”—(Continued).

(c) The following persons were held incompetent to prove foreign law:—

- (i) A *jurisconsult at the Prussian embassy*, who had no practical acquaintance with such law, but has studied it at a Saxon University, is not competent to prove Prussian law. *Bristow v. Sequeville*, 5 Ex. 275; Phip. Ev., 4th Ed., p. 357. **C**
- (ii) *Canadian Law* cannot be proved by an *English barrister* practising before the Privy Council in appeals from Canada. *Cartwright v. C.*, 26 W.R. 681 (English); Phip. Ev., 4th Ed., p. 357. **D**
- (iii) A *Scotch Roman Catholic priest* cannot prove Scotch law. *R. v. Savage*, 13 Cox. 178; Phip. Ev., 4th Ed., p. 357. **E**
- (iv) A *Scotch tradesman* cannot prove Scotch law. *R. v. Drampton*, 10 East, p. 287; Phip. Ev., 4th Ed., p. 357. **F**
- (v) A *gentleman merely residing in Scotland* cannot prove Scotch law. *Sussex Peerage*, 11 C. and P. 85, overruling *R. v. Dent*, 1 C. and K. 97; Phip. Ev., 4th Ed., p. 357. **G**

(3) Foreign law—English and Indian law—Difference.

In England, on a point of foreign law, the Court is not of itself at liberty to consult foreign law books, except so far as they are introduced by counsel in their argument. Foreign laws must be proved by calling an official or professional person to give an opinion about them. Under the English law opinions of experts are receivable on points of foreign law. But it is not necessary to call them, as, by S. 38, statements of law in law books are relevant; and by S. 57 the Court may refer to such books for information. *Vide* note to S. 38, *supra*. **H**

(4) Points on which opinions of lawyers are not admissible.

- (a) “The opinions of lawyers are not admissible to explain technical legal terms.” Phip. Ev., 4th Ed., p. 360. **I**
- (b) “Nor are such opinions admissible to prove general matters of law.” Phip. Ev., 4th Ed., p. 360. **J**
- (c) “But such opinions may be admissible to prove the proper cost of a particular legal proceeding.” *Gilligan v. National Bank*, 110 L.T. Jo. 60, Ir.; Phip. Ev., 4th Ed., p. 360. **K**
- (d) Neither experts nor ordinary witnesses may give their opinions upon matters of legal or moral obligation, or as to the manner in which other person would probably have been influenced had the parties acted in one way rather than another.” *Per* Lord Denman, in *Campbell v. Richards*, 5 B. and Ad. 840; Phip. Ev., 4th Ed., p. 360. **L**

(5) Foreign documents, construction of—Practice.

“In construing foreign documents the Court will generally require from experts the translation of the language, an explanation of the peculiar terms employed, and information as to any foreign law or rule of construction applicable to the case.” *Di Sora v. Phillips*, 10 H.L.C. 624; *Stearine Co. v. Heintzman*, 17 C.B.N.S. 56; *Chatenay v. Brazilian Co.*, 1 Q.B. 79; *Re Cliff*, 2 Ch. 229; Phip. Ev., 4th Ed., p. 360. **M**

2.—“Point of foreign law.”—(Concluded).

(6) Evidence of experts on questions of Hindu Law.

(a) The—, is not admissible; because Hindu Law is not foreign Law. 16 M.L.J. 178 (237)=29 M. 437. N

(b) Thus, it is wrong to allow experts to give evidence as to the meaning of the various texts in Hindu Law and as to the correct view on a disputed point of Hindu Law. 16 M.L.J. 178 (237)=29 M. 437. O

(7) Foreign customs—Proof of.

(a) “Foreign customs and usages may be proved by any witness, whether expert or not, who is acquainted with the fact.” *Ganer v. Lanesborough*, 1 Peake R. 18; *Sussex Peerage case*, 11 C. and P. 124; A.A. and W. Ev., 4th Ed., p. 300. P

(b) As to proving the laws or customs of savage states, see *In re Bethell*, 38 Ch. D. 220; Ros. Cr. Ev., 13th Ed., p. 122. Q

(8) Trade usage—Proof of.

(a) “It has sometimes been said that a witness to a trade usage may state only specific instances, or must at least mention one or more in support of his statement of the general practice. This notion is traceable to some remarks of Lord Mansfield and later Judges, which do not justify it.” *Edie v. East India Co.*, 1 W. Bl. 295; 2 Burr. 1216; Wigm. Ev., 5th Ed., S. 1954, p. 2600. R

(b) “There have been indeed Judges who have refused, on all the facts of a case, to credit testimony to usage, which could not adduce instances in verification.” *Bishop v. Clay Ins. Co.*, 45 Conn. 430 (455); *Chenery v. Goodrich*, 106 Mass. 556; *Mills v. Hallock*, 2 Edw. Ch. 652; Wigm. Ev., 5th Ed., S. 1954, p. 2600. S

(c) “But there is no definite rule of excluding such evidence in the absence of instances supporting such usage.” *Camden v. Cowley*, 1 W. Bl. 417; Wigm. Ev., 5th Ed., S. 1954, p. 2600. T

(d) “An usage of trade must be proved by instances, and cannot be supported by evidence of opinion merely.” *Cunningham v. Fonblaque*, 6 C. and P. 43; Wigm. Ev., 5th Ed., S. 1954, p. 2600. U

(e) “Is there any general course of business? Let your mind resolve over instances. I am not asking you whether it is just and proper, but whether there is any prevailing course of business.” *Per Tindal, C.J.*, in *Hall v. Benson*, 7 C. and P. 711; Wigm. Ev., 5th Ed., S. 1954, p. 2600. V

(f) “Insurance brokers and others might be examined as to the general opinion and understanding of the persons concerned in the trade; though they knew no particular instance in fact, upon which such opinion was founded.” *Per Mansfield, L.C.J.*, in *Camden v. Cowley*, 1 W. Bl. 417; Wigm. Ev., 5th Ed., S. 1954, p. 2600. W

(g) “Evidence as to mercantile usage may be received; but you cannot ask a witness what the meaning of a written document is.” *Kirkland v. Nisbet*, 3 Macq. Sc. App. C. 766; *Wyllly v. Gazan*, 69 Ga. 510; Wigm. Ev., 5th Ed., S. 1955, p. 2601. X

N.B.—For further notes see under S. 38, *supra*.

3.—“*Science.*”(1) **Medical men, evidence of.**

- (a) “The opinions of medical men have been admitted upon questions of insanity, the causes of disease or death or injuries, the effects of injuries, medicines, poisons, the consequence of wounds, the conditions of gestation, the effects of hospitals upon the health of a neighbourhood.” *Lawson's Expert and Opinion Evidence*, A.A. and W., 4th Ed., p. 301. **Y**
- (b) “Where, in a case the defence was insanity a medical witness may be asked whether, in his judgment, such and such appearances were symptoms of insanity, and whether a long fast followed by a draught of strong liquor, was likely to produce a paroxysm of that disorder in a person subject to it.” *Wright Russ. and Ry.* 456; *Ros. Cr. Ev.*, 18th Ed., p. 122. **Z**
- (c) “A medical witness may be asked whether he has not in the course of his reading become acquainted with such and such results of scientific experience; and he may state that his judgment is founded in part on what he has read, though the books themselves could not be read.” *Collier v. Simpson*, 5 C. and P. 74; *Ros. Cr. Ev.*, 18th Ed., p. 122. **A**
- (d) A medical witness cannot be asked as to his opinion on the very point which the jury were to decide, *viz.*, whether, from the other testimony given in the case, the act with which the prisoner was charged was, in his opinion, an act of insanity. *R. v. Wright*, *Russ. and Ry.* 456; *Ros. Cr. Ev.*, 18th Ed., p. 122; see also *Phip. Ev.*, 4th Ed., p. 361, and cases noted therein. **B**

(1-A) **Who can testify as medical experts.**

“Unqualified practitioners, hospital students, and dressers have been permitted to testify as medical experts.” *Best Ev.*, S. 516; *Phip. Ev.*, 4th Ed., p. 356. **C**

(2) **Post-mortem examination—Evidence.**

- (a) The evidence of a medical man, who has seen a corpse and made its post-mortem examination, is admissible in any inquiry regarding the death, to prove the nature of the injuries observed by him, and, as expert evidence, as to the manner of the infliction of the injuries and as to the cause of death; whereas a medical man, that has not seen the corpse, can give only expert evidence. 9 C. 455=11 C.L.R. 569. **D**
- (b) The report of a medical man on his post-mortem examination, though it may be used to refresh his memory when giving evidence, cannot be treated as evidence; and no facts can be taken from it. 9 C. 455=11 C.L.R. 569. **E**
- (c) A Civil Surgeon, who wrote a post-mortem report, may be allowed to refresh his memory from the report though the report is not admissible in evidence by itself. 16 C.P.L.R. 122 (128). **F**
- (d) A medical man, who has not seen a corpse which has been subject to a post-mortem examination, and who is called to corroborate the opinion of the medical man who made such post mortem examination and has stated what he considered was the cause of death, is in a position to give evidence of his opinion as an expert. *R. v. Wright*, *R. and R. Cr. Cas.* 456; *M'Naughten's case*, 10 Cl. and Fin. 200, *Dist.* in 15 C. 589 (594). **G**

3.—“ Science.”—(Concluded).

- (e) The proper mode of electing such opinion is to put the signs observed at the post-mortem to the witness and to ask what, in his opinion, was the cause of death on the hypothesis that those signs were really present and observed. 15 C. 589 (594). H

(3) Case of poisoning—Expert evidence.

- (a) “The most legitimate, valuable, and wonderful application of expert evidence is on charges of poisoning, where poison is extracted from a corpse by means of chemical analysis.” Best Ev., 9th Ed., S. 514, p. 430. I

- (b) “It is surely, ‘no mean effort of human skill to be brought to a dead body, —disinterred perhaps after it has lain for months, or even years in the grave,—to examine its morbid condition; to analyse the fluid contained in it (often in the smallest possible quantities); and, from a course of deductions, founded in the strictest logic, to pronounce an opinion, which, combined circumstances, or the confession of the criminal, prove to be correct.” Best Ev., 9th Ed., S. 514, p. 430. J

(4) Actuaries, opinions of.

The opinions of actuaries are admissible as to the average duration of life with respect to the value of annuities. Lawson's Expert and Opinion Evidence, A.A. and W., 4th Ed., p. 301. K

(5) Naturalists, Chemists, Geologists, Botanists, &c.

- (a) Those of *naturalists* are admissible as to the ability of fish to overcome obstacles in the river. (*Ibid*); *Cottrill v. Myrick*, 3 Fariff. 222 (Am.); Tay. Ev., 10th Ed., S. 1418, p. 1024. L

- (b) Those of *chemists* as to the value of a particular kind of guano as a fertiliser, &c. Lawson's Expert and Opinion Evidence. M

- (c) Those of *geologists* as to the existence of coal seams. (*Ibid*). N

- (d) Those of *botanists* as to the effects of working coke ovens upon trees in the neighbourhood. (*Ibid*). O

- (e) Those of *persons specially skilled in insurance matters*, as to whether a partition in a room increased the risk in a fire policy. (*Ibid*). P

(6) Engineer.

An engineer may be called to say what, in his opinion, was the cause of a harbour being blocked up. *Folkes v. Chadd*, 3 Dougl. 157; 4 T.R. 498; Ros. Cr. Ev., 13th Ed., p. 121; Tay. Ev., 10th Ed., S. 1418, p. 1023. Q

4.—“ Art.”

(1) Artists, opinion of.

The opinions of artists have been admitted as to the genuineness and value of a work of art. Lawson's Expert and Opinion Evidence, A. A. and W., 4th Ed., p. 301. R

(2) Photographers.

The opinion of a photographer is admissible as to the good execution of a photograph (though a non-expert might speak to its being a good likeness). (*Ibid*). S

4.—“Art.”—(Continued).

(3) Engravers, engineers, military men, post office clerks, ship builders, nautical men, masons, miners, blacksmiths, &c.

- (a) The opinion of an *engraver* or professional examiner of writings is admissible as to erasure in a document. Lawson's Expert and Opinion Evidence, A. A. and W., 4th Ed., p. 301. **T**
- (b) Those of *seal engravers* as to the impressions from a seal. (*Ibid*). See also *Folles v. Chadd*, 3 Doug 517; Ros. Cr. Ev., 13th Ed., p. 121. **U**
- (c) Those of *engineers* as to the cause of obstruction to a harbour. See Lawson's Expert and Opinion Evidence. **Y**
- (d) Those of *military men* as to a question of a military practice. (*Ibid*) *Bradlay v. Arthur*, 1 B. and C. 292; *Barnes v. Kettle*, 2 Wills. 314; Tay. Ev., 10th Ed., S. 1418, p. 1024. **W**
- (e) Those of *officers of a fire brigade* as to the cause of a fire. Lawson's Expert and Opinion Evidence. **X**
- (f) Those of *Post office clerks* as to post-marks. (*Ibid*). **Y**
- (g) Also the opinion of any *person in the habit of receiving letters* as to the genuineness of a post mark. See *Abbey v. Jull*, 5 Bingham, 299; Ros. Cr. Ev., 13th Ed., p. 121. **Z**
- (h) Those of *ship builders, marine surveyors and engineers* as to the strength and construction of a ship. See Lawson's Expert and Opinion Evidence. **A**
- (i) Those of *nautical men* as to the proper navigation of a vessel. (*Ibid*). **B**
- (j) The opinion of a *mason* as to how long it takes to dry the walls of a house. (*Ibid*). **C**
- (k) Of a *miner* as to the cause of the settling of the walls of a mine. (*Ibid*). **D**
- (l) Of a *blacksmith* as to whether a horse was properly shod. (*Ibid*). **E**
- (m) Of a *foreman of a mill* as to the running order of the machinery. (*Ibid*). **F**
- (n) The opinions of *farmers and agriculturists* on matters peculiarly within their knowledge. (*Ibid*). **G**
- (o) Those of a *grazier* on the effect of disturbance in the value of cattle. (*Ibid*). **H**
- (p) Of a *farmer* as to the quality of the soil of a farm. (*Ibid*). **I**
- (q) A *banker* may depose as to the genuineness of a bank note. (*Ibid*). **J**
- (r) A *merchant* may speak as to the value of goods in which he deals and so forth. (*Ibid*). **K**
- (s) *Shop keepers* may speak as to the average waste resulting from the retail sale of goods. (*Ibid*). **L**
- (t) *Business-men* may speak as to the meaning of trade-terms. (*Ibid*). **M**

(4) Seal impression.

“ ‘Many nice questions’ may arise as to forgery, and as to the impressions of seals, whether the impression was made from the seal itself, or from an impression in wax. In such cases I cannot say the opinion of seal makers is not to be taken.” *Per* L. Mansfield in *Folles v. Chadd*, 3 Doug. 517; 4 T.R. 498; Ros. Cr. Ev., 13th Ed., p. 121. **N**

4.—“Art.”—(Continued).

(5) Trade mark.

(d) Evidence of experts or men in the trade cannot be given to show whether or not a combination is such as is calculated to deceive the purchaser. 4 C.L.J. 268 (285). O

(b) Such a question is entirely for the Judge to decide. 4 C.L.J. 268 (285). P

(c) But evidence of facts, which may assist the Judge to come to a conclusion whether one mark is a colourable imitation of another may be given. 4 C.L.J. 268 (285). (*North Cheshire Co. v. Manchester Brewery Co.*, (1899) A.C. 83 (85), *F.*; *Johnstone v. Orr Ewing*, L.R. 7 App. Cas. 219, D.) Q

(6) Questions of valuation.

“One of the commonest cases in which an expert is called is in order to state the value of property; I suppose this is admitted on the ground that the value is a ‘point of art.’” Mark Ev., p. 41. R

(7) Advantage of expert opinion regarding value of land.

(a) Land is not like ordinary goods, the value of which can be fixed on inspection by a person who has knowledge of them. Its value is the result of various factors working in different ways and degrees, and they cannot be apprehended and estimated a right off-hand. 32 C. 343 (346). See also 10 B.L.R. 675 (681). S

(b) The advantage of experience in the valuation of land lies in this, that the expert knows what factors should be considered, what information he should seek for, where he should seek it, and how he should test it and apply it. 32 C. 343 (346); see also 10 Bom. L.R. 675 (681). T

(c) But experience does not enable one to dispense with inquiry, and an honest and useful valuation cannot be made simply by visiting the land and picking up orally some casual and untested information or gossip which may be interested or one-sided. These considerations apply specially to land in or near large towns. 32 C. 343 (346). U

(d) “To describe to a jury a piece of ground, however minutely, with its supposed adaptations to use, its advantages and disadvantages and demand of them, upon this information alone, a verdict as to its value would be merely farcical.” *Per Skinner, J.* in *Illinois C.R. Co. v. Van Horn*, 18 Ill. 259; Wigm. Ev., 55 Ed., S. 1941, p. 2577; see, also, 33 C. 343 (346); 10 Bom. L.R. 675 (681). Y

(8) Value of land—Opinion evidence—Practice.

(a) There are two guides to assessing the value of potentialities in land; (1) the opinion of experts, (2) evidence of the value the purchasing public has put upon them within a reasonable period prior to the date of acquisition. 10 Bom. L.R. 675 (681). W

(b) In cases under the Land Acquisition Act the tendency is for the Courts to rely far more on evidence of sales than on expert opinion. 10 Bom. L.R. 675 (682); but see also 32 C. 343 (346). X

4.—“Art.”—(Continued).

(9) Reason for admitting expert opinion on questions of value.

- (a) In some cases, “Courts have noticed the inconsistency of allowing the witness to speak of land-values generally while rejecting his statement as to the total damage done by a forcible taking. That inconsistency comes prominently to view where the witness is allowed to state the value of the piece of land taken and then the value of the whole estate before the taking and after the taking, but is not allowed to state the net value of loss or benefit.” Wigm. Ev., 05 Ed., S. 1942, p. 2578. **Y**
- (b) “The witnesses being competent to testify to the value of the land affected before and after the alteration of the highway, might testify to the simple question of arithmetic as to which of those two values was the greater,—in other words, whether the petitioner’s estate was benefited or injured.” *Per* Gray, J., in *Swan v. Middlesex*, 107 Mass. 178; Wigm. Ev., 05 Ed., S. 1942, p. 1941. **Z**
- (c) “The value of the amount of damage to property must necessarily be a matter of opinion, and the judgment of one well acquainted with its situation and character, its surroundings and facility of market, must be more satisfactory than any description without such judgment. It is true, this, like all oral testimony, may at times prove unreliable; but its value can be readily and satisfactorily tested by cross-examination.” *Per* Danforth, J., in *Snow v. R. Co.*, 65 Me. 231; Wigm. Ev., 05 Ed., S. 1942, p. 2579. **A**
- (d) “The difference in value before and after the location would be a valid test of that damage, and it would seem to be immaterial whether the testimony was admitted in this form or in answer to a direct question as to the amount of the damage. In either case it must come as an opinion, and in either case it is a question of value.” *Per* Danforth, J., in *Snow v. R. Co.*, 65 Me. 231; Wigm. Ev., 05 Ed., S. 1942, p. 2579; see, also, Mark Ev., p. 41. **B**

(10) Value of cattle—Expert evidence.

“It cannot be said that the witness can tell the jury how long the cattle were in the cars, or how they looked and acted, and that from that imperfect information the jury may arrive at a correct conclusion as to the damage. The poverty of the English language makes it absolutely impossible for a witness to present to the minds of the jurors the appearance of cattle, and what that appearance denotes, as it is presented to his practised and experienced eyes. The experience of the witness and the appearance of the cattle cannot be photographed on the minds of the jurors. The knowledge of the condition of these cattle, and how that condition affected their value, must, of necessity, have existed in the mind of the witness, who had had such a large and extended experience in shipping cattle, with far greater clearness and certainty, than it could have been communicated to the minds of the jurors, by any statement he might have made of what he saw merely, however clear and lucid such statement might have been. It is obvious that, if witnesses were to be permitted to state to a jury those facts only of which they have absolute knowledge, not only the range of injury, but the province of remedial justice also, would be very materially contracted.” *Per* Caldwell, J., in *St. Louis I.M. and S. R. Co. v. Edwards*, 24 C.C.A. 300, 78 Fed. 745; Wigm. Ev., 05 Ed., S. 1941, p. 2577. **C**

4.—“Art.”—(Continued).

(11) Expert interpretation of technical words or phrases.

- (a) “It is obvious that the interpretation of the meaning of a document in respect of ordinary words, being a part of the function of the Court, is not for a witness to speak to.” *Wigm. Ev.*, 05 Ed., S. 1955, p. 2601. **D**
- (b) “But so far as the words are technical, and the witness speaks to technical usage or meaning, there is no prohibition to the admission of expert evidence.” *Wigm. Ev.*, 05 Ed., S. 1955, p. 2601. **E**
- (c) “The Court must determine anew in each instance whether it needs any testimonial aid to interpret the word or phrase in dispute.” *Fuller v. Ins Co.*, 70 Conn. 647; *Wylly v. Gazon*, 69 Ga. 510; *Sigsworth v. McIntyre*, 18 Ill. 126; *Wigm. Ev.*, 05 Ed., S. 1955, p. 2601. **F**
- (d) “Experts may explain the meaning of technical phrases, but are not to construe the clauses.” *Cargill v. Thompson*, 57 N.W. 534; 59 N.W. 638; *Wigm. Ev.*, 05 Ed., S. 1955, p. 2601. **G**

(12) Expert evidence—Meaning of words.

- (a) “In an action for slander it was held that a witness could not be asked what meaning he attached to words spoken by the defendant in his presence, until some evidence had been given to show that they were spoken in a sense other than the ordinary one.” *Daynes v. Hartley*, 3 Ex. 200, cited in *Cun. Ev.*, 11th Ed., p. 122. **H**
- (b) “It is for the Judge or the jury, and not for the witness, to say what the words taken by themselves meant.” *Daynes v. Hartley*, 3 Ex. 200, cited in *Cun. Ev.*, 11th Ed., p. 122. **I**
- (c) “The words spoken to by the witness in the above case were ‘You must look out sharp that those bills are met by them,’ and the question proposed was ‘What did you understand by that?’ Pollock, C.B., while disallowing the question observed:—“There can be no doubt that words may be explained by bystanders to import something very different from their obvious meaning. The bystanders may perceive that what is uttered is uttered in an ironical sense, and, therefore, that it may mean the reverse of what it professes to mean. Something may have previously passed which gives a peculiar character and meaning to some expression; and some word which ordinarily and popularly is used in one sense, may, from something which has gone before, be restricted and confined to a particular sense, or may mean something different from that which it ordinarily and usually does mean. But the proper course for a counsel, who proposes so to get rid of the plain and obvious meaning of words imputed to a defendant, as spoken by the plaintiff, is to ask the witness, not ‘what did you understand by those words?’ but, ‘was there anything preventing those words from conveying the meaning which ordinarily they would convey?’ because, if there was, evidence of that may be given; and then the question may be put. When you have laid the foundation for it, then the question may be put ‘What did you understand by them?’ when it appears that something occurred by which the witness understood the words in a sense different from their ordinary meaning.” *Daynes v. Hartley*, 3 Ex. 200, cited in *Cun. Ev.*, 11th Ed., p. 122. **J**

4.—“Art.”—(Concluded).

(13) Meaning of conversation.

“It rarely happens that two persons are able to give precisely the same account of a conversation. Their narration will differ more or less according to their intelligence, their interest in the subject matter, their opportunities for hearing, their prejudices for or against the parties, the lapse of time since the conversation occurred, and a variety of other circumstances. Emphasis thrown upon the wrong word might convey a meaning different from that originally intended. Often the manner in which a remark is made, and the conduct and the appearance of the party, may have much to do in producing the understanding that was received, much of which it is difficult, and sometimes impossible, for a witness to describe.” *Per* Smith, J, in *Fiske v. Gowing*, 61 N.H. 432; Wigm. Ev., 65 Ed., S. 1969, p. 2613. K

5.—“Identity of handwriting.”

(1) Handwriting—Reason for admitting expert opinion as to—

- (a) “Men are distinguished by their handwriting as well as by their faces; for, it is seldom that the shape of their letters agree any more than the shape of their bodies.” Buller’s *Nisi Prius*, 286; A.A. and W. Ev., 4th Ed., p. 302. L
- (b) “The handwriting of every man has something peculiar and distinct from that of every other man and is easily known by those who have been accustomed to see it.” Peake’s Ev., p. 67. M
- (c) “Almost everybody’s usual handwriting possesses a peculiarity in it, distinguishing it from other people’s writing.” Ram on facts, 68; A. A. and W. Ev., 4th Ed., p. 302. N
- (d) “Manifold as are the parts of difference in the infinite variety of nature in which one man differs from another, there is nothing in which men differ more than in handwriting.” *Per* Cockburn, C. J., in the *Tichborne trial*, *R. v. Castor*, 762. O
- (e) “Calligraphic experts have for years asserted the possibility of investigating handwriting upon scientific principles, and the Courts have consequently admitted such persons to testify in cases of disputed handwriting. It is claimed that experiment and observation have disclosed the fact that there are certain general principles which may be relied upon in questions pertaining to the genuineness of handwriting.” Rogers, *op. cit.*, 291 (292). P
- (f) “Handwriting, notwithstanding it may be artificial, is always, in some degree, the reflex of the nervous organisation of the writer. There is in each person’s handwriting some distinctive characteristic, which, as being the reflex of his nervous organisation, is necessarily independent of his own will, and unconsciously forces the writer to stamp the writing as his own. Those skillful in such matters affirm that it is impossible for a person to successfully disguise in a writing of any length this characteristic of his penmanship.” (*Ibid*). Q

5.—“Identity of handwriting.”—(Continued).

(2) Handwriting—By whom can be proved.

The following persons have been allowed to testify as experts in matters of handwriting :—

- (i) *Post-office officials.* *R. v. Coleman*, 6 Cox. 163 ; *Best Ev.*, S. 246 ; *Phip. Ev.*, 4th Ed., p. 356. R
 - (ii) *Lithographers.* (*Ibid*). S
 - (iii) *Bank clerks.* (*Ibid*). T
 - (iv) A *solicitor* who, “had for some years given considerable attention and study to the subject, and had several times compared handwriting for purposes of evidence, though never before testified as ‘an expert.’”
R. v. Silverlock, 2 Q.B. 766 ; *Phip. Ev.*, 4th Ed., p. 356. U
- N.B.*—But *police inspectors* and *constables* were held *not* competent as experts.
R. v. Crouch, 4 Cox. 163 ; *R. v. Wilbain*, 9 Cox. 448 ; *R. v. Harvey* 11 Cox. 546 ; *Phip. Ev.*, 4th Ed., p. 356. Y

(3) Expert evidence—Conviction—Practice.

- (a) To base a conviction upon the opinion of an expert in handwriting is, as a general rule, very unsafe. 2 A.L.J. 444. W
- (b) When it is sought to convict a clerk employed in an office of forgery, upon the supposed similarity between his handwriting and that of some fragmentary pieces of writing upon which the charge is based, the prosecution should make an attempt to show that the accused is the only man in the office who could have written the forged documents. 2 A.L.J. 444. X

(4) Evidence as to handwriting—Value in civil action and criminal prosecution.

“In proving the handwriting of a defendant, there is no legal distinction between that which is legal evidence in a civil action and that which is legal evidence in a criminal prosecution.” *De la Motte’s trial*, 21 How. St. Tr. 810 ; *Wigm. Ev.*, 5th Ed., S. 1994, p. 2650. Y

(5) Expert knowledge as to handwriting—Solicitor—Costs—Practice.

In a case, the defendant’s solicitor, failing to obtain an expert in handwriting made a special study of the subject occupying 128 hours. In his bill of costs he claimed extra fees for the special work done.

Held that the solicitor was entitled to special remuneration for his work in qualifying himself as an expert in handwriting. 9 Bom. L.R. 819-31 B. 430.

(6) Witness proving handwriting—Practice.

- (a) “The witness need not state in the first instance how he knows the handwriting, since it is the duty of the opposite party to explore on cross examination the sources of his knowledge, if he be dissatisfied with the testimony as it stands.” *Tay. on Evidence*, cited and followed 28 B. 58 (62) = 5 Bom. L.R. 663 ; but see, also, *Bowley v. London & North Western Railway Company*, L.R. 8 Ex. 221, cited in 11 B. (101).
- (b) It is within the power of the presiding Judge and often may be desirable permit the opposing advocate to intervene and cross-examine, so that the Court may, at that stage, be in a position to come to a definite conclusion, on adequate materials, as to the proof of the handwriting 28 B. 58 = 5 Bom. L.R. 663.

5.—“Identity of handwriting.”—(Concluded).

- (c) The opinion of an expert is not properly admissible, without asking any question from which it may be shown what claims he may have to the character of an expert. See *Rowley v. London and North-Western Co.*, L.R. 8 Ex. 221, cited in 11 B. 89 (101). But see 28 B. 58=5 Bom. L.R. 663. C

(7) Ancient handwriting.

Antiquaries may be examined as to the date of ancient handwriting. Tracy Peagee, 10 Cl. & Fin. at p. 191; Ros. Cr. Ev., 13th Ed., p. 121. D

6.—“Finger Impressions.”

(1) “Finger Impressions”—These words introduced by Act V of 1899.

- (a) The words “finger impressions” were introduced in this section by Act V of 1899 in consequence of the decision in *Queen-Empress v. Fakir Mahomed Shek*, reported in 1 C.W.N. 33. E

- (b) It was held by the Calcutta High Court in the case—apparently unreported—(see, however, 1 C.W.N. 33 where the case is reported)—of the *Queen-Empress v. Fakir Mahomed Shek, and Sita Nath Dass*, which was decided on the 16th July, 1896, that the opinion of an expert as to the identity of finger impressions is not admissible under S. 45 of the Indian Evidence Act (I of 1872). The system of identification by means of such impressions was, however, gaining ground and had been introduced with considerable success, especially in the Lower Provinces of Bengal. It, therefore, seemed desirable to the Government of India that expert evidence in connection with it should be admitted, and with that object it was proposed to amend the law on the subject. See Statement of Objects and Reasons, noted in 3 C.W.N. xxiv. F

- (c) In commenting on the bill to introduce the words “finger impressions” in this section the following observation was made in 3 C.W.N. iv:—

“We doubt whether it (finger impression) has yet been generally accepted in the scientific world as an infallible means of personal identification. To raise it to the rank of a physical law a wider series of experiments, research, testing and recognition by scientific men in different parts of the world will be necessary.... We do not know how far it is wise to stamp this means of identification with the authority of the Legislature simply because it has been ‘gaining ground’ or been used with success in some cases.... We apprehend that this new means of identification may be put to improper use, especially when it will be difficult to secure independent experts in the matter. But turning to the decision referred to [1 C.W.N. 34 (85)] we find a safeguard.” See 3 C.W.N. iv. G

N.B.—The safeguard above referred to is with reference to the decision in 1 C.W.N. 33 that the Court had power to make a comparison of thumb impressions for itself, although no evidence as to their identity could be given by a witness.

(2) Finger Impressions, use of, in Identification—History of Identification evidence.

“Our identification evidence had hitherto been of a rough and ready kind. We had for the most part depended on the oral evidence of witnesses speaking from memory; upon handwriting; upon photographs; upon clothes and so on. The chances of being misled to a wrong

6.—“*Finger Impressions.*”—(Continued).

judgment by such evidence are not inconsiderable. The witnesses may be wilfully false or honestly mistaken; the handwriting may be a deliberate forgery or an innocent and accidental imitation; the photograph may present a deceptive likeness; the clothes may for many obvious reasons be equally misleading. Yet, this is the evidence upon which identity has been held proved or disproved, men have suffered sentence of death, and valuable property has passed from one person to another. The weakness of the system was realized many years ago, and anthropometry found birth. But the danger of depending on a system of measurements was soon, more or less, realized, owing to the obvious possibility of an approximation in the measurements of two individuals being so great as to make differentiation doubtful, upon the theory that it might be due only to defective measurement; and this weakness prevented any general adoption of the system, until now its gradual abandonment in favour of “finger prints,” may be regarded as certain. It is only in very recent years that we have discovered our possession literally at our finger ends, of what seems to be an absolutely certain mode of identification, wherever the materials for its application are present.

1 N.L.R. 1 (9).

H

Impressions—Reason of admitting expert evidence.

“Those who have made finger prints their special study have come to the conclusion that their similarity is, as a rule, evidence of personal identity and their dissimilarity will, therefore, as a rule, be evidence of the reverse.” See *Galton on Finger Prints*, cited in 1 C.W.N. 33 (34, 35).

I

(4) Reliance on finger impressions—Chances of correctness.

(a) By those who have made a study of the subject, though they have classifications of finger impressions into divisions and sub-divisions of types and patterns presenting general features of resemblance, there has never yet been found any case in which the pattern made by one finger exactly resembled the pattern made by any other finger of the same or of any other hand. On the contrary, the one may readily be differentiated from all others by comparison. 3 N.L.R. 1 (11); 1 C.W.N. 33 (34, 35).

J

(b) Every such pattern has been found to contain numerous “bifurcations,” “origins,” “islands” and “enclosures” (technically called *minutiae*) in the ridges which compose it; and these, while proved to be almost beyond change from birth to death, are never wholly repeated in the case of any other pattern. See *Galton on Finger Prints*, cited in 3 N.L.R. 1 (11).

K

(c) A complete or even a nearly complete, accordance between two prints of a single finger, affords evidence requiring no corroboration that the persons from whom they were made are the same, the chances of their being made by two different persons standing at about one to an amount expressed by eight figures. 3 N.L.R. 1 (11).

L

(d) By another calculation the chances of prints made by two different fingers resembling one another in all their *minutiae* are shown to be one against 64 thousand millions; while such resemblance between two

6.—*Finger Impressions.*—(Continued).

fingers each from two different persons, rests on a chance of one against a figure altogether beyond the range of the imagination, being 62 thousand millions squared. In the case of three fingers the figure is cubed and so on. 3 N.L.R. 1 (11). M

- (e) The evidential value of identity afforded by the prints of two or three fingers which contain even a few points of resemblance in their *minutiae* and no points of disagreement, is so great as to render it superfluous to seek confirmation from other sources. 3 N.L.R. 1 (12). N

(5) *Finger impressions, how do they help in identification?*

- (a) The papillary ridges presented by the surface of the skin on the palms of the hands and soles of the feet, have been ascertained to be the most important of all anthropological data. For identification purposes it is as only been found necessary to deal with impressions made by the bulbs of the fingers and thumbs. It has been discovered that systems of parallel ridges sweep in bold curves across the palmar surface of the hand, and that, wherever the boundaries of two systems of such ridges diverge, the interspace is filled up by an independent compact little system, variously curved or whirled, having a fictitious resemblance to an eddy between two currents. Such an interspace, with a compact system of its own, is found in the bulb of every human digit. The patterns which are made by the papillary ridges on this bulb, afford the means of identification under discussion. It is from these "dies" that are taken the prints which serve to fix human personality, and to give to each human being an individuality differentiating him from all others. 1 N.L.R. (9, 10); see also 1 C.W.N. 33 (34, 35). O

- (b) The absence of absolute repetition, which seems to be an universal law of nature,* is also found to be present in finger impressions. We may classify human beings and human features, but we cannot bring about or find a precise agreement between any two: we have white men, black men, red men, and yellow men: we have well ascertained and defined types of humanity: we have in each type classifications of hair, eyes, noses, mouths and so on: but a large residue of difference between any two individuals remains, as it were a recurring decimal, which cannot be extinguished. The difference between each human face and every other of its species, upon which evidence of identity has always so firmly rested, can be easily observed: but it cannot be specifically and completely isolated. We know that it is there, but we cannot in any case completely define its details. But in the case of finger impressions there is no question of dealing with those evanescent expressions, which so largely contribute towards recognition of the identity of a human being. The exact differences in such impressions can be pointed out with as much certainty as the differences between the maps of two countries. 1 N.L.R. 1 (10). I

(6) *Examination of finger impression—Conviction—Practice.*

- (a) It is not safe to convict one on the mere result of critical examinations of thumb impressions made by an expert. *Per* Henderson, J. in 9 C.W.N. 520 (524)=82 C. 759=2 Cr. L.J. 259; 4 L.E.R. 125; but see 3 N.L.R. 1. H

6.—“Finger Impressions.”—(Continued).

(b) Where it is proved by competent expert testimony that two finger impressions, made at different times, however far apart, contain several points of agreement and no points of disagreement in their *minutiae* no further evidence is necessary to prove that they were made by the same finger. 3 N.L.R. 1; but see also 4 L.B.R. 125. R

(c) Where a comparison between two finger prints is relied on to establish the identity of an accused person with a previous convict, it should be strictly proved:—

(1) that the previous print was made by the hand of the person who suffered the conviction;

(2) that the subsequent print was made by the hand of the accused;

(3) that an expert in the deciphering of finger impressions has found several points of agreement, and no points of disagreement, in the *minutiae* of the two impressions. 3 N.L.R. 1. S

(d) The High Courts have upheld convictions based largely, as to the identity of the accused with the criminal, on the evidence afforded by thumb prints accidentally left by the accused at the scene of the offence. 3 N.L.R. 1 (15). T

(e) In an Allahabad case the accused, a Kayesth, had left a thumb print in blood on a cloth found near the body of the man he was accused of having murdered. He pleaded an *alibi*, and the Sessions Judge disposed of it in these words:—“In this land of lies an ounce of good circumstance is worth many pounds of oral evidence, and even if, instead of two, two hundred Kayesths swore they had sat in a circle round accused from 6 P.M. to 6 A.M. it would be as nothing in my mind compared with the unexplained bloody thumb print.” The High Court, in confirming the sentence of death passed in the case, referred to the thumb print as “evidence upon which we can safely rely,” and added that it was “conclusive of the presence of the appellant” at the scene of the murder. 3 N.L.R. 1 (15). U

(7) Thumb impression—Judge and jury—Practice.

(a) Though the classification of finger impressions is a science requiring much study, and though it may require an expert in the first instance to say whether any two finger impressions are identical, yet the reasons which guide him to this conclusion are such as may be weighed by any intelligent person with good powers of eyesight. 9 C.W.N. 520 (527) = 52 C. 759 = 2 Cr. L.J. 259. Y

(b) The question as to the identity of thumb impressions on two or more documents, for the purpose of ascertaining whether the thumb impressions are of one and the same person, is eminently a matter for the jury and not for the Judge. 1 C.L.J. 385 (387). W

(c) A jury is not bound to accept the opinion of an expert upon thumb impressions without corroboration of their own intelligence as to the reasons which guided him in his conclusions. *Per* Geidt, J, in 9 C.W.N. 520 (527) = 52 C. 759 = 2 Cr. L.J. 259. X

6.—“*Finger Impressions.*”—(Continued).

(3) Questioning the jury as to thumb impressions.

(a) It is only when it is necessary to ascertain what the verdict really is that S. 309, Cr. P.C., justifies the Judge in putting questions to the jury. 9 C.W.N. 520 (521) = 32 C. 759 = 2 Cr. L.J. 259. (*Per* Henderson, J.). Y

(b) Where the jury returned a plain and simple verdict of “not guilty,” no question should have been put to them as regards the identity of the thumb impressions. *Per* Henderson, J. in 9 C.W.N. 520 (524) = 32 C. 759 = 2 Cr. L.J. 259. Z

(9) Comparison of thumb impressions by Court—Practice.

It is also permissible to the Court to compare for itself thumb impressions of persons and to decide whether the opinion of an expert on the point is correct. 9 C.W.N. 520 (523) = 32 C. 759 = 2 Cr. L.J. 259; 3 N.L.R. 1 (14). A

(10) Proof of previous conviction by identity of finger impressions.

(a) It is also permissible to prove previous conviction by identity of finger impressions. 3 N.L.R. 1 (14); *but* see 4 L.B.R. 125. B

(b) The accused was convicted of theft. He had three previous convictions. The previous convictions were denied by the accused, and, in order to prove them, the prosecution produced certain finger impression slips, and the finger print instructor at Rangoon was called. He took impressions of the accused's fingers in Court, and after having compared them with finger impressions on sheets he produced from the finger impression bureau, he declared that the accused must be the man whose finger impressions were on the sheets he produced and whose previous convictions were entered on those sheets. He did not personally know the accused and had not himself taken the impressions on the sheets he produced. *Held*, the previous convictions of the accused stated on the slips were not proved by mere production of such slips. 4 L.B.R. 125; *but* see 3 N.L.R. 1. C

A.—MISCELLANEOUS.

(1) Subjects on which experts may not testify—Construction of documents.

(a) “Questions as to construction of documents, being matters of law, and not of fact, belong exclusively to the Court, and expert opinion on such questions is inadmissible.” *Phip. Ev.*, 4th Ed., p. 360. D

(b) Thus opinion evidence was held inadmissible as to the construction of a company prospectus. *Grove v. Bulawayo Co.*, *Times*, Mar. 30, 1898, C.A.; *Phip. Ev.*, 4th Ed., p. 360. E

(c) So also as to the construction of patent specification. *Gadd v. M. of Manchester*, 67 L.T. 569; *Brooks v. Steele*, 14 R.P.C. p. 73; *Badische v. Leveinstein*, 14 App. Cas. 717; *Phip. Ev.*, 4th Ed., p. 360. F

(d) So also the construction of covenants in restraint of trade cannot be proved by expert evidence. *Haynes v. Doman*, 15 T.L.R. 354 C.A.; *Phip. Ev.*, 4th Ed., p. 360. G

(e) Statutory plans cannot be construed by expert evidence. *Dowling v. Pontypool Co.*, 19 Eq. 714; *Phip. Ev.*, 4th Ed., p. 360. H

6.—“Finger impressions”—(Continued).

A.—MISCELLANEOUS.—(Continued).

(2) Disputed points of professional duty or majority.

(a) “The opinions of experts cannot be received upon—.” *Phil. Ev.*, 4th Ed., p. 360; see also *Ros. Cr. Ev.*, 13th Ed., p. 122; *Tay. Ev.*, 10th Ed., S. 1419, p. 1024; *Greenbaf* in S. 441; *Campbell v. Rickards*, 5 B. and Ad. 840. I

(b) “But such evidence is admissible if it be necessary to elucidate the rules of the profession.” *Phil. Ev.*, 4th Ed., pp. 360 and 363. J

(3) Opinions of cattle drovers.

“The—~~are~~ not admissible upon the question of how an accident to the cattle in a railway truck must have happened.” *Smith v. Midland Ry.* 57 L.T. 813; *Phil. Ev.*, 4th Ed., p. 360. K

(4) Opinions of firemen.

“The—~~are~~ not admissible to prove whether there was anything to point to the fire having occurred accidentally, this being a matter of scientific knowledge.” *It. v. Cattermoul*, 121 *Sess. Pap. C.C.C.* 151; *Phil. Ev.*, 4th Ed., p. 360. L

(5) Opinions of jurymen.

“The opinions of jurymen are not admissible as to what verdict they would have given had the evidence been different.” *Hatch v. Lewis*, 2 F. and F., p. 475; *Phil. Ev.*, 4th Ed., p. 360. M

(6) Opinion evidence was held not admissible to prove the following matters:—

(a) “That one name is like another as to be calculated to deceive purchasers.” *North Cheshire and Manchester Brewery Co. v. Manchester Brewery Co.*, (1899) A.C. 83; *Tay. Ev.*, 10th Ed., S. 1419, p. 1024; see also 4 C.L.J. 268 (285). N

(b) “That one trade mark is like another as would deceive intending purchasers.” *Bourne v. Swan and Edgar*, 1 Ch. 211; *Tay. Ev.*, 10th Ed., S. 1419, p. 1024; 4 C.L.J. 268 (285). O

(c) “That the make up of one article is so like another as would deceive possible purchasers.” *Payton and Co. v. Snelling*, (1901) A.C. 308; *Tay. Ev.*, 10th Ed., S. 1419, 1024; 4 C.L.J. 268 (285). P

(d) For a case in which a Judge was held to have been wrong in calling expert testimony, see 9 W.R. 88. Q

(7) Possession, how to be proved.

(a) A witness's statement that a party “is in possession” is no evidence of the fact. The question of possession is a mixed one of law and fact; and the evidence produced must give the various acts of ownership which go to constitute possession so that the Court may arrive at its own conclusion. 9 W.R. 79; but see 4 B.L.R. 97 (F.B.). R

(b) A statement by a witness that a party is in possession is, in point of law, admissible as evidence of the facts that such party was in possession. 4 B.L.R. 97 (F.B.). S

N.B.—For further examples of cases where expert testimony was admitted or rejected, see *Phil. Ev.*, 4th Ed., pp. 362—367.

(8) Opinions of unscientific witness—when and how receivable.

(a) The—may be admitted in giving evidence as to “facts which are made up of a great variety of circumstances and a combination of appearances which, from the infirmity of language, cannot properly

6.--"Finger impressions."—(Continued).

A.—MISCELLANEOUS.—(Concluded).

be described; in this category may be placed matters involving magnitude, of quantities, portions of time, space, motion, gravitation, value, and such as relate to the condition or appearance of persons or things." Johnston, J. in *State v. Baldwin*, 36 Kan. 10, 12 Pac. 318; Wigm. Ev., 05 Ed., S. 1977, p. 2822. T

- (b) "The very basis upon which this exception to the general rule rests is that the nature of the subject-matter is such that it cannot be reproduced or detailed to the jury precisely as it appeared to the witness at the time." Per Loomis, J. in *Sydlleman v. Beckwith*, 43 Conn. 12; Wigm. Ev., 05 Ed., S. 1918, p. 2551. U

- (c) "The ground upon which opinions are admitted in such cases is, that, from the very nature of the subject in issue, it cannot be stated or described in such language as will enable persons, not eye-witnesses, to form an accurate judgment in regard to it. How can a witness describe the weight of a horse? or his value? Will any description of the wrinkles of the face, the color of the hair or tones of the voice, or the elasticity of step, convey to a jury any very accurate impression as to the age of the person described?" Per Foster, C.J., in *Hardy v. Merrill*, 56 N.H. 241; Wigm. Ev., 05 Ed., S. 1918, p. 2552. Y

- (d) "And so, also, in the investigation of mental and psychological conditions,—because it is impossible to convey to the mind of another any adequate conception of the truth by a recital of visible and tangible appearances,—because you cannot, from the nature of the case, describe emotions, sentiments and affections, which are really too plain to admit of concealment, but, at the same time, incapable of descriptions,—the opinion of the observer is admissible from the necessity of the case; and witnesses are permitted to say of a person, 'he seemed to be frightened'; 'he was greatly excited'; 'he was much confused'; 'he was agitated'; 'he was pleased'; 'he was angry'." (*Ibid*). W

- (e) "The opinions admitted are formed from minute peculiarities of form, shape, colour, sound, &c., that cannot be described in human language, so as to convey any accurate impression of the object, and, therefore, unless opinions are received there must be a failure of evidence. When the facts and peculiarities upon which the opinion is formed can be stated and described, they must be, and it is then for the jury and not to witness to form an opinion. Per Billows, J. in *Whittier v. Franklin*, 46 N.H. 24; Wigm. Ev., 05 Ed., S. 1977, p. 2622. X

- (f) "All concede the admissibility of the opinions of non-professional men upon a great variety of unscientific questions arising every day and in every judicial inquiry. These are questions of identity, handwriting, quantity, value, weight, measure, time, distance, velocity, form, size, age, strength, heat, cold, sickness, and health; questions, also, concerning various mental and moral aspects of humanity, such as disposition and temper, anger, fear, excitement, intoxication, veracity, general character, and particular phases of character, and other conditions and things, both moral and physical, too numerous to mention." Per Foster, C.J., in *Hardy v. Merrill*, 56 N. H. 241; Wigm. Ev., 05 Ed., S. 1977, p. 2622. Y

- (g) N.B.—For further cases see under S. 47, *infra*.

46. Facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts¹, when such opinions are relevant.

Illustrations.

(a) The question is, whether A was poisoned by a certain poison.

The fact that other persons, who were poisoned by that poison, exhibited certain symptoms which experts affirm or deny to be the symptoms of that poison, is relevant.

(b) The question is, whether an obstruction to a harbour is caused by a certain sea-wall.

The fact that other harbours similarly situated in other respects, but where there were no such sea-walls, began to be obstructed at about the same time, is relevant.

(Notes).

1.—“If they support or are inconsistent with the opinions of experts.”

(1) Principle of the section.

(a) This section embodies an exception to the general rule which lays down that evidence of collateral facts cannot be received. Tay. Ev., 10th Ed., S. 335, p. 263. **Z**

(b) Where the question is a matter of science, and where the facts proved, though not directly in issue, tend to illustrate the opinions of scientific witnesses, such facts may be received in evidence. Tay. Ev., 10th Ed., S. 335, p. 263. **A**

(c) “For example, where the point in dispute was, whether a sea-wall had caused the choking up of a harbour, and engineers were called to give their opinions as to the effect of the wall, proof that other harbours on the same coast, where there were no embankments, had begun to be choked about the same time as the harbour in question, was admitted, as such evidence served to elucidate the reasoning of the skilled witnesses.” *Folkes v. Chadd*, 3 Dug. 157; *M’Fadden v. Murdock*, Ir. R. 1 C.L. 211; Tay. Ev., 10 Ed., S. 335, p. 263; Phip. Ev., 4th Ed., p. 151. **B**

N.B.—The above case is embodied in illustration (b) to this section.

(d) “If the point in dispute be whether a defendant was or was not in his right mind on a certain occasion, it is clear that after proof by a medical man, or (in a civil case) an admission by counsel, that madness is often of an hereditary character, evidence tending to show that none of the defendant’s ancestors or near relations had been insane, would be admissible in support of the negative proposition.” *Bagot v. Bagot*, 1 L.R. Ir. 308; Tay. Ev., 10th Ed., S. 335, p. 263. **C**

(e) “And on a question of disputed paternity, after proving that, as a matter of science, that children are apt to inherit the features or general appearance of their parents, evidence will be received of personal resemblance between the party in question and his alleged father.” *Bagot v. Bagot*, 1 L.R. Ir. 308.; Tay. Ev., 10th Ed., S. 335, p. 263. **D**

(2) English Law.

(a) This section is in accordance with the rule of English Law. See Tay. Ev., 10th Ed., Ss. 316, 337; Field Ev., 6th Ed., p. 193. **E**

(b) Illustration (b) is taken from the case of *Folkes v. Chadd*, 3 Douglas, Rep. 157; see Field Ev., 6th Ed., p. 193 (note). **F**

N.B.—See also Notes under S. 45, *supra*, and S. 51, *infra*.

47. When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion as to handwriting when relevant. opinion of any person acquainted with the handwriting¹ of the person by whom it is supposed to be written or signed, that it was or was not written or signed by that person, is a relevant fact.

Explanation ²—A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

Illustrations ³.

The question is, whether a given letter is in the handwriting of A. merchant in London.

B is a merchant in Calcutta, who has written letters addressed to A, and received letters purporting to be written by him. C is B's clerk, whose duty it was to examine and file B's correspondence. D is B's broker, to whom B habitually submitted the letters purporting to be written by A for the purpose of advising with him thereon.

The opinions of B, C, and D on the question whether the letter is in the handwriting of A are relevant, though neither B, C, nor D ever saw A write.

(Notes).

1.—"The opinion of any person acquainted with the handwriting, etc."

(1) Principle of section.

"All proof of handwriting, except when the witness either wrote the document himself, or saw it written, is in its nature comparison; it being the belief which a witness entertains upon comparing the writing in question with an exemplar formed in his mind from some previous knowledge." *Doe v. Suckermore*, 5 A. and E. 703, 731; Tay. Ev., 10th Ed., S. 1869, p. 1339. G

(1-A) Comparison of seals—English and Indian Law.

"Under this section and S. 73, comparison of a disputed writing or seal with a genuine writing or seal may be made by the witnesses or by the Court in criminal as well as civil proceedings. There is no such provision in England as to seals. As to writings, see 17 and 18 Vic. C. 125, Ss. 27, 103; and 28 and 29 Vic. C. 18, Ss. 1 and 8." See Whitley Stokes' Anglo-Indian Codes, Vol. II, p. 890. H

(2) Handwriting, different modes of.

"A document wholly in the handwriting of a party is said to be an *autograph* or *holograph*; where it is in the handwriting of another person, and is only signed by the party, the signature may be called '*onomastic*': where it is signed by a cross or other symbol, '*symbolic*.'" ⁴ 2 Benth. Jud. Ev., 459—61; Best Ev., 9th Ed., S. 292, p. 217. I

1.—“The opinion of any person acquainted with the handwriting, etc.”

—(Continued).

(3) Modes of proving handwriting under the Act.

The following are the ways provided for the proof of handwriting under the Act.—

(i) By the evidence of the person who wrote the document. See *Phip. Ev.*, 4th Ed., p. 477; *A.A. and W.* 4th Ed., p. 312; *Tay. Ev.*, 10th Ed., S. 1862, p. 1336; *Cun. Ev.*, 11th Ed., pp. 128, 129; *Best Ev.*, 9th Ed., S. 232, pp. 216, 217; 13 *W.R.* 191; *Field Ev.*, 6th Ed., p. 194. **J**

(ii) By the evidence of an attesting witness, i.e., one who actually saw the person write the particular document. See *Tay. Ev.*, 10th Ed., S. 1862, p. 1336; *Cun. Ev.*, 11th Ed., pp. 128, 129; *Best Ev.*, 9th Ed., S. 232, pp. 216, 217; 13 *W.R.* 191; *Field Ev.*, 6th Ed., p. 194. **K**

(iii) By the evidence of a person who had seen the party write other documents. *Tay. Ev.*, 10th Ed., S. 1863, p. 1336; *Dela Motte's case*, 21 *How. St. Tr.* 810. But see *Best Ev.*, 9th Ed., S. 234, pp. 217 and 218; *Field Ev.*, 6th Ed., p. 194. **L**

(iv) By the evidence of a person acquainted with such handwriting either by receiving letters “purporting to be written by the person in answer to documents written by the witness or under his authority and addressed to that person or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.” See *Explanation. Tay. Ev.*, Vol. II p. 1555, cited with approval in 13 *W.R.* 191 (193); *Field Ev.*, 6th Ed., p. 194. **M**

N.B.—“These last mentioned two modes of proof may in all cases be given in the first instance, since the law recognises no distinction between them and the ocular proof of witnesses who actually saw the particular document written.” *Tay. Ev.*, Vol. II, p. 155, cited and followed in 13 *W.R.* 191 (193). **N**

(v) By the evidence of an expert in the comparison of handwriting. See S. 45, *supra*; *Cun. Ev.*, 11th Ed., pp. 128, 129; *Best Ev.*, 9th Ed., S. 232, pp. 216, 217; *Field Ev.*, 6th Ed., p. 194. **O**

N.B.—“Proof of similarity of handwriting is admissible in our Courts, and the law makes no distinction between such proof and the direct testimony of witnesses in whose presence the document is written.” 13 *W.R.* 191 (193). **P**

(vi) By the Court comparing the document in dispute with any others proved to the satisfaction of the Judge to be genuine. See S. 73, *infra*. **Q**

(vii) “The Court may also direct any person present in Court to write any words or figures for the purposes of enabling the Court to compare the words or figures so written with any words alleged to have been written by such person.” See S. 73, *infra*. **R**

(viii) By the admission of the party against whom the document is tendered. See *Phip. Ev.*, 4th Ed., p. 477; see also S. 21, *supra*. 12 *B.L.R. App.* 18; *Cun. Ev.*, 11th Ed., pp. 128, 129; *Best Ev.*, 9th Ed., S. 232, pp. 216, 217. **S**

N.B.—As to the relative values of the various modes of proof detailed above, see *Field Ev.*, 6th Ed., p. 194. **T**

1.—“The opinion of any person acquainted with the handwriting, etc.”
—(Continued).

(4) Mode of proof—Presumption—Practice.

“Where a less valuable method of proof is resorted to it should be borne in mind that this may raise a suspicion that the party is actuated by some improper motive in withholding evidence of a more conclusive nature, if it does not appear that such evidence is not readily available. Field Ev., 6th Ed., pp. 194, 195. U

(5) Handwriting, whether includes signature.

- (a) The word ‘handwriting’ in the section, presumably includes oth handwriting in general and signature.” A. A. and W. 4th Ed., p. 310.Y
- (b) “One person’s knowledge of the handwriting of another may be confined to his general style and may not extend to his signature.” (*Ibid*). W
- (c) “A signature may and very often does possess a great peculiarity. Although, therefore, a person can recognise another’s style it may not follow that he can recognise his style of signature; this he may have never seen.” (*Ibid*). X
- (d) On the other hand, a person may be competent to recognise another’s style of signature, although quite unable to recognise his general style of writing; for, of his style, beyond his signature, he may be quite ignorant, and the one may be very different from the other. (*Ibid*).Y
- (e) That one is not acquainted with another’s general writing does not disqualify him from proving his signature. Ram on Facts, 72, 73. Z
- (f) And “a witness may be acquainted with the signature of a firm without being able to identify the handwriting of either, or any, partner.” Lawson, op. cit. 298. A

(6) Signature, what amounts to.

- (a) Any form in which a person affixes his name, with intent that it shall be treated as his signature, is sufficient. Phip. Ev., 4th Ed., p. 477. B
- (b) Thus, a will was held to be signed by another guiding the testator’s hand. *Wilson v. Beddard*, 12 Sim. 28; Phip. Ev., 4th Ed., p. 477. C
- (c) Signature may be made in the form of a third person (as) where A writing “sold to A.” *Johnson v. Dodgson*, 2 M. and W. 659; *Bleakley v. Smith*, 11 Sim. 150; Phip. Ev., 4th Ed., p. 477; see also *Durrell v. Evans*, 1 H. and C. 174. D

(7) Stamp—Seal—Signature.

- (a) Thus, again stamping was held, in one case, to amount to signature. *Jenlyns v. Gaisford*, 11 W.R. 854; *Bennett v. Drumstitt*, L.R. 3 C.P. 28; Phip. Ev., 4th Ed., p. 477. E
- (b) “Witnesses who know the seal of another have been permitted to say whether a particular seal was or was not the seal of that other, even though they were not present and saw the seal fixed.” A. A. and W. Ev., 4th Ed., p. 311. F

(8) Mark.

- (a) A name may be signed by a mark. *Baker v. Denning*, 8 A. and E. 94; Phip. Ev., 4th Ed., p. 477. G
- (b) In the above case it was held that it was not material whether the person could write or not, and that no such inquiry could be allowed. (*Ibid*). H

1.—“The opinion of any person acquainted with the handwriting, etc.”
—(Continued).

(9) Initials.

- (a) Initials were also held to amount to a sufficient signature. *Re Blewitt*, 5 P.D. 116; *Re Savory*, 15 Jur. 1042; Phip. Ev., 4th Ed., p. 477. **I**
- (b) Initialled seal was held to operate as signature in one case. *Re Emerson*, 9 L.R.L. 443; *Re Lemon*, 30 Ir. L.T.R. 127; Phip. Ev., 4th Ed., p. 477. **J**

(10) Assumed name.

A will or deed executed in an assumed name is valid, if not intended to deceive. *Re Clarke*, 1 S. and T. 22; *Re Douce*, 2 S. and T. 598; Phip. Ev., 4th Ed., p. 477. **K**

(11) Surname.

A signature by a surname may be sufficient. *Lobb v. Stanley*, 5 Q.B. 574; Phip. Ev., 4th Ed., p. 477. **L**

(12) Pencil signature.

- (a) Signature may be made in pencil. *Greay v. Physic*, 5 B. and C. 234; Phip. Ev., 4th Ed., p. 477. **M**
- (b) And an endorsement in pencil of a promissory note has been held valid. (*Ibid*). **N**

(13) Printing—Signature.

Signature may be made by printing. *Schneider v. Norries*, 2 M. and S. 236; *Torrent v. Cripps*, 27 W.R. 706; *Hucklesby v. Hook*, 83 L.T. 117; Phip. Ev., 4th Ed., p. 477. **O**

(14) Qualified signatures.

As to the effects of qualifying words appended to a signature, see *Exchange Bank v. Bleithen*, 10 App. Cas. 293; *Kirkwood v. Carroll*, 1 K.B. 531; Phip. Ev., 4th Ed., p. 478. **P**

(15) Intention of person signing.

The signature in the above cases must be intended to govern and authenticate every material part of the instrument. *Hubert v. Turner*, 4 Scott. N.R. 486; *Caton v. Caton*, L.R. 2 H.L. 127; Phip. Ev., 4th Ed., p. 477. **Q**

(16) Mark, signature by—Evidence.

- (a) “Handwriting ordinarily means whatever the party has written (*i.e.*, formed into letters) with his hand.” *Com v. Webster*, 5 Cush. 301 (Amer.) **R**
- (b) “The identity of a party may be proved by showing that this mark was made in the book and that mark is in his handwriting. *Per Parke, B.*, in *Sayer v. Glossop*, 12 Jur. 465. **S**
- (c) *Witnesses were allowed in certain cases to express their opinion that a mark on the document was the mark of a particular person. *George v. Surrey*, M. and M. 516; see *Lawson*, *op. cit.*, 206, 297; *Pearcy v. Decker*, 18 Jur. 997; *Tay. Ev.*, 10th Ed., S. 1813, p. 1937; *Best Ev.*, S. 234, p. 218; see also 18 B. 66 (79). **T**

1.—“The opinion of any person acquainted with the handwriting, etc.”
 —(Concluded).

(d) But it was only in some very extraordinary instances that the mark of an illiterate person may become so well known as to be susceptible of proof like handwriting. *Per* Ruffin, C.J. in *Currie v. Hampton*, 11 Ired. 311. **U**

(e) “The general rule deducible from the various authorities seems to be that unless there is something to identify the mark as being that of a particular person, the evidence is not to be admitted.” *Best Ev.* 9th Ed., S. 234, p. 218. **Y**

(17) Party executing document in several different capacities.

(a) A—need not sign the document more than once. *Young v. Schuler*, 11 Q.B.D. 651; *Ball v. Dunsgerville*, 4 T.R. 313; *Phip. Ev.*, 4th Ed., p. 478. **W**

(b) Extrinsic evidence is admissible to show the intention of the person signing. (*Ibid.*) **X**

(18) Identity of person, evidence as to.

In whichever way the witness has acquired his knowledge of handwriting, it is obvious that evidence identifying the person whose writing is in dispute with the person whose hand is known to the witness, must be adduced, either aliunde, or by the testimony of himself, if he be personally acquainted with the writer. See *Doc v. Suckermore*, 5 A. and C. 703, 731; *Tay. Ev.*, 10th Ed., S. 1867, p. 1339. **Y**

2.—“Explanation.”

(1) Mode of acquiring knowledge as to handwriting, question as to—Practice—English and Indian Law.

(a) “The witness need not state in the first instance how he knows the handwriting, since it is the duty of the opposite party to explore on cross-examination the sources of his knowledge, if he be dissatisfied with the testimony as it stands.” *Moody v. Rowell*, 17 Pick. 419; overruling *Slaymaker v. Wilson*, 1 Penrose and Watts, 216; *Tay. Ev.*, 10th Ed., S. 1863, p. 1337, cited and followed in 18 B. 58 (62) = 5 Bom. L.R. 663. **Z**

(b) The above is a correct exposition of law in this country also. *Per* Jenkins, C.J., in 18 B. 58 (62) = 5 Bom. L.R. 663. **A**

(c) But it is permissible, and may often be expedient, that the matters referred to in the explanation should be elicited on the examination in-chief. (*Ibid.*) **B**

(d) It is in the power of the presiding Judge and often may be desirable to permit the opposing advocate to intervene and cross-examine, so that, the Court may, at that stage, be in a position to come to a definite conclusion, on adequate materials, as to the proof of the handwriting. *Per* Jenkins, C.J. (*Ibid.*) **C**

(e) “Still, the party calling the witness may interrogate him, if he thinks proper, as to the circumstances on which his belief is founded.” *R. v. Murphy*, 8 C. and P. 310; *Da Costa v. Pym*, Pea. Add. Cas. 144; *Tay. Ev.*, 10th Ed., S. 1863, p. 1337. **D**

2.—“*Explanation.*”—(Continued).

- (f) “It it should appear that a witness’s belief as to handwriting rests on the probabilities of the case, or on the character or conduct of the supposed writer, and not on the actual knowledge of it, the testimony will be rejected.” (*Ibid.*) E

(2) Form of answer by witness as to handwriting.

- (a) A witness called as to handwriting must declare his *belief* that it is genuine. *Eagleton v. Kingston*, 8 Ves. 476; Tay. Ev., 10th Ed., S. 1868, p. 1339. See also 13 W.R. 191 (194). F
- (b) But there seems to be considerable difference of opinion on this point even in England. 13 W.R. 191 (194). G
- (c) “It is proper to receive the testimony of a person, who, while declining to express a decided belief, will yet declare *that he is of opinion* or that *he thinks* the paper is genuine.” Tay. Ev., 10th Ed., S. 1868, p. 1339. See also 13 W.R. 191 (194). H
- (d) When a skilled witness swears to his belief that a particular writing is that of a certain individual, *he* does not pledge himself to anything beyond the fact that the handwriting is, in his opinion, precisely similar to that of the said individual, and nothing further than this can be guaranteed to the Court when one writing is compared with another. 13 W.R. 191 (194). I
- (e) In one case a witness was allowed to state in his cross-examination that his father could not write or sign his name, but used to make a mark—the mark of a plough—that he had no paper with him that bears his mark, and that the paper then shown to him was not his mark. 18 B. 66 (73). J

(3) Acquaintance should not be gained with a view to the specific occasion on which the proof is offered.

- (a) “In order to render admissible either of the above modes of proof of handwriting, the knowledge must not have been acquired or communicated with a view to the specific occasion on which the proof is offered.” See the judgments of Patterson and Coleridge, JJ., in *Doe d. Mudal v. Suchermore*, 5 A. and E. 703; 44 R. R. 533; Best Ev., 9th Ed., S. 236, p. 219; Tay. Ev., 10th Ed., S. 1863, p. 1337. K
- (b) “Where a witness, called to establish a forgery, had become acquainted with the signature of the party, from having seen him, after the commencement of the suit, sign his name for the purpose of showing the witness his true manner of writing it, the evidence was held inadmissible.” *Stanger v. Searle*, 1 Esp. 15; see also *Page v. Homans*, 2 Shopl. 478; Tay. Ev., 10th Ed., S. 1863, p. 1337; Best Ev., 9th Ed., S. 236. L
- (c) “In such a case the party might, through design, have written differently from his common mode of signature.” *Per* Lord Kenyon. (*Ibid.*) M
- (d) “So again where, on an indictment for sending a threatening letter, the only witness called to prove that the letter was in the handwriting of the accused, was a policeman who, after the letter had been received and suspicions aroused, was sent by his Inspector to the accused to pay him some money and procure a receipt, in order thus to obtain a

2. - "Explanation."—(Continued).

knowledge of his handwriting by seeing him write, his evidence was rejected on the ground that the knowledge obtained for such a specific purpose and under such a bias, is not such as to make a man admissible as a *quasi expert*." *R v. Crouch*, 4 Cox. Cr. Cas. 163; Best Ev., 9th Ed., S. 236, p. 220; Tay. Ev., 10th Ed., S. 1863, p. 1337. **N**

(4) Acquaintance gained by seeing the party write.

(a) The conditions affecting the value of the evidence of the person who has seen the person write, are:—

- (i) The number of times the party has seen him write,
- (ii) The interval that has elapsed since the last occasion when the witness saw him write,
- (iii) The circumstances, whether of hurry or deliberation, under which the writing was made, and
- (iv) The opportunities and motives which the witness had for observing the handwriting with attention. *Doe v. Suckermore*, 5 A. and E. 703, 730; Tay. Ev., 10th Ed., S. 1863, p. 1336. **O**

(b) These circumstances only affect the weight of the evidence, and not its admissibility. *Ph. and Am.* 693; Best Ev., 9th Ed., S. 235, p. 219. **P**

(c) In one case the evidence of a person was admitted though he had not seen the party write for twenty years. *R. v. Horne Tooke*, 1795; 25 How. St. Tr. 71, 72; *Eagleton v. Kingston*, 8 Ves. 473; Tay. Ev., 10th Ed., S. 1863, p. 1335; Best. Ev., 9th Ed., S. 234, p. 218. **Q**

(d) In another case the evidence of a person who has seen the party write but once was admitted. *Willman v. Worrall*, 8 C. and P. 380, *Warren v. Anderson*, 8 Scott. 384; Best Ev., 9th Ed., S. 234, p. 218; Tay. Ev., 10th Ed., S. 1863, p. 1336. **R**

(e) The evidence of a person will be admitted even if such person sees the party write only his surname. *Lewis v. Sapio*, 1827, M. and M. 39; Tay. Ev., 10th Ed., S. 1863, p. 1336; Best Ev., 9th Ed., S. 234, p. 218. **S**

(f) But these circumstances may affect the weight of the evidence, and may be matter of comment for the jury. See Best Ev., 9th Ed., S. 234, p. 218; Tay. Ev., 10th Ed., S. 1863, p. 1337. **T**

(5) Acquaintance gained by seeing the party's letters in the course of business.

The following persons have been held to be competent as witnesses to whom letters were habitually submitted in the course of business:—

(i) The clerk who had constantly read the letters to his master. *Doe v. Suckermore*, 5 A. and E. 703, 740; Tay. Ev., 10th Ed., S. 1864, p. 1338. **U**

(ii) The broker who has been consulted upon such letters. (*Ibid*). **Y**

(iii) A servant who having habitually carried his master's letters to the post, and has thereby had an opportunity of obtaining a knowledge of his writing. (*Ibid*). **W**

2.—“*Explanation.*”—(Continued).

- (iv) “A solicitor as to signature of a person, though his knowledge of the handwriting is solely derived from having seen the same signature attached to other documents which have been used in the cause.” See *Smith v. Sainsbury*, 5 C. and P. 196, cited in *Doe v. Suckermore*, 5 A. and E. 708, 740; Tay. Ev., 10th Ed., S. 1865, p. 1338. But see *Greaves v. Hunter*, 2 C. and P. 477. X
- (v) The above persons were held to be competent witnesses though they never saw him write. *Doe v. Suckermore*, 5 A. and E. 708, 740; Tay. Ev., 10th Ed., S. 1864, p. 1338. Y

(6) *Witness as to handwriting—Right to refresh memory—Practice.*

- (a) “There seems no reason why, on principle, one who comes to Court with a knowledge of handwriting (by having seen the act of writing or by having had correspondence or having possessed old documents) should not be allowed to refresh his memory by a perusal in Court of the specimens forming the foundation of his knowledge.” Wigm. Ev., 05 Ed., S. 2007, p. 2670; see also *Burr v. Harper*, Holt, N.P.C. 420; 17 R.R. 656; Best Ev., 9th Ed., S. 237, p. 220. Z
- (b) “On principle, if this perusal was desired, not as in itself the foundation for the opinion, but as a means of refreshing the memory of an opinion already formed, it could be permitted so far as it served that end.” Wigm. Ev., 05 Ed., S. 2007, p. 2670. A
- (c) “There can be no doubt, I presume, that if a witness knows he is about to be examined as to handwriting, and has frequently seen the party write, and has in his possession papers that he saw him write, and looks at them so as to refresh his memory as to the character and manner of writing, and then deposes, that this would not destroy his testimony. A witness is called on to identify a man he had before known, but, before he sees him, he looks at a picture which he recognises to be a likeness, which recalls the features and expression of countenance, and notwithstanding alterations by age, etc., he testifies to his identity; (this is allowable).” *Per Coalter, J., in Redford's Adm'r v. Peggy*, 6 Rand. 326 (345); Wigm. Ev., 05 Ed., S. 2007, p. 2670. B
- (d) “That by way of refreshing memory such inspection is allowable seems clearly the law to-day in the United States.” Wigm. 05 Ed., S. 2007, p. 2670; *Clark v. Wyatt*, 15 Ind. 272; *Thomas v. State*, 103 Ind. 419; *Smith v. Walton*, 8 Gill. 85; *National Bank v. Armstrong*, 66 Md. 115. C

(7) *Evidence of person acquainted with handwriting in the usual course of business, value of.*

In one case the Court made the following observations on the value of evidence of persons who became acquainted with the person's handwriting only in the usual course of business :—

It was contended that the evidence to show that the postcard and the letter were in the handwriting of the accused is extremely meagre. We do not think that there is much force in this contention. There is the employer of the appellant and other persons who say that the postcard and the letter are in the handwriting of the accused. All of them do not say that they have seen the accused write, but they say

2—"Explanation."—(Concluded).

that, in the course of business, they have seen his handwriting; and, viewing the matter in the way in which such matters ought to be viewed by reasonable men, we do not think it would be right to hold that this evidence does not prove that the postcard and the letter were in the handwriting of the accused." 22 O. 313 (322). **D**

(8) Value of the modes of proof mentioned in this section.

(a) "Whatever may be the relative values of the several modes of proving handwriting mentioned above when compared with each other, it is certain that all such proof is, even in its best form, precarious, and often extremely dangerous." *Huberus, Præcl. Jur. Civ. lib. 22, tit. 4, n. 16*; *Wills, Cic. Ev.*, 111, 3rd Ed.; *Robson v. Locke*, 2 Add. Ecl. Rep. 79; *Best Ev.*, 9th Ed., S. 247, p. 228. **E**

(b) Evidence of mere similarity of handwriting is extremely weak in its probative force. 13 W.R. 191 (194). **F**

(c) But, when that evidence is strongly supported by other facts, there is no reason why the Judge should not be required to take it into his consideration. 13 W.R. 191 (194). **G**

(d) "Many persons write alike, having the same teacher, writing in the same office, being of the same family,—all these produce similitude in writing which in common cases, and by common observers is not liable to be distinguished." *Per Adam, arguendo, in R. v. Mr. Justice Johnson*, 29 How. St. Tr. 475; *Best Ev.*, 9th Ed., S. 247, p. 228. **H**

(e) The handwriting of the same person varies at different periods of life; it is affected by age, by infirmity, by habit. " (*Ibid.*) **I**

(f) "In the present day, all females seem to be taught after one model." *Best Ev.*, 9th Ed., S. 247, p. 228. See also *Chambers' Edinb. Journal* for July 26, 1845. **J**

(g) For instances showing the deceptive nature of the kind of evidence mentioned in this section. See *Eagleton v. Kingston*, 8 Ves. 476; *Case of Carsewell, Glasgow*, 1791; cited in *Burnet's Crim. Law of Scotland* 502; *Wills, Cic. Ev.*, 112, 3rd Ed.; *Best Ev.*, 9th Ed., S. 247, p. 228. **K**

(h) "Standing alone, any of the modes of proof of handwriting by resemblance is worth little; in a criminal case nothing,—their real value being as *admnacula* of testimony." *Best Ev.*, 9th Ed., S. 247, p. 229. **L**

(i) "But slight evidence, uncontradicted, may become cogent proof." *Best Ev.*, 9th Ed., S. 247, p. 229; see also 13 W.R. 191 (193). **M**

3.—"Illustration."

N.B.—The illustration to this section is based on the case of *Doe v. Sackermore*, 5 A. and E. 705 (Coleridge, J.); 730 (Patteson, J.) 739—740 (Denman, C.J.), cited in *Steph. Dig.*, 7th Ed., Art. 51, p. 64. **N**

48. When the Court has to form an opinion as to the existence of any general custom or right¹, the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence, if it existed, are relevant.

Opinion as to existence of right or custom when relevant.

Explanation².—The expression, 'general custom or right,' includes customs or rights common to any considerable class of persons.

Illustration.

The right of the villagers of a particular village to use the water of a particular well is a general right within the meaning of this section.

(Notes).

I.—“Existence of any general custom or right.”

(1) Principle of the section.

Such persons as are contemplated by this section are, so to speak, the depositaries of customary law, just as the text books are the depositaries of the general law. 10 B. 528 (543). **O**

(2) Scope of section.

(a) Opinions of persons who are in a position to know the existence of custom or usage, is admissible under this section. 26 C. 184 (187) **P**

(b) The word “opinions” in this section also include such opinions recorded in a *wajib-ul-arz*, etc. See 5 C. 744 - 7 I.A. 68; Field Ev., p. 199; 3 C.L.J. 594 (P.C.) = 3 A.L.J. 415 - 8 Bom. L.R. 402 - 10 C.W.N. 730 = 28 A. 488. **Q**

(c) “The kind of evidence contemplated by this section is admissible to *prove* as well as to *disprove* a general right or custom.” Norton. Ev. 227; A.A. and W. 4th Ed., p. 315. **R**

(3) This section compared with S. 32, cl. (4) and S. 13.

(a) “Under Cl. (4), S. 32, evidence may be given of a statement written or verbal made by a person who is dead, or who cannot be found or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense, which, under the circumstances of the case, appears to the Court to be unreasonable, such statement giving the opinion of such person as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware and having been made before any controversy as to such right, custom, or matter arose.” Field Ev., 6th Ed., p. 195. **S**

(b) “The present S. 48 is concerned with oral evidence given in open Court by the person expressing the opinion, and is not governed by the limitation, before any controversy, etc.” Field Ev., 6th Ed., p. 195; Cunn. Ev., 11th Ed., p. 130. A.A. and W., 4th Ed., p. 314. **T**

(c) S. 13 applies to all rights and customs, public, general, private, and refers to specified facts which may be given in evidence. See A. A. and W., 4th Ed., p. 514. **U**

(4) Custom and usage—Distinguished.

(a) “Usage is a fact and custom is a law. There can be usage without custom, but not custom without usage. Usage is inductive based on the consent of persons in a locality. Custom is deductive making established local usage a law.” Wharton, S. 965 cited in A.A.W., 4th, Ed., p. 314. **Y**

(b) “Usage is a matter of fact, and not of opinion.” *Haskins v. Warren*, 155 Mass. 514 (535); Wigm. Ev., 5th Ed., S. 1954, p. 2600. **W**

(c) “The mere assertion of a ‘custom’ does not involve opinion.” *Conner v. R. Co.*, 146 Ind. 490; 45 N.E. 662; Wigm. Ev., 5th Ed., S. 1954, p. 2600. **X**

I.—“Existence of any general custom or right.”—(Continued).

(5) Opinion evidence as to custom—Its value.

(a) Mere opinion evidence is entitled to no weight in matters of custom, and the custom set up must be proved by specific instances. 3 B. 34, *cited and followed* in 20 B. 53 (59). **Y**

(b) In the case of *Bai Baiji v. Bai Santok*, Ranade, J, made the following remarks :—

“The appellant-plaintiff also set up a custom which she failed to prove. Her witnesses were unable to cite a single instance in support of the custom set up by her, &c.” See 20 B. 53 (58). **Z**

(c) “It has sometimes been said that a witness to trade usage may state any specific instances, or must at least mention one or more in support of his statement of the general practice. This notion is traceable to some remarks of Lord Mansfield and later Judges, which do not justify it. There have indeed been Judges who have refused, on all the facts of a case, to credit testimony to usage, which could not adduce instances in verification. But there is no rule of exclusion. The usage is itself a fact, and the opinion rule does not treat such testimony as an inference from data which can be adequately stated without the inference.” Wigm. Ev., 5th Ed., S. 1954, p. 2600; *Edie v. East India Co.*, 1 W.B.L. 295; *Bishop v. Clay*, Ins. Co., 45 Conn. 430 (455); *Camden v. Cowley*, 1 W.B.L. 417; see also 3 B. 34; 20 B. 53 (59). **A**

(d) “An usage of trade must be proved by instances, and cannot be supported by evidence of opinion merely.” *Per* Park, J., in *Cunningham v. Fonblanque*, 6 C. and P. 43; Wigm. Ev., 5th Ed., S. 1954, p. 2600; 3 B. 34; 20 B. 53 (58). **B**

(e) “As to whether one witness to usage suffices.” See Wigm. Ev., 5th Ed., Ss. 2053, and 1954. **C**

(f) “As to whether, when instances are given, one instance suffices.” See Wigm. Ev., 5th Ed., Ss. 379 and 1954. **D**

(6) Cogent evidence of custom—Essentials of valid custom.

(a) The most—is not that which is afforded by the expression of opinion as to its existence, but by the enumeration of instances in which the alleged custom has been acted upon, and by the proof afforded by judicial or revenue records or private accounts and receipts that the custom has been enforced. 1 A. 440 (441). **E**

(b) Again, a custom to be good must be definite. 1 A. 440 (442). **F**

(c) Courts must inquire very fully before affirming the existence of customs which appertained to the feudal system and are disappearing with that system. 1 A. 440 (441). **G**

(d) In cases where the existence of ancient customs was in dispute it is peculiarly incumbent on the Courts to try the existence of the custom regarding each case as a separate issue. 1 A. 440 (441). **H**

(e) The Courts should also test the parol evidence given generally as to the existence of the custom by ascertaining on what grounds the opinion of each witness is based. 1 A. 440 (441). **I**

1.—“Existence of any general custom or right.”—(Continued).

(7) Evidence of usage—Usage, whether should be from time immemorial.

(a) In England a valid custom is required to be proved to have dated from time immemorial. 23 C. 427 (429). J

(b) But in this country there is no necessity for proof in all cases of such long existence. 23 C. 427 (429). K

(c) In the case of *Dalglisch v. Guzuffer Hassan*, their Lordships Trevelyan and Beverley, JJ, made the following remarks:—

“The word ‘usage’ at any rate, would include what the people are now or recently in the habit of doing in a particular place. It may be this particular habit is only of a very recent origin, or it may be one which has existed for a long time. If it be one regularly and ordinarily practiced by the inhabitants of the place where the tenure exists, that would be ‘usage’ within the meaning of the S. 183 of the Bengal Tenancy Act (VIII of 1885).” 23 C. 427 (429), cited and followed in 26 C. 184 (187). L

Examples of opinions admitted under this section.

(1) Wajib-ul-arz recording custom.

(a) On the question of the existence of a special custom the wajib-ul arz of village administration-papers, directed to be made by Reg. VII of 1822, and ascertaining and recording usages of the kind of the custom in question, were properly received in evidence. 5 C. 744=6 C.L.R. 593=7 I.A. 63 (P.C.). M

(b) The question of the admissibility of such papers is not affected by the fact that they were prepared by the settlement officer's subordinates and not by himself as required by the Regulation. 5 C. 744=6 C.L.R. 593=7 I.A. 63 (P.C.). N

(c) Even if such papers were to be treated only as the recorded opinions of those likely to know the custom, they would be admissible in evidence under this section. 5 C. 744=6 C.L.R. 593=7 I.A. 63 (P.C.). (2 N.W.P. 395, App.). See also 3 C.L.J. 594=3 A.L.J. 415=8 Bom. L.R. 402=10 C.W.N. 730=28 A. 488 (P.C.). O

(d) Entries in a wajib-ul-arz properly made and authenticated by the signatures of the officers who made them, are admissible in evidence under this section, as the record of opinions as to the existence of such custom by persons likely to know of it. 3 C.L.J. 594=3 A.L.J. 415=8 Bom. L.R. 402=10 C.W.N. 730=28 A. 488 (P.C.). P

(e) Upon a question of custom, a wajib-ul-arz is generally more valuable as a record of the opinion of persons presumably acquainted with the custom than as an official record of custom. 8 O.C. 94 (102). Q

(f) Entries in a wajib-ul-arz however important they may be as evidence of a custom, are not conclusive evidence of such custom. 12 A. 328 (335) (F.B.). R

(2) Opinion evidence was admitted to prove the following facts:—

(i) A boundary between villages. Norton Ev., 227; A.A. and W. 4th Ed., p. 315. See also Cunn. Ev., 10th Ed., p. 201. S

(ii) The limits of a village or town. (*Ibid*). T

(iii) The opinions of persons likely to know about village pasturage. (*Ibid*). U

(iv) A right to collect tolls. (*Ibid*). Y

1.—“Existence of any general custom or right.”—(Concluded).

Examples of opinions admitted under this section.—(Concluded).

- (v) Right to the use of paths, water-courses, or ferries. (*Ibid*). W
- (vi) Right to collect fuel. (*Ibid*). X
- (vii) Right to use tanks and bathing ghats. (*Ibid*). Y
- (viii) Rights to water-courses, tanks and ghats for washing. (*Ibid*). Z
- (ix) A right to trade to the exclusion of others. (*Ibid*).
- (x) Other mercantile usages and local customs may be proved under this section. (*Ibid*). B
- (xi) Rights of commons and the like may also be proved under this section. (*Ibid*). C
- (xii) A person, who had been in the habit of writing out deeds of sale, or one who had been seeing transfers frequently made, would certainly be in a position to give his opinion whether there was a custom or usage in that particular locality, and we think that the opinions of such persons would be admissible. *Per* Ameer Ali and Pratt, JJ. in 26 C. 184 (187). D

2.—“Explanation.”

(1) Scope of the explanation.

- (a) “The explanation to this section excludes *private* rights from the operation of the section. Opinion evidence is not admissible to prove such rights. They must be proved by facts, such as acts of ownership.” See Norton Ev., 227; A.A. and W. Ev., 4th Ed., p. 815. E
- (b) “The explanation to this section adopts the sense in which the term ‘general’ is used by the English writers.” Field Ev., 6th Ed., p. 195; see Tay. Ev., 10th Ed., S. 609, p. 430; Phip. Ev., 4th Ed., p. 273. F
- (c) “The Indian Evidence Act, however, makes no express provision for the admission of oral evidence expressing the opinion, as to the existence of a public custom or right, of persons who would be likely to know of its existence, if it existed. Why oral evidence of opinion should be admitted in the case of a general, though not of a public, custom or right, is not very obvious. It may perhaps be said that every public custom or right is a general custom or right though the converse of this proposition would not hold good.” Field Ev., 6th Ed., p. 195; A. A. and W. 4th Ed., p. 314; Cunn. Ev., 11th Ed., p. 130. G
- (d) Public and general rights, as to distinction in English Law between, see notes under S. 32, p. 613, *supra*. H

(2) “General custom or right,” whether comprehends public custom or right.

- (a) The term “general custom or right” probably includes “public customs or rights.” Whitley Stokes, Vol. II, p. 884. I
- (b) “It would seem that the terms “public” and “general” are used in this Act as synonymous. Cunn. Ev., 11th Ed., p. 130; but see also Field Ev., 6th Ed., p. 195.
- (c) As to the meaning of the word “rights,” see notes under S. 13, pp. 112 and 113, *supra*. K

49. When the Court has to form an opinion as to—

Opinions as to the usages and tenets of any body of men or
usages, tenets¹,
&c., when relevant. family,

• the constitution and government of any religious or charitable
foundation, or

the meaning of words or terms used in particular districts or by
particular classes of people;

the opinions of persons having special means of knowledge
thereon are relevant facts.

(Notes).**1.—“Opinions as to usages, tenets, etc.”****(1) Section explained.**

The following points may be proved under this section :—

- (i) The usages of any body of men. A. A. and W. 4th Ed., pp. 316, 317. **L**
- (ii) The tenets of any body of men. (*Ibid*). **M**
- (iii) Usages of a family. (*Ibid*). **N**
- (iv) Tenets of a family. (*Ibid*). **O**
- (v) The constitution and government of any religious or charitable foundation. (*Ibid*). **P**
- (vi) The meaning of the words or terms used in particular districts or by particular classes of people. (*Ibid*). **Q**

(2) Scope of the section.

- (a) “The kind of evidence contemplated by this section must be the expression of independent opinion based on hearsay and not repetition of hearsay.” 23 A. 37 (52)=5 C.W.N. 33 (P.C.) (41). See also 2 A.L.J. 720 (732)=27 A. 203. **R**
- (b) It is admissible evidence for a living witness to state his opinion on the existence of a family custom, and to state as the grounds of that opinion information derived from deceased persons. 23 A. 37 (52)=5 C.W.N. 33 (P.C.) See also 2 A.L.J. 720 (732)=27 A. 203. **S**
- (c) And the weight of the evidence would depend on the position and character of the witness and of the persons on whose statements he has formed his opinion. 23 A. 37 (52)=5 C.W.N. 33 (P.C.). See also 2 A.L.J. 720 (732)=27 A. 203. **T**

(3) Evidence of absence of usage, if admissible.

Evidence of persons engaged in a particular business, that they never heard of the existence of an usage in such business, is also admissible under this section. *Evansville, etc., R.R. and Co. v. Young*, 28 Ind. 516; A. A. and W. 4th Ed., p. 317. **U**

1.—“*Opinions as to usages, tenets, etc.*”—(Continued).

(4) Entry of opinion in official record—Wajib-ul-arz.

- (a) If the opinions of persons are relevant under this section, the entry of such opinions in an official record is also relevant. 5 C. 744 (754) (P.C.)=7 I.A. 63=6 C.L.R. 593; 3 O.L.J. 594 (P.C.)=3 A.L.J. 415=8 Boun. L.R. 402=10 C.W.N. 730=28 A. 488. **Y**
- (b) Proof of special custom—Village administration-papers, admissibility of—Evidence Act, Ss. 35 and 48. See 5 C. 744 (P.C.)=6 C.L.R. 593=7 I.A. 63; 3 C.L.J. 594 (P.C.)=3 A.L.J. 415=8 Boun. L.R. 402=10 C.W.N. 730=28 A. 488 noted under S. 35, *supra*. **W**
- (c) Certain wajib-ul-arz were put in as evidence in favour of the respondents, but they were held not sufficient to outweigh the evidence afforded by the acts of the parties and actual descent of the estate. 5 C.W.N. 33=23 A. 37. **X**

(5) Value of evidence under this section.

- (a) Courts would not be disposed to place much reliance upon the kind of evidence contemplated by this section standing alone. 23 A. 37 (52)=5 C.W.N. 33 (P.C.) (41). **Y**
- (b) So much depends upon the circumstances of each case, and so trifling in value is any one ruling as an illustration of the principle, that no amount of illustrations will be of much use. See Wigm. Ev., 1905 Ed., S. 1955, p. 2601. **Z**

(6) Evidence of usage—Instances of observance of usage.

- (a) A well qualified witness who could not state individual cases was admitted. See *Hamilton v. Nickerson*, 13 All. 351; Wigm. Ev., 1905 Ed., S. 1955, p. 2600. **A**
- (b) Insurance brokers might be examined as to the general opinion and understanding of the persons concerned in the trade; though they knew no particular instance in fact, upon which such opinion was founded. *Camden v. Cowley*, 1 W. Bl. 417 (L.C.J. Mansfield); Wigm. Ev., 1905 Ed., S. 1955, p. 2600. **B**

N.B.—See also notes under S. 45, *supra*.

(7) Examples.

- (a) Evidence was admitted of the meaning of the word “level” in a mining contract. *Clayton v. Gregson*, 5 A. and E. 302; Wigm. Ev., 1905 Ed., S. 2464, p. 3489. **C**
- (b) In a contract to build a stone wall at 11 cents a foot; evidence of usage was admitted to determine whether the inner or the outer face should be taken as the basis. *Ford v. Tisell*, 9 Grey 401; Wigm. Ev., 1905 Ed., S. 2464, p. 3489. **D**
- (c) For an instance where mining usage was admitted to interpret a lease, see *Cambers v. Lowry*, 21 Mont. 478, 54 Pac. 816; Wigm. Ev., 1905 Ed., S. 2464, p. 3489. **E**
- (d) For an instance where the trade meaning of “reduce” in an insurance contract was admitted, see *Halsey v. Adams*, 68 N.J.L. 330; 43 Atl. 708; Wigm. Ev., 1905 Ed., S. 2464, p. 3489. **F**

I.—“*Opinions as to usages, tenets, etc.*”—(Concluded).

- (e) In a contract for plastering at a price per square yard, local usage was admitted to determine whether “yard” included space actually plastered or total superficial area of walls including windows and doors, *Walls v. Bailey*, 49 N.Y. 463, 468; Wigm. Ev., 1905 Ed., S. 2464, p. 3489. **G**
- (f) In a contract to furnish brick at Sh. 6.25 per thousand, evidence of usage as to whether this signified the number furnished or used or the like was admitted. *Boue v. Lehman*, 15 Oh. St. 179, 184; Wigm. Ev., 1905 Ed., S. 2464, p. 3489. **H**
- (g) For an instance where technical abbreviations of the wheat trade was admitted, see *Maurin v. Lyon*, 69 Minn. 257, 72 N.W. 72; Wigm. Ev., 1905 Ed., S. 2464, p. 3489. **I**
- (h) Evidence as to mercantile usage may be received; but you cannot ask a witness what is the meaning of a written document. *Kirkland v. Nisbet*, 3 Macq. Ss. App. C. 766; Wigm. Ev., 1905 Ed., S. 1955, p. 2601. **J**
- (i) For an instance where “necessary signals and switchmen” were interpreted by an expert, see *Louisville and N.R. Co. v. R. Co.*, 174 Id. 448, 51 N.E. 824; Wigm. Ev., 1905 Ed., S. 1955, p. 2601. **K**
- (j) For an instance where the effect of the words “protest waived” was excluded, see *Schwartz v. Wilner*, 90 Md. 136, 44 Atl. 1059; Wigm. Ev., 1905 Ed., S. 1955, p. 2601. **L**
- (k) For an instance where explanation of patent specifications was allowed, see *Burton v. B.S.C. Co.*, 171 Mass. 499, 50 N.E. 1029; Wigm. Ev., 1905 Ed., S. 1955, p. 2601. **M**
- (l) For an instance where experts were allowed to explain technical phrases in hydraulic contract, see *Cargill v. Thompson*, 57 Id. 594, 59 N.W. 638; Wigm. Ev., 1905 Ed., S. 1955, p. 2601. **N**
- (m) But in the above case they were not allowed to construe the clauses in the contract. *Cargill v. Thompson*, 57 Id. 594, 59 N.W. 638; Wigm. Ev., 1905 Ed., S. 1955, p. 2601. **O**
- (n) For an instance where the meaning of “excavated and prepared” as applied to a roadbed was admitted, see *Clayton Co. v. R. Co.*, 179 Pa. 350, 36 Atl. 287; Wigm. Ev., 1905 Ed., S. 1955, pp. 2601-2. **P**
- (o) For an instance where an expert was allowed to explain what is a “full cargo,” see *Oyden v. Parsons*, 23 How. 169; Wigm. Ev., 1905 Ed., S. 1955, p. 2602. **Q**
- (p) “It was common enough for the masters in Chancery to consult Scotch advocates upon the effect of the Scotch marriage settlements or the like.” *Williams v. Williams*, 3 Beav. 547; *Hitchcock v. Clendinning*, 12 Beav. 534; Wigm. Ev., 1905 Ed., S. 1955, p. 2602. **R**

(8) Expert interpretation of technical words and phrases.

- (a) “The interpretation of the meaning of a document in respect to ordinary words, being a part of the function of the Court, is not for a witness to speak to.” Wigm. Ev., 1905 Ed., S. 1955, p. 2601. **S**
- (b) But so far as the words are technical and the witness speaks to technical usage or meaning, there is no prohibition Wigm. Ev., 1905 Ed., S. 1955, p. 2601. **T**
- (c) “The Court must determine anew in each instance whether it needs any testimonial aid to interpret the word or phrase in dispute.” Wigm. Ev., 1905 Ed., S. 1955, p. 2601. **U**

50. When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship¹, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact: Provided² that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, or in prosecutions under section 494, 495, 497, or 498, of the Indian Penal Code.

Illustrations.

(a) The question is, whether A and B were married. The fact that they were usually received and treated by their friends as husband and wife is relevant.

(b) The question is, whether A was the legitimate son of B. The fact that A was always treated as such by members of the family is relevant.

(Notes).

1.—“Opinion, expressed by conduct, as to the existence of such relationship.”

(1) Scope of section.

(a) In this section the opinions spoken of are the opinions of persons called as witnesses. Mark. Ev., p. 44. **Y**

(b) That proof of the opinion, as expressed by conduct, may be given, seems to imply that the person himself is not to be called to state his own opinion, but that, when he is dead or cannot be called, his conduct may be proved by others. 9 M. 9 (11). **W**

(c) The section appears to afford an exceptional way of proving a relationship but by no means to prevent any person from stating a fact of which he or she has special means of knowledge. 9 M. 9 (11). **X**

(2) Principle of section.

(a) The opinion and belief of the family may be inferred from the family conduct (as) the tacit recognition of relationship and the distribution and devolution of property. Tay. Ev., 10th Ed., S. 649, p. 460. **Y**

(b) Thus “if the father is proved to have brought up the party as his legitimate son, this amounts to a daily assertion that the son is legitimate.” *Per* Mansfield, J, in *Berkley Peerage case*, 4 Camp. 416; Tay. Ev., 10th Ed., S. 649, p. 460. **Z**

(3) English Law.

(a) “On a question of *pedigree*, family conduct is admissible to prove relationship; and the treatment of friends and neighbours may be received as presumptive proof of marriage.” Phip. Ev., 4th Ed., p. 99. **A**

(b) Even treatment by entire strangers is in some cases receivable. Phip. Ev., 4th Ed., p. 99. **B**

(4) Qualifications of witness speaking as to relationship.

(i) The uncorroborated statement of a single witness has been received. *Evans v. Morgan*, 2 C. and J. 453; Tay. Ev., 10th Ed., S. 578, p. 408. **C**

1.—“Opinion, expressed by conduct, as to the existence of such relationship.”—(Continued).

- (ii) Such a witness need not necessarily be related to the parties. (*Ibid*). **D**
- (iii) Nor need he be a neighbour living near them. (*Ibid*). **E**
- (iv) Nor need he know the parties intimately. (*Ibid*). **F**
- (v) It is enough that such witness merely asserts that he *heard* that the parties were married. His evidence was held sufficient *prima facie* to warrant the jury in finding a marriage. (*Ibid*). **G**

N.B.—In the above case the adverse party did not cross-examine the witnesses, nor did he controvert the fact by other evidence. (*Ibid*). **H**

(b) The following are admissible as showing relationship :-

- (a) Family conduct and treatment. *Greaves v. Greenwood*, 2 Ex. D. 289; Phip. Ev., 4th Ed., p. 288. **I**
- (b) The tacit recognition of relations (*Ibid*). **J**
- (c) Distribution of family property. (*Ibid*). **K**
- (d) Omission of particular persons from mention or benefit in family wills and settlements. (*Ibid*). 12 M.I.A. 203 (218) = 11 W.R. 6 (P.C.) = 2 B.L.R. 15. **L**
- (e) Omission to mention an alleged son in a *Pooroonn* grant by a zemindar may afford an inference that he was not the son of the zemindar, nor was recognised so by him at that time. 12 M.I.A. 203 (218) = 11 W.R. 6 (P.C.) = 2 B.L.R. 15. **M**

N.B.—But this inference can be drawn only on the assumption that the child was then in existence. 12 M.I.A. 203 (218) = 11 W.R. (P.C.), 6 = 2 B.L.R. 15. **N**

- (f) Recognition by the Sovereign is receivable to prove the legitimacy of a peer. Hubb. Ev., p. 698; Phip. Ev., 4th Ed., p. 99. **O**
- (g) Where a daughter's son was accorded, by an Oudh Talukdar, a treatment that is accorded to a son, it was held that the lower Courts were right in treating such daughter's son as the heir of the talukdar. 21 C. 997 = 21 I.A. 163 (P.C.). **P**
- (h) Conveyance of property by strangers to a person who would only be entitled to it if legitimate, may be shown to prove legitimacy. *Slaney v. Wade*, 7 Sim. 595; Phip. Ev., 4th Ed., p. 99. **Q**
- (i) And where title even to a private office or relationship is in question, proof that the party was treated by others as entitled thereto may be given, even in actions between strangers. *R. v. Fordunbridge*, 27 L.J.M.C. 290; Phip. Ev., 4th Ed., p. 99. **R**
- (j) The conduct and statements of a paramour is admissible to prove the illegitimacy of the child born in wedlock. *Morris v. Davies*, 5 C. and F. 163; *Aylesford peerage case*, 11 App. Cas. 1; *Burnaby v. Baillie*, 42 Ch. D. 282; Phip. Ev., 4th Ed., p. 288. **S**
- (k) Such statements, however, though receivable as part of the *res gestae*, are no proof *per se* of their truth. Phip. Ev., 4th Ed., p. 288. **T**
- (l) “The tradition and repute prevailing in the family as to any genealogical event may also be proved, and will be received as presumptive evidence of its existence.” Phip. Ev., 4th Ed., p. 288. **U**

1.—“*Opinion, expressed by conduct, as to the existence of such relationship.*”—(Continued).

(6) **Facts relevant to prove marriage.**

(a) The following are among the —.

(i) Evidence of the parties being received into society as man and wife. *Kay v. Duchesse de Vienne*, 3 Camp. 123; *Hervey v. Hervey*, 2 W. Bl. 877; *Birt v. Barlow*, 1 Doug. 174; *Read v. Passer*, 1 Esp. 214; *Leader v. Barry*, 1 Esp. 353; *Deu v. Fleming*, 4 Bing. 266; *Goodman v. Goodman*, 28 L.J. Ch. 745; *Smith v. Smith*, 1 Phillim. R. 294; *Hapmick v. Brownson*, 5 Day. 290 (293); *Tay. Ev.*, 10th Ed., S. 578, p. 408. **Y**

(ii) Evidence of their being visited by respectable families in the neighbourhood. (*Ibid*). **W**

(iii) Evidence of their attending church and public places together, and otherwise behaving themselves in public. (*Ibid*). **X**

(iv) Evidence of their mode of addressing each other, as persons actually married. *Kay v. Duchesse de Vienne*, 3 Camp. 123; *Hervey v. Hervey*, 2 W. Bl. 877; *Tay. Ev.*, 10th Ed., S. 578, p. 408. **Y**

N.B.—These might possibly be put upon the ground that they amount to admissions by the parties themselves. *Tay. Ev.*, 10th Ed., p. 408 (foot-note). **Z**

(7) **Proof of marriage in English Law.**

(a) In the English Courts a marriage is usually proved by the production of the parish or other register, or a certified extract therefrom; but, if celebrated abroad, it may be proved by any person who was present at it, though circumstances should also be proved, from which the jury may presume that it was a valid marriage according to the law of the country in which it was celebrated. 9 M. 9 (11). **A**

(b) “Proof that the ceremony was performed by a person appearing and officiating as a priest, and that it was understood by the parties to be the marriage ceremony according to the rites and customs of the foreign country, would be sufficient presumptive evidence of it.” See *R. v. Inhabitants of Brampton*, 10 East 282, cited in 9 M. 9 (11). **B**

(c) But only so as to throw on the defendant the onus of impugning its validity. *Archbold on Bigamy*, p. 925, cited in 9 M. 9 (11). **C**

(d) And even a marriage in England may be proved by any person who was actually present and saw the ceremony performed; it is not necessary to prove its registration or the license or publication of the banns. *Archbold on Bigamy*, p. 925, quoting *R. v. Allison*, R. and R. 109; *R. v. Manwaring*, Dears and B. 132 = 26 L.J. (M.C.), 10, cited in 9 M. 9 (11). **D**

(8) **Proof of marriage in this country.**

In this country there is no statutory marriage law for natives, and the validity of any particular marriage depends chiefly on the usage of the caste to which the parties belong. 9 M. 9 (11). **E**

(9) **Marriage—Evidence of reputation.**

(a) General reputation is usually admissible to establish the fact of the parties being married. *Tay. Ev.*, 10th Ed., S. 578, p. 408; see also *Phip. Ev.*, 4th Ed., p. 288. **F**

1.—“Opinion, expressed by conduct, as to the existence of such relationship.”—(Continued).

- (b) But not in petitions for damages for adultery and prosecutions for bigamy, where stricter proof is required. *Tay. Ev.*, 10th Ed., S. 578, p. 408 (foot-note); *Phip. Ev.*, 4th Ed., p. 355; 5 A. 233. G
- (c) Evidence of general reputation in the neighbourhood, in order to be receivable in proof of marriage need not be supported by facts. *Lyle v. Ellwood*, L.R. 19 Ex. 98; *Collins v. Bishop*, 48 L.J.Ch. 31; *Tay. Ev.*, 10th Ed., S. 578, p. 408. H
- (d) Such evidence is receivable even if contradicted to some extent by evidence of a contrary repute. *Lyle v. Ellwood*, L.R. 19 Ex. 98; *Collins v. Bishop*, 48 L.J. Ch. 31; *Tay. Ev.*, 10th Ed., S. 578, p. 408. I
- (e) A marriage may be even established by reputation, though one of the parties to it denies it. *Elliott v. Totnes Union*, 57 J.P. 151; *Tay. Ev.*, 10th Ed., S. 578, p. 408. J
- (f) Evidence of general reputation is also admissible in disproof of marriage. *Steph. Dig. Art. 53*; *Tay. Ev.*, S. 578; *Phip. Ev.*, 4th Ed., p. 354. K
- (g) “In the case of marriage, the repute and conduct need not be confined to the family; reputation among and treatment by friends and neighbours may also be received.” *Phip. Ev.*, 4th Ed., p. 288. L
- (h) Such evidence has sometimes been accepted in preference to the oath of the party. *Elliott v. Totnes Union*, 57 J.P. 151; *Phip. Ev.*, 4th Ed., p. 354. M
- (i) “And it is not inadmissible because it is divided, discontinuous or restricted to a particular class or locality though these circumstances may impair its weight.” *Andrews v. Ullswate*, 2 T.L.R. 895; *Re Haynes*, 94 L.T. 431; *Phip. Ev.*, 4th Ed., p. 354. N
- (j) But the testimony must be general; if it is based merely on the statements of some particular person, it ceases to be admissible as general reputation. *Shedden v. A.—G.*, 30 L.J.P.M. and A. 217; *Phip. Ev.*, 4th Ed., p. 354. O
- (k) In cases of bigamy, divorce, and petitions for damages by reason of adultery, however, stricter proof is required. *Phip. Ev.*, 4th Ed., p. 355. P

(10) The following have been held insufficient for proving marriage:—

- (a) On a charge of bigamy, the prisoner's admission of a former valid marriage was held not sufficient. *Phip. Ev.*, 4th Ed., p. 355. Q
- (b) On a similar charge the prisoner's marriage certificate coupled with evidence of cohabitation, though without testimony of any witness present at the marriage was held insufficient. *R. v. Simpson*, 15 Cox. 923; *Phip. Ev.*, 4th Ed., p. 355. R
- (c) In the case of a Jewish marriage, even such testimony without the production and proof of the marriage contract itself, was held to be insufficient. *R. v. Althausen*, 17 Cox. 630; *Phip. Ev.*, 4th Ed., p. 355. S

1.—“Opinion, expressed by conduct, as to the existence of such relationship.”—(Concluded).

(11) The following circumstances are relevant to rebut the presumption of legitimacy of the child of a married woman :—

- (a) The concealment of the birth of a child from the husband. *Hargrave v. Hargrave*, 2 C. and Kir. 701; Tay. Ev., 10th Ed., S. 649, p. 460. **T**
- (b) The subsequent treatment of such child by the person who, at the time of its conception, was living in a state of adultery with the mother. *Goodright v. Saul*, 4 T.R. 356; *Morris v. Dames*, 5 Cl. and Fin. 163 (H.L.); Tay. Ev., 10th Ed., S. 649, p. 460. **U**
- (c) The fact that the child and its descendants assumed the name of the adulterer. (*Ibid*). **V**
- (d) The fact that the child had never been recognised in the family as the legitimate offspring of the husband. (*Ibid*). **W**
- (e) The fact that the alleged father had never so put the child as his. (*Ibid*). **X**
- (f) Conduct of the adulterer showing that he and not the husband was the father of the child. *Burnaby v. Baillie*, 42 Ch. D. 282; Phip. Ev., 4th Ed., p. 99. **Y**
- (g) The fact that the mother had never so put the child forward,—“these all are circumstances that will go far to rebut the presumption of legitimacy, which the law raises in favour of the issue of a married woman.” *Goodright v. Saul*, 4 T.R. 356; *Morris v. Davis*, 5 Cl. and Fin. 163; Tay. Ev., 10th Ed., S. 649, p. 460. **Z**
- (h) The legal presumption as to paternity raised by S. 112 of this Act is applicable only to the offspring of a married couple. 27 M. 32 (34). **A**
- (i) As to acknowledgment under Mahomedan law, see notes under S. 31, pp. 539 to 542, *supra*; see also 21 C. 666 (P.C.)=21 I.A. 56; 23 C. 130. **B**

(12) Proof of illegitimacy.

A person claiming as an illegitimate son must establish his alleged paternity like any other disputed question of relationship, and can rely upon statements of deceased persons under S. 32, cl. (5), upon opinion expressed by conduct under this section, and also upon such presumptions of fact as may be warranted by the evidence. 27 M. 32 (34, 35). **C**

(13) Delay in suing—Effect.

- (a) In a case in which the legitimacy of a person in possession is questioned a very considerable time after his possession has been acquired, by a party who has a strict legal right to question his legitimacy, the defendant, in order to defend his status, should be allowed to invoke against the claimant every presumption which reasonably arises from the long recognition of his legitimacy by members of the family or other persons. 14 M.I.A. 67 (77)=15 W.R. 41 (P.C.). **D**
- (b) The above remarks also apply to a case of a Hindu claiming by adoption. 14 M.I.A. 67 (77)=15 W.R. 41 (P.C.). **E**

2.—“Proviso.”

(1) Principle of proviso.

- (a) “The marriage of a woman is as essential an element of the crime charged as the fact of the illicit intercourse, and the provisions of the Evidence Act (this section) seem to point out very plainly that, where the marriage is an ingredient in the offence, the fact of the marriage must be proved in the regular way.” 5 C. 566=5 C.L.R. 597 (F.B.), cited in 9 M. 9 (10). **F**

2.—“ *Proviso.* ”—(Concluded).

- (b) “ In the case of bigamy, etc., the fact of the marriage must be proved, and it must also be proved in the ordinary way, *i.e.*, by other and more reliable evidence than that of the mere ‘ opinion—expressed by conduct —of a person who, as a member of the family or otherwise, has special means of knowledge.’ ” 9 M. 9 (10). **G**

(2) Scope of proviso.

- (a) From the proviso we see that evidence which is considered sufficient for one purpose is not considered sufficient for another, or, in the language of S. 4, what amounts to proof depends on the ‘ circumstances of the case.’ Mark. Ev., p. 44. **H**
- (b) Strict proof is required in all criminal cases. 5 A. 233 (234). **I**
- (c) In proceedings founded on a charge of adultery, strict proof of the marriage is always required. *Per* Wilson and Tottenham, JJ., in their reference of the case to the Full Bench in 4 W.R. (Cr. Rul.), 31; 5 C. 566 (F.B.) = 5 C.L.R. 597; 5 A. 233 (234); 8 B.L.R. App. 68. **J**
- (d) The provisions of this section show, that where marriage is an ingredient in an offence, as in bigamy, adultery, and the enticing of married women, the fact of the marriage must be strictly proved. 5 C. 566 (F.B.) = 5 C.L.R. 597, Rat. Unrep. Cr. Rul. 190; 3 O.C. 342; 18 A.W.N. 186; 20 A. 166 = 18 A.W.N. 7; 13 C.L.R. 125 (127). But see 8 B.L.R. App. 63, *overruled*. **K**
- (e) To justify a conviction under S. 498, Penal Code, it is not sufficient for the prosecution to prove that the complainant and the woman, in respect of whom the charge was made, lived together as man and wife. 13 C.L.R. 125 (127). See also 5 C.L.R. 597 (F.B.) = 5 C. 566. **L**
- (f) It is necessary that facts constituting a valid marriage should be proved in accordance with S. 60 of the Evidence Act. 13 C.L.R. 125 (127). See also 5 C.L.R. 597 (F.B.) = 5 C. 566. **M**

(3) English Law.

- (a) The framers of the Evidence Act have endeavoured, in dealing with this subject, exactly to follow the English Law. *Per* Wilson and Tottenham, JJ., in their reference of the case to the Full Bench in 5 C. 566 (567) (F.B.) = 5 C.L.R. 597. **N**
- (b) In England,¹ there has never been any doubt that, in an indictment for bigamy, the first marriage, or in proceedings founded upon adultery, the marriage, must be proved with the same strictness as any other material fact. *Per* Wilson and Tottenham, JJ., in their reference of the case to the Full Bench in 5 C. 566 (567) (F.B.) = 5 C.L.R. 597. **O**

51. Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant ¹.

Illustration

An expert may give an account of experiments performed by him for the purpose of forming his opinion.

(Notes).

1.—“Grounds on which such opinion is based are also relevant.”

(1) Principle of section.

- (a) “The mere opinions of the witnesses are entitled to little or no regard, unless they are supported by good reasons, founded on facts, which warrant them in the opinion of the jury. If the reasons are frivolous or inconclusive, the opinions of the witnesses are worth nothing.” *Per* Washington, J. in *Harrison v. Hovan*, 8 Wash. C. C. 587; Wigm. Ev., 05 Ed., S. 1917, p. 2545. **P**
- (b) “Opinion is no evidence, without assigning the reason of such opinion.” *Per* Duane, J. in *Rambler v. Tryan*, 7 S. & R. 94; Wigm. Ev., 05 Ed., S. 1917, p. 2545. **Q**
- (c) “It is true that the mere opinions of witnesses who have not the aid of science to guide them would not have any weight in such a case, and would be generally inadmissible unless sustained by facts showing the opinion to be true.” *Per* O’Neill, J. in *Seibles v. Blackhead*, 1 McMull, 57; Wigm. Ev., 05 Ed., S. 1917, p. 2545. **R**

(2) Scope of section.

- (a) “In all cases in which the opinion of experts are receivable, the grounds or reasoning upon which such opinion is based may also be inquired into.” Phip. Ev., 4th Ed., p. 362, see also 10 Bom. L.R. 907 (913). **S**
- (b) “Facts otherwise irrelevant may be given in evidence in corroboration, illustration, or rebuttal of the opinion.” *Tav. Ev.*, S. 337; *Steph. Dig.*, Art. 50; Phip. Ev., 4th Ed., p. 362. **T**
- (c) “Thus in cross-examination, the expert may be asked whether he has not expressed opinions inconsistent with his present testimony.” Phip. Ev., 4th Ed., p. 362. **U**
- (d) “And, if he deny the fact, it may be independently proved.” Phip. Ev., 4th Ed., pp. 362, 357. **V**

(3) Practice.

“The general practice is to reserve inquiry as to the grounds of opinion for cross-examination.” *Per* Bramwell, B. in *Sheen v. Bumpstead*, 1 H. and C. 358; Phip. Ev., 4th Ed., p. 362. **W**

(4) Examples.

- (a) “Witnesses called to impeach the general reputation for veracity of an adversary’s witness may in cross-examination, but not in chief, state the grounds of their opinion.” *Steph. Dig.*, Art. 133; Phip. Ev., 4th Ed., p. 362. **X**
- (b) “Medical witnesses may detail the results of an examination before being asked as to their opinions founded thereon.” Phip. Ev., 4th Ed., p. 362. **Y**
- (c) “Where a witness called to prove the handwriting of A. had stated in chief, ‘I think the handwriting is A.’s from its contents and other circumstances,’ he was allowed to be asked in chief what those circumstances were.” *R. v. Murphy*, 8 C. & P. 297; Phip. Ev., 4th Ed., p. 362. **Z**

1.—“Grounds on which such opinion is based are also relevant.”
—(Concluded).

(5) Question of valuation—Grounds of opinion.

- (a) It is quite true that, in all valuations, judicial or otherwise, there must be room for inferences and inclinations of opinion which, being more or less conjectural, are difficult to reduce to exact reasoning or to explain to others. Every one who has gone through the process is aware of this lack of demonstrative proof in his own mind, and knows that every expert witness called before him has had his own set of conjectures of more or less weight according to his experience and personal sagacity. 28 I.A. 121 (128); see also 10 Bom. L.R. 907 (913). **A**
- (b) Hence, in such inquiry relating to subjects abounding with uncertainties there is more than ordinary room for such guess work, and it would be unfair to require an exact exposition of reasons for the conclusions arrived at. 28 I.A. 121 (128). See also 10 Bom. L.R. 907 (913). **B**
- (c) The opinion of an expert witness is admissible in evidence not only when it rests on the personal observation and inquiry of the witness himself or on facts within his own knowledge, but also when it is founded on the case as proved by other witnesses at the trial. 10 Bom. L.R. 907 (913). **C**

Character when relevant.

52. In civil cases the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him, is irrelevant, except in so far as such character appears from facts otherwise relevant.

In civil cases character to prove conduct imputed, irrelevant¹.

(Notes).

1.—“In civil cases character to prove conduct...irrelevant.”

(1) Scope and object of section.

- (a) This section excludes evidence of character from being given only for the purpose of rendering probable or improbable any conduct imputed to the party. But, when facts which are relevant otherwise than for the purpose of showing character are proved, and those facts raise inferences concerning the character of a party to the suit, such facts become relevant not only to prove the facts for which they were directly tendered, but also for the purpose of showing the character of the party concerned. Norton Ev., 230. **D**
- (b) In such a case it is open to the Court to form its own conclusion as to the character of the party, and as to the effect of such character on the conduct imputed to the party. (*Ibid*). **E**
- (c) Whatever the legislature may have chosen to say, evidence of character is always relevant. The objections to it are:—(i) that it is very difficult to get a correct statement of it; (ii) that if the accused is alleged to be of bad character juries are apt to treat him harshly. Mark. Ev., p. 45; 10 W.R. (Or.), 17. **F**
- (d) As to the meaning of the term character, see S. 55, Expl., *infra*. **G**

1.—“*In civil cases character to prove conduct...Irrelevant.*”—(Continued).

(2) Principle of section.

- (a) The exclusion of evidence of character mentioned in this section is based on the principle of law that “the evidence adduced should be, alike directed and confined to the matters which are in dispute, or which form the subject of investigation.” *Best Ev.*, 8th Ed., S. 251, p. 241; *Wigm. Ev.*, 55 Ed., S. 64, p. 135. **H**
- (b) “The tribunal is created to determine matters which either are in dispute between contending parties, or otherwise require proof; and anything which is neither directly nor indirectly relevant to those matters ought at once to be put aside as beyond the jurisdiction of the tribunal, and as tending to distract its attention and to waste its time.” *Best Ev.*, 8th Ed., S. 251, p. 241. **I**
- (c) The exclusion of the evidence mentioned in this section is based on the ground of remoteness or want of reasonable connection between the principal and evidentiary facts. *Best Ev.*, 8th Ed., S. 255, p. 243. **J**
- (d) This is only an application of the fundamental principle of our law “that the best evidence is to be adduced.” *Best Ev.*, 8th Ed., S. 255, p. 243. **K**
- (d1) The reasons advanced for the general rule as to the exclusion of character in civil cases is that a party’s character is usually of “no prohibitive value.” *Wigm. Ev.*, 55 Ed., S. 64, p. 135. **L**
- (d2) “The business of the Court is to try the case, and not the man; and a very bad man may have a very righteous cause.” *Thompson v. Church*, 1 Root, 312; *Wigm. Ev.*, 55 Ed., S. 64, p. 135. **M**
- (e) The general exclusion of character evidence is based on grounds of public policy and fairness, “since its admission would surprise and prejudice the parties by raking up the whole of their careers, which they could not possibly come into Court prepared to defend.” *R. v. Rowton*, 34 L.J.M.C. 57; *Phip. Ev.*, 4th Ed., p. 167; *Tay. Ev.*, Ss. 349-63; *Ros. N.* 87; *Ros. Cr. Ev.*, 89-90; 3 *Russ. Cr.* 424-428; *Steph. Dig.*, Art. 57; *Whart. S.* 50; *Wigm. Ev.*, 1905 Ed., Ss. 52-80; *Mark Ev.*, p. 45. **N**
- (f) “In criminal cases evidence of good character of the accused is most properly and with good reason admissible in evidence, because, there is a fair and just presumption that a person of good character would not commit a crime. But, in civil cases, such evidence is with equal and good reason not admitted, because no presumption would fairly arise, in the very great proportion of such cases, from the good character of the defendant, that he did not commit the breach of contract or of civil duty, alleged against him.” *Per Martin, B.*, in *A.-G. v. Radloff*, 10 Exch. 97; *Wigm. Ev.*, 55 Ed., S. 64, p. 135. **O**
- (f1) Thus in a case where a will was impeached for fraud, the defendant was not allowed to prove his good character in answer. *Goodright v. Hicks*, B.N.P. 296; *Phip. Ev.*, 4th Ed., p. 168. **P**
- (g) Again in a divorce case a husband was not allowed to give, in disproof of a particular act of cruelty, evidence of his general character for humanity. *Narracott v. Narracott*, 33 L.J.P. and M. 61; *Phip. Ev.*, 4th Ed., p. 168. **Q**

1.—“*In civil cases character to prove conduct..irrelevant.*”—(Continued).

(3) Policy of the section.

- (a) “The general reputation and previous conduct of a litigant party is often of immense weight as natural or moral evidence, as tending to raise a presumption that his action or defence is well or ill-founded.” *Fost Cr. Law*, 246; *Best Ev.*, 8th Ed., S. 256, pp. 244-5. **R**
- (b) But, on the other hand, the exposing every man who comes into our Courts of Justice, to have every action of his life publicly scrutinised, would keep most men out of them. *Fost Cr. Law*, 246; *Best Ev.*, 8th Ed., S. 256, p. 245. **S**
- (c) “To admit character evidence in every case, or to reject it in every case, would be equally fatal to justice; and to draw the line—to define with precision where it ought to be received, and where it ought to be rejected—is as embarrassing a problem as any legislature can be called upon to solve.” *Best Ev.*, 8th Ed., S. 256, p. 245. See also *Bentham*, 3 *Jud. Ev.*, 193. **T**
- (d) Even *Bentham* admits the difficulties of this subject, and says that some of them seem scarce capable of receiving solution but in the Gordian style. See *Bentham*, 3 *Jud. Ev.*, 193; *Best Ev.*, 8th Ed., S. 257, p. 245. **U**

(4) English Law—Same as Indian Law.

- (a) “According to the general rule, it is not competent to give evidence of the general character of the parties to forensic proceedings, much less of particular facts not in issue in the cause, with the view of raising a presumption either favourable to one party or disadvantageous to his antagonist.” *Ph. and Am. Ev.*, 488-91; *Best Ev.*, 8th Ed., S. 257, p. 245; *King v. Francis*, 3 *Esp.* 117 (*Per Lord Kenyon*). **Y**
- (b) This principle has been carried so far that, “on a prosecution for an infamous offence, evidence of an admission by the accused, that he was addicted to the commission of similar offences, was rejected as irrelevant.” *R. v. Cole*, *Mich.* 1810; *Best Ev.*, 8th Ed., S. 257, p. 245. **W**
- (c) But, where the very nature of the proceedings is such as to put in issue the character of any of the parties to them, a different rule necessarily prevails. *Bull. N.P.* 295; *Best Ev.*, 8th Ed., S. 258, p. 245. **X**
- (d) And in such a case it is not only competent to give general evidence of the character of the party with reference to the issue raised, but even to inquire into particular facts tending to establish it. (*Ibid*); but see also *J’Anson v. Stuart*, 1 *T.R.* 754; *Tay. Ev.*, 10th Ed., S. 351, p. 273. **Y**
- (e) The inquiry as to the character must be confined to the general character of the prisoner, and must not condescend to particular facts. *J’Anson v. Stuart*, 1 *T.R.* 754; *Tay. Ev.*, 10th Ed., S. 351, p. 273. **Z**

EXAMPLES.

- (a) Thus “on an indictment for keeping a common gaming house the prosecutor may give in evidence any acts of the defendant which support the general charge.” *Clark v. Periam*, 2 *Atk.* 399; *Best Ev.*, 8th Ed., S. 258, p. 245. **A**

1.—“*In civil cases character to prove conduct..Irrelevant.*”—(Continued).

(b) So also where the issue is whether a party is *non compos mentis*, proof may be adduced of particular acts of insanity. *Clark v. Periam*, 2 Atk. 340; Best Ev., 8th Ed., S. 258, p. 245. **B**

(c) In actions for seduction the character of the female for chastity is directly in issue, and may be impeached either by general evidence of misconduct, or proof of particular acts of it. Best Ev., 8th Ed., S. 258, p. 245; *Bamfield v. Massey*, 1 Camp. 460; *Dodd v. Norris*, 3 Camp. 519; 1 Phill. Ev., 10th Ed., 503. **C**

(d) So a charge of rape or of assault with intent to commit rape, brings the question of the chastity of the female so far in issue that it is competent to the accused to give general evidence of her previous bad character in this respect. Ph. and Am. Ev., 489; 1 Phill. Ev., 10th Ed., p. 505; *R. v. Martin*, 6 C. and P. 562; *R. v. Barker*, 3 C. and P. 589; *R. v. Clarke*, 2 Stark. 244; Best Ev., 8th Ed., S. 258, p. 246. **D**

(e) It may even be shown that she has been criminally connected with himself. *R. v. Martin*, 6 C. and P. 562; Best Ev., 8th Ed., S. 258, p. 246; 3 Stark Ev., 3rd Ed., p. 952. **E**

(f) But the authorities are not agreed as to whether and under what circumstances, he will be allowed to prove particular acts of unchastity committed by her with other men. See Tay. Ev., Ss. 336 and 1296; Best Ev., 8th Ed., S. 258, p. 246. **F**

(g) And in an action for libel, evidence of the plaintiff's general bad character is admissible in mitigation of damages. *Scott v. Sampson*, R.L. 8 Q.B.D. 491; Best Ev., 8th Ed., S. 258, p. 246. **G**

(5) Limitations of character evidence.

(a) Where evidence is admitted touching the character of the party, it ought manifestly to bear reference to the nature of the charge against him. *Douglass v. Touzey*, 2 Wend 352; Tay. Ev., 10th Ed., S. 351, p. 274; Phip. Ev., 4th Ed., p. 168; 2 Stark. Ev., 3rd Ed., p. 304; 28 B. 129 (135); 5 Bom. L.R. 805; 1 C.W.N. 146. **H**

(b) Thus if the accused be charged with theft, evidence should be given that he has been reputed an honest man. (*Ibid*) Tay. Ev., 10th Ed., S. 351, p. 274. **I**

(c) If he be charged with treason, evidence must be given that he is a man of loyalty. (*Ibid*). **J**

(d) It is also necessary that the evidence should relate to the same period as the supposed offence. (*Ibid*); Phip. Ev., 4th Ed., p. 169. **K**

(e) “A man is not born a knave; there must be time to make him so; nor is he presently discovered after he becomes one. Subject to these observations, evidence of the defendant's general good character is admissible in all prosecutions whether for felony or misdemeanor.” *Per* Lord Holt in 2 Russ. C. and M. 784; Tay. Ev., 10th Ed., S. 351, p. 274. **L**

1.—“*In civil cases character to prove conduct...irrelevant.*”—(Continued).

(f) In *R. v. Wood*, the prisoner, who was indicted for a highway robbery, called a witness, who deposed to having known him for years, during which time he had, as the witness said, borne a good character. On cross-examination it was proposed to ask the witness whether he had not heard that the prisoner was suspected of having committed a robbery which had taken place in the neighbourhood some years before. This was objected to, as raising a collateral issue; but Parke, B., overruled the objection, saying “the question is not whether the prisoner was guilty of that robbery, but whether he was suspected of having been implicated in it. A man’s character is made up of a number of small circumstances of which his being suspected of misconduct is one.” The question was accordingly put and the prisoner convicted. *R. v. Wood*, Kent Sp. Ans. 1841, M.S.; and 5 Taunt. 225. Best Ev., 8th Ed., S. 261, p. 248. **M**

(6) Cases where character evidence is admissible.

Character evidence may be tendered for the following purposes :—

- (i) For the purpose of raising a presumption of innocence or guilt of the accused. 2 St. Ev., 303; Tay. Ev., 10th Ed., S. 349, p. 272; see S. 54, *infra*. **N**
- (ii) For the purpose of affecting the amount of damages. (*Ibid*); see S. 55, *infra*. **E**
- (iii) (a) For the purpose of impeaching or supporting the veracity of a witness. (*Ibid*); see also S. 146, *infra*. **P**
- (b) “The first object is chiefly confined to criminal prosecutions, and the second to the civil causes, while the third is equally applicable to both forms of procedure.” Tay. Ev., 10th Ed., S. 349, p. 272. **Q**
- (iv) In some cases the general character of a party may also be admitted to show *animus* or intent. Tay. Ev., 10th Ed., S. 349, p. 272; see also S. 8, *supra*. **R**
- (v) (a) When the general character of a party is itself in issue, proof may be received of what that general character is. Tay. Ev., S. 355; Best Ev., S. 258; Phip. Ev., 4th Ed., p. 167; *Martin v. Hardesty*, 27 Ala. 458. **S**
- (b) Thus where the question is whether a governess was “competent, lady-like and good tempered,” while in her employer’s service, evidence of her general competency, good manners and temper was allowed to be given. *Fountain v. Boodle*, 3 Q.B. 5; *Brine v. Bazalgette*, 3 Ex. 692; *King v. Waring*, 5 Esp. 14; *Jones v. James*, 18 L.T. 243; Phip. Ev., 4th Ed., p. 167. **T**
- (c) Thus also in an action for libel or slander, the character of the plaintiff is a fact relevant to the issue. 1 Whar. Ev., S. 53; *Imman v. Foster*, 8 Wend. 602; *Anderson v. Long*, 10 S. & R. 55; *Bodwell v. Swan*, 3 Pick. 376; *Proctor v. Houghtaling*, 37 Mich. 41; *Adams v. Lawson*, 17 Gratt. 250; *Swayer v. Eifert*, 2 Nott & McC. 511; *Holley v. Burgess*, 9 Ala. 728; *Leonard v. Allen*, 11 Cush. 241; *Schroyer v. Miller*, 3 W. Va. 158; Best Ev., 8th Ed., p. 257. **U**

1.—“In civil cases character to prove conduct..Irrelevant.”—(Continued).

(d) So also in an action for breach of promise of marriage, the character of the plaintiff is relevant. *Burnett v. Simpkins*, 24 Ill. 264; *Van Strock v. Griffin*, 77 Pa. St. 504; *McGregor v. McArthur*, 5 C.P.U.S. 493; Best Ev., 8th Ed., p. 257. **Y**

(e) And in the above cases particular instances were also admitted. *Clarke v. Periam*, 2 Atk. 333; *Traies v. Annesley*, Times, Dec. 16, 1898; Best Ev., S. 258; Phip. Ev., 4th Ed., p. 167; Ros. N.P. 87. **W**

(7) The character of the plaintiff for chastity is relevant in the following cases —

(i) In cases of alleged rape. Greenl. Ev., S. 54-N; *Low v. Mitchell*, 6 Stepl. 372; see also notes under S. 54, *infra*; Best Ev., 8th Ed., p. 257. **X**

(ii) In cases of bastardy. (*Ibid*). **Y**

(iii) In cases of indecent assault, the character of the plaintiff for chastity is relevant to the issue. 1 Greenl. Ev., S. 54-N; *Low v. Mitchell*, 6 Stepl. 372; *Com. v. Kendall*, 113 Mass. 210. (*Ibid*). **Z**

(iv) Impeachment in the above cases may also extend to particular acts of misconduct. (*Ibid*). **A**

(8) Witnesses as to the characters of parties—Practice.

(a) Witnesses to the characters of parties are in general treated with great indulgence—perhaps too much. Best Ev., 8th Ed., S. 262, p. 248. **B**

(b) “Thus it is not the practice of the bar to cross-examine such witnesses unless there is some specific charge on which to found a cross-examination, or at least without giving notice of an intention to cross-examine them if they are put in the box.” *R. v. Hodgkiss*, 7 C. and P. 298; Best Ev., 8th Ed., S. 262, p. 248; Wigm. Ev., 1905 Ed., S. 58, p. 127. **C**

(c) It was observed by Martin, B., in *R. v. Boulton*, Leigh & C. 520 that in “no single recorded instance during a period of 200 years was evidence of general bad character given in reply to evidence of the prisoner’s good character.” See Wigm. Ev., 1905 Ed., S. 58, p. 127 (note). **D**

(d) The Judges also discourage the exercise of the undoubted right of the prosecuting counsel to reply on the testimony as to good character. *R. v. Stannard*, 7 C. and P. 673; Best Ev., 8th Ed., S. 262, p. 248. **E**

(e) The most obvious perjury in giving false characters for honesty, &c., is every day either overlooked, or dismissed with a slight reprimand (*Ibid*). **F**

(f) Judges knowing from experience how little weight is due to the character evidence so often received, have occasionally told juries that character evidence is not to be taken into consideration unless a doubt exists on the other evidence. Best Ev., 8th Ed., S. 262, p. 249; Tay. Ev., 10th Ed., S. 351; Wigm. Ev., 1905 Ed., S. 56, p. 125. **G**

(g) “The above remarks may be perfectly true in the sense that if, on the facts, the jury believe the accused guilty, to acquit him out of regard for his good character would be a violation of their oath; but utterly false and illegal, if its meaning be that character evidence is not to be considered until the guilt or innocence of the accused is first determined on the facts.” Best Ev., 8th Ed., S. 262, p. 249. **H**

1.—“*In civil cases character to prove conduct..Irrelevant.*”—(Continued).

- (h) “A man is not born a knave, there must be time to make him so, nor is he presently discovered after he becomes one. A man may be reputed an able man this year, and yet be a beggar the next.” *Per* Holt, C.J., in *R. v. Swendsen*, 14 How. St. Tr. 596; Best Ev., 8th Ed., S. 262, p. 249. I
- (i) “In practice, however, we seldom see evidence adduced to rebut evidence as to character, although perhaps the interests of justice would be advanced if this were done more frequently.” Best Ev., 8th Ed., S. 261, p. 248. J
- (j) “The use of character evidence is to assist the jury in estimating the value of the evidence brought against the accused.” Best Ev., 8th Ed., S. 262, p. 249. K

(9) Value of character evidence.

- (a) “Evidence of the general good character of the accused is entitled to little weight, unless some reasonable doubt exists as to his guilt; and therefore in this later event alone will the jury be advised to act upon such evidence.” *R. v. Turner*, 6 How. St. Tr. 613; Tay. Ev., 10th Ed., S. 351, p. 273; *Bennett v. State*, 8 Humph. 118; *Long v. State*, 11 Fla. 295; *Schaller v. State*, 14 Mo. 502, *Soule v. Bruce*, 67 Mo. 581, Best Ev., 8th Ed., p. 256; Wigm. Ev., 1905 Ed., S. 56, p. 125. L
- (b) “Evidence of character may explain conduct, but cannot alter facts.” Stephen’s Criminal Law of England, pp. 311, 312, Best Ev., S. 262, Tay. Ev., S. 351, Warton’s Cr. Ev., S. 66. M
- (c) “If you do not know which way to decide, character should have an effect. But it is otherwise in cases which are clear. If it could be permitted to operate where a crime is clearly proved, it would always be brought forward, because there is hardly any one who has not at some time maintained a good character.” *Per* Lord Ellenborough, C.J., to the jury in *Davison’s trial*, 31 How. St. Tr. 217; Wigm. Ev., 1905 Ed., S. 56, p. 124; Tay. Ev., 10th Ed., S. 351, p. 274. N
- (d) “None are all evil, and the most consummate villain may be able to prove that on some occasions he has acted with humanity, fairness or honour.” Tay. Ev., 10th Ed., S. 351, p. 274. O
- (e) “If the evidence were in even balance, character should make it preponderate in favour of a defendant; but in order to let character have its operation, the case must be reduced to that situation.” (*Ibid*). P
- (f) Few subjects are more liable to be misunderstood than character evidence. Best Ev., 8th Ed., S. 259, p. 246. Q
- (g) “On an indictment for stealing from A, for instance, proof that on other occasions, wholly unconnected with the transaction in question the accused acted the part of an honest or even liberal and high-minded man, in certain transactions with B. and C.,—even assuming that it would to a certain extent render improbable the supposition of his having acted with felonious dishonesty towards A,—is too remote and insignificant to be receivable in evidence.” *R. v. Rorrtton*, 34 L. J. M. C. 57; Best Ev., 8th Ed., S. 260, p. 247. R

"In civil cases character to prove conduct... Irrelevant."—(Concluded).

- (h) "The inquiry should be as to his general character among those who have known him, with a view of showing that his general reputation for honesty is such as to render unlikely the conduct imputed to him; and even the individual opinion of a witness, founded on his own personal experience of the disposition of the accused is admissible." *R. v. Routon*, 34 L.J.M.C. 57; Best Ev., 8th Ed., S. 260, p. 247. **S**
- (i) "It frequently occurs, that witnesses after speaking to the general opinion of the prisoner's character, state their personal experience and opinion of his honesty; but when this statement is admitted, it is rather from favour to the prisoner than strictly as evidence of general character." Ph. and Am. Ev., p. 491; Best Ev., 8th Ed., S. 260, p. 247; 1 Phil. Ev., 10th Ed., 506; but see S. 55, Explanation. **T**

In criminal cases,
previous good
character relevant

53. In criminal proceedings the fact that the person accused is of a good character is relevant.

(Notes).

N.B.—See notes under S. 54, *infra*.

54. In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

*Previous bad character not relevant, except in reply.

Explanation 1.—This section does not apply to cases in which the bad character of any person is itself a fact in issue.

Explanation 2.—A previous conviction is relevant as evidence of bad character.

(Notes).

General.

(1) State of law before the passing of Evidence Act, same as in present section.

- (a) Evidence of bad character is not admissible in the first instance. 7 W.R. 7 (Cr.) **U**
- (b) Evidence of a prisoner's previous convictions and bad character and of the bad character of his relations is admissible. 8 W.R. 11 (Cr.) **Y**
- (c) Evidence of character and previous conduct of a prisoner, being matters of prejudice and not direct evidence of facts relevant to the charge against the prisoner, ought not to be allowed to go to the jury. 10 W.R. (Cr.), 17. **W**
- (d) In charging a jury, a Sessions Judge should not tell them that the prisoners had previously been bad characters. 10 W.R. (Cr.), 99. **X**
- (e) If evidence of bad character, by accident, had come out in open Court, then, the Judge ought most distinctly to tell the jury that they are carefully to guard themselves from being influenced by it. 10 W.R. (Cr.), 17 (19). **Y**
- (f) But that fact might be taken into consideration by a Sessions Judge in passing sentence when the prisoners are convicted. 10 W.R. (Cr.), 39. **Z**

General—(Continued).

(g) Records of previous convictions should not be put in until the close of the trial. 3 W.R. (Cr.), 38. **A**

(h) Such convictions can only be used after conviction in determining the measure of punishment. 3 W.R. (Cr.), 38; 5 C. 768. **B**

(i) As to the remarks on the improper admission, at a sessions trial with the aid of Assessors, of a Chowkeedar's statement as to the previous bad character of the accused, see 6 W.R. (Cr.), 72. **C**

(2) Previous state of the law.

(a) The section before amendment ran as follows.—

"In criminal proceedings the fact that the accused person has been previously convicted of any offence is relevant; but the fact that he has a bad character is irrelevant unless evidence has been given that he has a good character, in which case it becomes relevant. Explanation.—This section does not apply to cases in which the bad character of any person is itself a fact in issue." **D**

(b) "As the Act originally stood a previous conviction might always be given in evidence against an accused person whether evidence had been given of good character or not. The Judges of the High Court of Calcutta expressed a strong disapproval of this, and accordingly the law was altered by Act III of 1891, S. 6, so that now evidence of a previous conviction can only be given like other evidence of bad character, in answer to evidence of good character." Mark. Ev., p. 15. **E**

(c) "And, consistently with this, S. 310 of the Code of Criminal Procedure contains provisions, the object of which is to prevent the fact of a previous conviction being disclosed to the jury whilst the accused is on his trial, though it may be necessary to prove the previous conviction afterwards in order to justify the severer sentence to which the accused, if found guilty, would be liable." Mark. Ev., p. 45. **F**

(3) Reason for old section.

In the case of a previous conviction, the bad character was deemed to have been reduced to a "legal certainty." *Per* West, J. in 11 B.H.C. 90 (92). **G**

(4) Rulings under the old section.

(a) Though this section, as it stood before it was amended by Act III of 1891, declared that "the fact that the accused person has been previously convicted of an offence is relevant," yet as the same section also declared that "the fact that he has a bad character is irrelevant," it was held that proof of previous convictions was irrelevant and inadmissible. 5 C. 768; but see 14 C. 721. **H**

(b) In charging the jury upon the trial of a prisoner for being dishonestly in possession of stolen goods, the Judge directed the jury to consider the proof of previous convictions for theft as evidence from which an inference might fairly be drawn as to the character of the accused; held, that this amounted to a misdirection. 5 C. 768; but see 14 C. 721. **I**

(c) But, in one case, it was held that, under this section, previous convictions were in every case admissible against an accused person. 14 C. 721, but see 1 C.W.N. 146 (148, 149). **J**

N.B.—But in view of the modification made in this section by Act III of 1891 since the decision in 14 C. 721 it cannot be held that, in any case, a previous conviction is relevant, except where the bad character of any person is itself a fact in issue. 1 C.W.N. 146 (148, 149). **K**

General—(Continued).

(5) Previous convictions, how else relevant under the Act.

(a) According to Expl. 2 to S. 14, previous convictions become relevant within the meaning of that section when the existence of any state of mind, or body, or bodily feeling, is in issue or relevant. 28 B. 129 (125)—5 Bom. L.R. 805. **J**

(b) For instance where a person was charged with the offence of belonging to a gang of persons associated for the purpose of habitually committing dacoity. It was held by the Calcutta High Court that proof of previous conviction was admissible under S. 14 of the Evidence Act, having regard to the character of the offence attributed to the accused. 28 B. 129 (135)—5 Bom. L.R. 805; 1 C.W.N. 146. **M**

(c) Having regard to the character of the offence under §. 400, I.P.C., previous commissions of dacoity are relevant under S. 14 of the Evidence Act. 1 C.W.N. 146. **N**

(d) Convictions previous to the time specified in the charge or to the framing of the charge are relevant under Expl. 2 of S. 14, but convictions subsequent to the time specified in the charge and to the framing of the charge are not so admissible. 1 C.W.N. 146. **O**

(e) A previous conviction may also be relevant under S. 8, *supra*, as showing motive. See S. 8, *supra*. **P**

(f) Previous convictions may also be relevant in cases where the accused is liable to enhanced punishment. See S. 75, Penal Code; Ss. 3 and 4, Whipping Act (VI of 1864); Art. 117, Indian Articles of War (Act V of 1869). L.B.R. (1872-92), 574; L.B.R. (1893-1900), 93. **Q**

(g) Evidence of previous convictions other than that of the kind referred to in S. 75 of the Penal Code may be received, after conviction, for the purpose of justifying a heavier sentence than would otherwise have been passed. L.B.R. (1872-92), 574. **R**

(h) A Magistrate is not debarred by this section or by any other of its provisions, from using any previous convictions for the purpose of aiding him in determining the amount of punishment to be awarded on the prisoner being convicted of the offence charged. L.B.R. (1893-1900), 93. **S**

(i) But evidence as to general dishonesty of character is not admissible under the Evidence Act for the purpose of raising a presumption of dishonesty in the particular case under trial. U.B.R. (1908), 2nd Quarter, Ev., p. 1. **T**

(j) As to the mode of proving a previous conviction, see S. 511, Crim. Pro. Code. **U**

(6) Use of previous convictions.

Except under very special circumstances, the proper object of using previous convictions is to determine the amount of punishment to be awarded should the prisoner be convicted of the offence charged. 5 C. 768 (769); 3 W.R. (Cr.), 38. **V**

(7) Form of question under the section

(a) "From S. 55 it appears that there are two forms in which the question as to the character may be put to a witness. Thus if the accused were charged with theft, a witness to bad character might be asked either—what was the general reputation of the accused for honesty? or, —was the accused generally of an honest disposition?" Mark. Ev., p. 46. **W**

General—(Continued).

- (b) "These two questions differ very widely. The witness would answer one from what was generally known about the accused in the neighbourhood where he lived; but he would, or might, answer the second from his own special knowledge of the accused." Mark. Ev., p. 45. **X**
- (c) "In an English case there was a difference of opinion amongst the Judges as to which of these two was the proper form of question; strong reasons are given in favour of both, and no doubt this is why the Act admits both." *R. v. Routon*, Leigh and Cave's Rep., p. 520; Mark. Ev., p. 46; see also notes under S. 55, *infra*. **Y**
- (8) Evidence of general reputation—Security cases—Crim. Pro. Code, S. 117.
- (a) For the purpose of an inquiry under S. 117 of the Crim. Pro. Code, the fact that a person is an habitual offender may be proved by evidence of general repute or otherwise. Sec S. 117, Crim. Pro. Code (Act V of 1898). **Z**
- (b) Hearsay amounting to evidence of general repute is admissible for the purposes of proceedings under Ch. VIII of the Crim. Pro. Code, 1898. 6 Bom. L.R. 34. **A**
- (c) To prove a charge under S. 110 that a person is by habit a thief and a dacoit, or that he is so desperate and dangerous as to render his being at large without security hazardous to the community, there should be proof of specific acts showing that he, to the knowledge of some particular individual, is a dangerous or desperate character. 29 C. 779. **B**
- (d) It is not sufficient that persons, however respectable, should come forward and depose that they have heard that such person is a thief and a dangerous character, when they themselves have no personal knowledge of or acquaintance with him. Such evidence is not only such as could not be safely acted upon, but is also likely to work serious prejudice. 29 C. 779. **C**
- (e) Vague and general statements that a man is a habitual offender is not sufficient evidence on which an accused person is liable to be bound down under S. 110, Crim. Pro. Code. 1 A.L.J. 616. **D**
- (f) Evidence of repute of an accused person must be the evidence of persons who are speaking to matters within their personal knowledge and not from mere hearsay. 1 A.L.J. 616; 29 C. 779. **E**
- (g) A charge under Cl. (f), S. 110, Crim. Pro. Code, cannot be proved by general reputation but can only be proved by definite evidence. 29 C. 779. **F**
- (h) Evidence that there are rumours in a particular place that a man has committed acts of extortions on various occasions. that he had badmashes in his employ to assist him, and generally that he is a man of bad character, is not evidence of general repute under S. 117, Crim. Pro. Code. 23 C. 621. **G**
- (i) Evidence of rumour is mere hearsay evidence of a particular fact. Evidence of repute is a different thing. 23 C. 621. **H**
- (j) A man's general reputation is the reputation which he bears in the place in which he lives amongst all townsmen. 23 C. 621. **I**
- (k) And if it is proved that a man who lives in a particular place is looked upon by his fellow townsmen, whether they happen to know him or not, as a man of good repute, that is strong evidence that he is a man of good character. 23 C. 621. **J**

General—(Concluded).

- (l) On the other hand, if the state of things is that the body of his fellow townsmen, who know him, look upon him as a dangerous man and man of bad habits, that is strong evidence that he is a man of bad character. 23 C. 621. **K**
- (m) It cannot be said that, because there are rumours in a particular place among a certain class of people that a man has done particular acts or has characteristics of a certain kind, these rumours are in themselves evidence under S. 117, Crim. Pro. Code. 23 C. 621. **L**
- (n) It is only in the case of a person who is an habitual offender, and who is called upon to furnish security for good behaviour, that the fact of his being an habitual offender may be proved by evidence of general repute. 25 A. 273.
- (o) Where a person is called upon to furnish security to keep the peace, evidence of general repute cannot be made use of to show that such person is likely to commit a breach of the peace or disturb the public tranquillity, or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity. 25 A. 273. **N**
- (p) The character of the accused not being a fact in issue in the offence of belonging to a gang of persons associated for the purpose of habitually committing theft punishable under S. 401, Penal Code, evidence of bad character or reputation of the accused is inadmissible for the purpose of proving the commission of that offence. 27 C. 139. **O**
- (q) Where it was proved that certain persons were found together at some distance from their houses, that they were all intimately connected with one another and were in the habit of visiting males together, that one of them was arrested in the act of picking a pocket, and that when they were arrested many of them gave false names and false addresses, held they could not be convicted under S. 401, Penal Code, there being no proof that they belonged to a gang of persons associated for the purpose of habitually committing theft. 27 C. 139. **P**

1.—“Previous bad character not relevant, except in reply.”**(1) Principle of section.**

- (a) “In all criminal cases involving punishment as distinguished from penalty, the prisoner is, on grounds of humanity, allowed the privilege of proving his good character either in chief or by cross-examination, for the purpose of raising a presumption of his innocence.” Phip. Ev., 4th Ed., p. 168. **Q**
- (b) Evidence of bad character and previous conduct of a prisoner being matters of prejudice, and not direct evidence of facts relevant to the charge against the prisoner, ought not to be allowed to go to the jury. 10 W.R. 17. (Cr.) **R**
- (c) “In criminal proceedings the necessity is stronger, if possible than in civil, of strictly enforcing the rule that the evidence is to be confined to the point at issue.” 3 Russel on Crimes, 279, cited and followed in 11 B.H.C. 90 (93). **S**
- (d) “And where a prisoner is charged with an offence, it is of the utmost importance to him that the facts, laid before the jury, should consist exclusively of the transaction which forms the subject of the indictment, which alone he can be expected to come prepared to answer.” 3 Russell on Crimes, 279, cited in 11 B.H.C. 90 (93). **T**

I.—“*Previous bad character not relevant, except in reply.*”—(Continued).

- (e) The decisions of Courts in criminal cases, and especially in so grave a matter as a capital offence, must not depend on mere suspicion, but must be regulated by the principles of law laid down for the guidance of the Courts of Justice. 8 A. 306 (315).
- (f) If evidence of bad character be first given, the Judge would be influenced by matters which would be calculated to mislead him and to cause his mind to place a colouring upon the facts, and which would not assist him in forming a calm and dispassionate judgment on the case. 8 A. 306 (314). **Y**
- (g) It is not competent to a prosecutor to prove a man guilty of one felony by proving him guilty of another unconnected felony. *Rez v. Ellis*, 6 Barn and Cress, 145; cited in 11 B.H.C. 90 (94). See also *Griffiths v. Payne*, 11 A. and E. 181; cited in 11 B.H.C. 90 (97). **W**
- (h) But where several felonies are connected together and form part of one entire transaction, the one is evidence to show the character of the other.” (*Ibid*) **X**
- (i) A charge of forging one promissory note was supported by evidence that another one found in the prisoner's pocket-book was forged. The evidence was admitted by the Judge at the assizes, but the prisoner was afterwards released on a case submitted to the 12 Judges, and it was understood that they thought the evidence inadmissible. *Rez v. Crocker*, 2 Leach 987, cited in 11 B.H.C. 90 (94); 2 Russell on Crimes, 816 (838). **Y**

(2) Reason of sections 53 and 54.

- (a) “A defendant is allowed to appeal to his own good character to aid in the demonstration of his innocence; and the prosecution is allowed to use the opposite fact for the opposite purpose.” Wigm. Ev., 1905 Ed., S. 55, p. 123. **Z**
- (b) “The object of laying the latter (good character) before the jury is to induce them to believe, from the improbability that a person of good character should have conducted himself as alleged, that there is some mistake or misrepresentation in the evidence on the part of the prosecution.” *Per Patteson, J.*, in *R. v. Stannard*, 7 C. and P. 674; Wigm. Ev., 1905 Ed., S. 55, p. 123. **A**
- (c) “It is evidence to induce them to say whether they think it likely that a person with such a character would have committed the offence.” *Per Williams, J.*, in *R. v. Stannard*, 7 C. and P. 674. (*Ibid*). **B**
- (d) “It is a mistake to suppose that because the prisoner only can raise the question of character, it is therefore a collateral issue. It is not. Such evidence is admissible because it renders it less probable that what the prosecution has averred is true; it is strictly relevant to the issue.” *Per Willes, J.*, in *R. v. Rowton*, Leigh and C. 520, 540; Wigm. Ev., 1905 Ed., S. 55, p. 123. **C**
- (e) “What you want to get at is the tendency and disposition of the man's mind towards committing or abstaining from the class of crime with which he stands charged.” *Per Cockburn, C.J.*, in *R. v. Rowton*, Leigh and C., 520, 540. (*Ibid*). **D**

I. — "Previous bad character not relevant, except in reply." — (Continued).

- (f) "From the life and conversation of a man, viewed conjointly, men, in private life form an opinion of his character; and Courts and jurors must form their opinion in the same manner. If the words and actions harmonize, they form a united whole; and every man who exhibits a good conversation out of his lips, as well as a fair example in his life, is entitled to the benefit of both, at all times and in all places." *Per* Hosmer, C.J., in *Stowe v. Converse*, 3 Conn. 325; 4 Wigm. Ev., 05 Ed., S. 55, p. 123. **E**
- (g) "The principle upon which good character may be proved is that it affords a presumption against the commission of crime." *Per* Strong, J., in *Cauceni v. People*, 16 N.Y. 506; Wigm. Ev., 05 Ed., S. 55, p. 123. **F**
- (h) "This presumption arises from the improbability, as a general rule, as proved by common observation and experience, that a man who has uniformly pursued an honest and upright course of conduct will depart from it and do an act so inconsistent with it. Such a person may be overcome by temptation and fall into crime, and cases of that kind often occur; but they are exceptions. The rule is otherwise; the influence of this presumption from character will necessarily vary according to the circumstances of different cases." (*Ibid*). **G**
- (i) "The purpose of the evidence as to the character of the accused is to show his disposition, and to base thereon a probable presumption that he would not be likely to commit, and therefore did not commit, the crime with which he is charged." *Per* Berry, J., in *State v. Lee*, 22 Minn., 409; Wigm. Ev., 05 Ed., S. 55, p. 123. **H**

(2-A) Methods of judicial investigation of crime.

"Two antagonistic methods for the judicial investigation of crime and the conduct of criminal trials have existed for many years. One of these methods favours this kind of evidence, in order that the tribunal which is engaged in the trial of the accused may have the benefit of the light to be derived from a record of the whole past life of the accused, his tendencies, his nature, his associates, his practices, and, in fine, all the facts which go to make up the life of a human being. This is the method which is pursued in France, and it is claimed that entire justice is more apt to be done where such course is pursued than where it is omitted. The common law of England, however, has adopted another, and, so far as the party accused is concerned, a much more merciful doctrine. In order to prove his guilt, it is not permitted to show his former character, or to prove his guilt of other crimes, merely for the purpose of raising a presumption that he who would commit them would be more apt to commit the crime in question." *Per* Peckham, J., in *People v. Shay*, 147 N.Y. 78; 41 N.E. 508; Wigm. Ev., 05 Ed., S. 57, p. 126. **I**

(3) Scope of section—English Law.

- (a) The character proved must be of the specific kind impeached, i.e., honesty where dishonesty is charged, good character in other respects being irrelevant. *Tay. Ev.*, 351; *Phip. Ev.*, 4th Ed., p. 168; 2 *Stark. Ev.*, 3rd Ed., p. 304; *Best Ev.*, 8th Ed., S. 259, p. 246; 1 *Phill. Ev.*, 10th Ed., p. 502; 28 B. 129 (135)=5 *Bom. L.R.* 805; 1 *C.W.N.* 146. **J**
- (b) "Thus on a charge of stealing, it would be irrelevant and absurd to inquire into the prisoner's loyalty or humanity." *Ph. and Am. Ev.*, 490; *Best. Ev.*, 8th Ed., S. 259, p. 246. **K**

1.—“Previous bad character not relevant, except in reply.”—(Continued).

- (c) “Again on a charge of high treason, it would be equally absurd to inquire into his honesty and punctuality in private dealings.” (*Ibid*). **L**
- (d) “Such evidence relates to principles of moral conduct which, however much they might operate on other occasions, would not be likely to operate on that which alone is the subject of inquiry.” (*Ibid*). **M**
- (e) “It would not afford the least presumption that the prisoner might not have been tempted to commit the crime for which he is tried, and is therefore totally inapplicable to the point in question.” (*Ibid*). **N**
- (f) The character proved must be general and not relate to particular instances of such honesty. Phip. Ev., 4th Ed., p. 168; Tay. Ev., S. 351. **O**
- (g) In strictness, also, it seems that the witness should depose to the prisoner's reputation (*i.e.*, the estimate formed of him by the community), and not to his own individual opinion of the prisoner's character or disposition. *R. v. Rowton*, 34 L.J.M.C. 57; Phip. Ev., 4th Ed., p. 168; but see S. 55, *infra*. **P**
- (h) But, even in the English Courts “this distinction is seldom, if ever, acted on in practice, the question always put to a witness to character being, what is the prisoner's character for honesty, morality, or humanity? as the case may be. Nor is the witness ever warned that he is to confine his evidence to the prisoner's reputation. It would be no easy matter to make the common run of witnesses understand the distinction.” Steph. Dig. note, xxvi; Phip. Ev., 4th Ed., p. 169. **Q**
- (i) As the best character is often the least talked of, the witness may even give negative as well as affirmative evidence on the subject—*e.g.*, that he has never heard anything against the prisoner. *R. v. Rowton*, 34 L.J.M.C. 57; *R. v. West*, 112 Pap. C.C.C. 725; Phip. Ev., 4th Ed., p. 169. **R**
- (j) Finally, the character proved must relate to a period proximate to the date of the charge. *R. v. Swendsen*, 14 How. St. Tr. 596; Phip. Ev., 4th Ed., p. 169; Tay. Ev., 10th Ed., S. 351, p. 274. **S**
- (k) This section has no bearing whatever upon the question of the relevancy of a previous conviction after an accused has been convicted of the offence with which he has been charged and for the purpose of enhancing the sentence to be passed upon him. It refers solely to the relevancy of a previous conviction as evidence to prove that the accused is guilty and should be convicted of the particular offence with which he is being charged. L.B.R. (1872-92), 449. **T**

(4) Evidence as to character of prisoner—History of English Law.

- (a) As to the history, in English Law, of the rule as to the admissibility of evidence as to the character of the prisoner, see Phip. Ev., 4th Ed., p. 168; Steph. Hist. of Cr. Law, 449-50; Wigm. Ev., 05 Ed., S. 56; 32 Am. L. Rev. 713. **U**
- (b) “It was also once thought that character evidence was receivable in doubtful cases only, to turn the balance of evidence.” Wigm. Ev., 05 Ed., S. 56, p. 124; see also *Darison's Trial*, 31 How. St. Tr. 217. **V**
- (c) “But it is now understood to be admissible without any such limitation.” See *Kee v. State*, 23 Ark. 155, 164; Wigm. Ev., 05 Ed., S. 56, p. 125. **W**

1.—"Previous bad character not relevant, except in reply."—(Continued).

(d) "But whether, when admitted, it should be given weight except in a doubtful case, or whether it may suffice of itself to create a doubt, is a mere question of the weight of evidence with which the rules of admissibility have no concern." Wigm. Ev., 05 Ed., S. 56, p. 125. **X**

(e) "Where the doing of the act charged is not in dispute, because conceded, character no longer has any probative function, and should not be received, since it certainly cannot be set up merely in excuse." Draper's Trial, 30 How. St. Tr. 1018; Wigm. Ev., 05 Ed., S. 56, p. 125; Best Ev., 8th Ed., S. 262, p. 249; Tay. Ev., 10th Ed., S. 351, p. 273. **Y**

(4-A) Accused's failure to produce testimony to his good character.

(a) The— is not open to the inference that the character is bad. *People v. Gleason*, 122 Cal. 370; *Fletcher v. State*, 49 Ind. 184; *State v. Kabrich*, 39 Ia. 277; Wigm. Ev., 05 Ed., S. 290, p. 376. **Z**

(b) "The absence of good character evidence simply leaves the defendant without such a benefit as it might have given in persuasion." *State v. Ford*, 3 Strobb. 522 (527); Wigm. Ev., 05 Ed., S. 290-n, p. 376. **A**

(c) "It is incorrect to say that the accused's good character is presumed; this inconsistently gives him the untrammelled benefit of evidence which if he had introduced might have been disputed. What really happens or ought to, is that the defendant's character is simply a non-existent quantity in the evidence." *Mullen v. U. S.*, 46 C.C.A. 22; 106 Fed. 892; Wigm. Ev., 05 Ed., S. 290-n, p. 376. **B**

(5) Nature of character evidence—Admission of previous good character in the first instance—Exclusion of bad character—Reasons.

(a) "There is just as much probative value in the argument 'A is quarrelsome, therefore he probably committed this assault' as in the argument, 'A is peaceable, therefore he probably did not commit the assault' and this is acknowledged in judicial opinion. Here, however, a doctrine of auxiliary policy operates to exclude what is relevant, the policy of avoiding the uncontrollable and unfair prejudice and possible unjust condemnation which such evidence might induce." Wigm. Ev., 05 Ed., S. 57, p. 125. **C**

(b) "Character is strictly relevant to the issue; but it is not admissible upon the part of the prosecution, because if the prosecution is allowed to go into such evidence, we should have the whole life of the prisoner ripped up, and, as has been witnessed elsewhere, upon a trial for murder you might begin by showing that when a boy at school the prisoner had robbed an orchard, and on through the whole of his life; and the result would be that the man on his trial might be overwhelmed by prejudice instead of being convicted by that affirmative evidence which the law of this country requires." *Per Willes, J.*, in *R. v. Rowton*, Leigh and C. 520, 540; Wigm. Ev., 05 Ed., S. 57, p. 125. **D**

(c) "The evidence is relevant to the issue, but is excluded for reasons of policy and humanity; because, although by admitting it you might arrive at justice in one case out of a hundred, you would probably do injustice to the other ninety-nine." (*Ibid*). **E**

I.—“Previous bad character not relevant, except in reply.”—(Continued).

- (d) “There would be great danger that the prisoner would be tried on the evidence of character, instead of on that bearing more directly upon the offence charged.” *Per* Martin, B., in (*Ibid*). **F**
- (e) “The rule and practice of our law in relation to evidence of character rests on the deepest principles of truth and justice; the protection of the law is due alike to the righteous and unrighteous. The sun of justice shines alike for the evil and the good, the just and the unjust. Crime must be *proved*, not *presumed*; on the contrary, the most vicious is presumed innocent until proved guilty. The admission of a contrary rule, even in any degree, would open a door to direct operation of prejudices.” *Per* Verplanck, *Sen.*, in *People v. White*, 24 Wind, 574 : Wigm. Ev., 05 Ed., S. 57, p. 126. **G**
- (f) “The exclusion of evidence of bad character in the first instance is a plain departure from the general principle which admits relevant and material evidence. There is reason to believe that this exception originated in a usurpation of legislative power by English Judges, led by a merciful impulse to mitigate the cruelty of a bloody Criminal Code by throwing obstacles in the way of its operation.” *Per* Doe, J., in *Darling v. Eastmoreland*, 52 N.H. 401 : Wigm. Ev., 05 Ed., S. 57, p. 126. **H**
- (g) “It is a maxim of our law, that every man is presumed to be innocent until he is proved to be guilty. It is characteristic of the humanity of all the English-speaking peoples that you cannot blacken the character of a party who is on trial for an alleged crime.” *Per* Cushing, C.J., in *State v. Lapaque*, 57 N.H. 289, 296. Wigm. Ev., 05 Ed., S. 57, p. 126. **I**
- (h) “Prisoners originally come before the Court and jury under manifest disadvantages. The very fact that a man is charged with a crime is sufficient to create in many minds a belief that he is guilty. It is quite inconsistent with that fairness of trial to which every man is entitled, that the jury should be prejudiced against him by any evidence except what relates to the issue. (*Ibid*). **J**

o EXAMPLES.

- (a) Thus in criminal cases in order to prove that the defendant committed a particular crime charged, evidence may not be given in the first instance that he bore a bad reputation in the community. *Phil. Ev.*, 4th Ed., p. 167. **K**
- (b) So also evidence may not be given that he had a disposition to commit crimes of that kind. *R. v. Cole*, 1 Phil. and Arn. Ev., 10th Ed., p. 508 ; *Phil. Ev.*, 4th Ed., p. 167. **L**
- (c) So also evidence may not be given that he had on other occasions committed particular acts of the same class evincing such a disposition. *Phil. Ev.*, 4th Ed., p. 167. **M**
- (d) Thus again in order to disprove particular instances of obtaining money by false pretences as to a marriage agency, the defendant cannot prove that the general character of his agency is genuine. *R. v. Mortimer*, 31 L. Jo. 180 ; *Phil. Ev.*, 4th Ed., p. 168. **N**
- (e) Nor can he prove that he has effected genuine marriages through it in other instances. *R. v. Mortimer*, 31 L. Jo. 180 ; *Phil. Ev.*, 4th Ed., p. 168. **O**

J.—“Previous bad character not relevant, except in reply.”—(Continued).

(f) In a case of perjury, a document made by the accused, but put in for the purpose of proving the untruthful character of the accused is highly improper. 6 Rom. L.R. 739. **P**

(g) The same rule prevails in civil cases. *Goodnight v. Hicks*, B.N.P. 296; Phip. Ev., 4th Ed., p. 168. **Q**

(6) Prosecution may rebut evidence of good character of accused.

(a) “After a defendant has attempted to show his good character in his own aid, the prosecution may in rebuttal offer evidence of his bad character.” Wigm. Ev., 5th Ed., S. 58, p. 127; *R. v. Murphy*, 19 How. St. Tr. 724; *R. v. Clarke*, 2 Stark. 241; Best Ev., 8th Ed., S. 261, p. 247; *R. v. Hodgkiss*, 7 C. and P. 298; Tay. Ev., 10th Ed., S. 352, p. 271. **R**

(b) “The true reason for this seems to be, not any relaxation of the principle of mercy just mentioned, *i.e.*, not a permission to show the defendant’s bad character, but a liberty to refute his claim that he has a good one. Otherwise a defendant, secure from refutation, would have an absolute license to impose a false character upon the tribunal.” (*Ibid*). **S**

(c) “If the prisoner having a bad character, misleads the Court, the false impression should be removed.” *Per* Erle, J., in *R. v. Rowton*, Leigh & C. 520. (*Ibid*). **T**

(d) The defendant by going into his own character, gives a challenge to the prosecutor. *Per* Lord Mansfield, J., in 2 Atk. 339; Wigm. Ev., 5th Ed., S. 58, p. 128 (note). **U**

(e) Where the accused produces evidence of good character with the view of raising a presumption of his innocence, counsel for the crown have then the undoubted right to cross-examine such witnesses in order to rebut this presumption. *R. v. Hodgkiss*, 7 C. and P. 298; Tay. Ev., 10th Ed., S. 352, p. 271. **V**

(7) The cross-examination may be directed to the following points.—

(a) (i) As to particular facts of the prisoner’s misconduct. *R. v. Hodgkiss*, 7 C. and P. 298; Tay. Ev., 10th Ed., S. 352, p. 274; Phip. Ev., 4th Ed., p. 169. **W**

(ii) A witness to character was allowed to be asked, in cross-examination, whether he had not heard that the prisoner was suspected of having committed a robbery some years before. *Per* Parke, B., in *R. v. Wood*, 5 Jur. 225; Tay. Ev., 10th Ed., S. 352 (footnote), p. 274; Phip. Ev., 4th Ed., p. 169. **X**

(iii) As to the grounds of the witnesses’ beliefs as to character. 2 St. Ev. 304; Tay. Ev., 10th Ed., S. 352, p. 274; Phip. Ev., 4th Ed., p. 169. **Y**

(b) Also, “whenever the defendant chooses to call witnesses to prove his general character to be good, the prosecutor may offer other witnesses to disprove their testimony.” *Per* Parsons, C.J., in *Com. v. Hardy*, 2 Mass. 317; Wigm. Ev., 5th Ed., S. 58-n, p. 127. **Z**

(c) “In criminal cases, where the prisoner calls persons to his reputation, this gives a handle to the Crown to give evidence of the prisoner’s reputation.” *Per* Page, J., cited in Vin. Abr. XII, 48, tit. Evidence; Wigm. Ev., 5th Ed., Note, p. 127. **A**

1.—“*Previous bad character not relevant, except in reply.*”—(Continued).

(d) But it must also be remembered that, as a matter of practice, the right of counsel for the Crown in this respect is as a matter of fact seldom resorted to. 2 St. Ev. 304; Tay. Ev., 10th Ed., S. 352, p. 274; Wigm. Ev., 5th Ed., S. 58, p. 127; Best Ev., 8th Ed., S. 262, p. 248. **B**

(e) And, “in no single recorded instance during the whole of that period (two hundred years) has evidence of general bad character been given in reply to evidence of the prisoner’s good character.” *Per* Martin, B., in *R. v. Rouvon*, Leigh and C. 520; Wigm. Ev., 5th Ed., S. 58-n, p. 127; see also Best Ev., 8th Ed., S. 262, p. 248. **C**

(8) Character of complainant in some criminal cases—Relevancy.

(a) The reasons of auxiliary policy do not affect the use of character as against the other persons in a criminal case wherever it may be relevant. Wigm. Ev., 5th Ed., S. 62, p. 130. **D**

(b) In cases of rape, etc., “the admissibility of the complainant’s character for chastity or unchastity is generally conceded.” *Per* Abinger, C.B., in *R. v. Tinsington*, 1 Cox. Cr. 48; Wigm. Ev., 5th Ed., S. 62, p. 131. **E**

(c) “And her habits as a prostitute are usually regarded as equivalent to a general trait of character.” *Per* Park and Parke, JJ., in *R. v. Barker*, 3 C. and L. 589, Wigm. Ev., 5th Ed., S. 62, p. 131. **F**

(d) “The non-consent of the complainant is here a material element; and the character of the woman as to chastity is of considerable probative value in judging of the likelihood of that consent.” *Per* Platt, B., in *R. v. Ryan*, 2 Cox Cr. 115; Wigm. Ev., 5th Ed., S. 62, p. 130. **G**

(e) The same doctrine should apply to a charge of enticement for prostitution, because the question is whether the woman went of her own impulses or yielded to persuasion.” *Gore v. Curtis*, 81 Me. 403, 17 Atl. 314, Wigm. Ev., 5th Ed., S. 62, p. 131. **H**

(f) “But it should not apply in rape where the woman is below the age of consent.” *People v. Johnson*, 106 Cal. 289; *People v. Abbot*, 97 Mich. 484; *People v. Wilmot*, 72 Pac. 838; Wigm. Ev., 5th Ed., S. 62, p. 132. **I**

(g) “And perhaps it should not apply also in a charge of a mere assault with intent to commit rape, or of indecent assault.” *R. v. Clarke*, 2 Stark. 243; *Gross v. Brodrecht*, 24 Out. App. 687; Wigm. Ev., 5th Ed., S. 62, p. 132. **J**

(h) “In all cases of this character, the assent of the witness to the act is the material matter in issue, and on that question the defence generally rests on circumstantial testimony. In determining that question, which is purely a mental act, it is important to ascertain whether her consent would, from her previous habits, be the natural result of her mind, or whether it would be inconsistent with her previous life and repugnant to all her moral feelings. Such habits as are imputed to the witness by this inquiry have a tendency to show such consent as the natural operation of her propensities, and rebut the inference or necessity of actual violence.” *Per* Isham, J., in *State v. Johnson*, 28 Vt. 514; Wigm. Ev., 5th Ed., S. 62, p. 130. **K**

(i) “This class of evidence is admissible for the purpose of tending to show the non-probability of resistance upon the part of the prosecutrix; for it is certainly more probable that a woman who has done these things

1.—“*Previous bad character not relevant, except in reply.*”—(Concluded).

voluntarily in the past would be much more likely to consent than one whose past reputation was without blemish, and whose personal conduct could not truthfully be assailed. In other words, this class of evidence goes to the question of consent only.” *Per Garoutte, J.*, in *People v. Johnson*, 106 Cal. 289; 39 Pac. 622; Wigm. Ev., 05 Ed., S. 62, p. 131. L

55. In civil cases, the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant.

Character as affecting damages L

Explanation 2.—In sections 52, 53, 54, and 55, the word ‘character’ includes both reputation and disposition; but, except as provided in section 54, evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown.

(Notes).

1.—“*Character as affecting damages.*”

(1) Character as affecting damages—English Law.

- (a) “In civil cases, good character being presumed, may not be proved in aggravation of damages; but the party attacked may repel general evidence of bad character by general evidence of good character.” *Phip. Ev.*, 4th Ed., p. 170; see also *Wigm. Ev.*, 05 Ed., S. 70, “pp. 146, 147. M
- (b) “The party may also meet evidence of specific acts of impropriety by disproof of such acts, though not by evidence of general good character.” *Jones v. James*, 18 L.T. 243; *Narracott v. Narracott*, 33 L.J.P. & M. 61; *Phip. Ev.*, 4th Ed., p. 170. N
- (c) “Bad character is admissible in chief in mitigation of damages, provided that it would not, if pleaded, amount to a justification.” *Tay. Ev.*, Ss. 356—63; *Steph. Dig.*, Art. 57; *Mayne, Damages*, 7th Ed., pp. 418, 515, 523, 527; *Watt v. Watt*, (1906) A.C. 115 (118); *Phip. Ev.*, 4th Ed., p. 170. O

(2) Defamation.

- (a) “In cases of defamation the bad general reputation of the plaintiff may be proved.” *Scott v. Sampson*, 8 Q.B.D. 491; *Wood v. Durham*, 21 Q.B.D. 501; *Wood v. Cox*, 4 T.L.R. 652; *Phip. Ev.*, 4th Ed., p. 171; see also *Wigm. Ev.*, 05 Ed., S. 70, pp. 146, 147, 148. P
- (b) “But evidence of rumours or suspicions to the same effect as the libel cannot be given.” (*Ibid*). Q
- (c) “Nor can particular facts showing bad character or disposition be given.” (*Ibid*). R
- (d) “As to cases where justification has been pleaded but no particulars given. see *Houston v. Cleave*, 2 I.R. 536 (551); *Phip. Ev.*, pp. 171, 19, 163. S

1.—“*Character as affecting damages.*”—(Continued).

- (e) “Whether in an action for defamation the defendant may use the plaintiff's poor reputation (or lack of reputation) to mitigate the damages has been one of the most controverted questions in the whole law. The arguments on each side are so strong, and the balance of convenience is so clear, according to the point of view taken, that it is no wonder that Courts have taken radically opposite views.” Wigm. Ev., 05 Ed., S. 70, p. 146. **T**
- (f) “The argument in favour of considering reputation has been expressed in the following terms. The principle of this argument is that a person should not be paid for the loss of that which he never had.” Wigm. Ev., 05 Ed., S. 70, pp. 146 and 147. **U**
- (g) “To deny this would, as is observed in *Starkie on Evidence*, be to decide that a man of the worst character is entitled to the same measure of damages with one of unsullied and unblemished reputation. A reputed thief would be placed on the same footing with the most honourable merchant, a virtuous woman with the most abandoned prostitute. To enable the jury to estimate the probable quantity of injury sustained, a knowledge of the party's previous character is not only material but seems to be absolutely essential.” *Per* Cave, J., in *Scott v. Sampson*, L.R. 8 Q.B.D. 491; Wigm. Ev., 05 Ed., S. 70, p. 146. **Y**
- (h) “It cannot be just that a man of infamous character should, for the same libellous matter, be entitled to equal damages with the man of unblemished reputation; yet such must be the result unless character be a proper subject of evidence before the jury.” *Per* Thompson, J., in *Frost v. Tracy*, 1 Jones, 46; Wigm. Ev., 05 Ed., S. 70, p. 147. **W**
- (i) “As the legal intentment is that the action is brought to repair an injury to be done to a person's character in the estimation of the public, the jury must be left very much in the dark, in making a just estimation in damages, without being furnished with some data by which to estimate its value and susceptibility to injury.” (*Ibid*). **X**
- (j) “In every action at law the object is to recover damages for some injury sustained. And where the injury is to property, the value of the article is the principal object of inquiry. And I can see no good reason why the value of character may not be investigated as well as that of any other commodity, when the reputation of character is the object of this suit.” *Per* Nott, J., in *Duford v. M'Luay*, 1 Nott and M. 269; *Sawyer v. Eiferl*, 2 Nott and M. 515; Wigm. Ev., 05 Ed., S. 70, p. 147. **Y**
- (k) “It is said it would be taking a person by surprise thus to permit any inquiry into his character. But if the character of a witness, who is called upon in Court and compelled to give evidence without any previous notice, is not shielded from such an attack, how much less ought a party who has voluntarily brought his character into Court claim such an exemption? He commences with stating that he is a person of good name, fame, and reputation, and he ought to be always prepared to defend his allegation. A person is presumed to be always prepared to defend his general character, if he has a good one; if he has not, it ought to be exposed.” (*Ibid*). **Z**

1.—“Character as affecting damages.”—(Concluded).

(l) “I hold that a woman ought not to be taken from the stews and brothels of the town, to be placed alongside of the most respectable ladies who adorn our drawing-rooms and our churches; nor that the high priest of vice and corruption should be ranked with the pious priest of the parish or the respectable bishop of the diocese. Where a person's character is such that he cannot safely trust it to a Court and jury, slander can do him but little injury; and a person who is neither ashamed nor afraid to expose his character to the eye of the public ought not to be permitted to shelter it under the forms of the law from the eye of a jury.” (*Ibid*). **A**

(m) “The opposing arguments lay stress on the abuses to which the use of such evidence is open.” Wigm. Ev., 65 Ed., S. 70, p. 147. **B**

(3) Breach of promise of marriage.

(a) “In cases of—the plaintiff's general character for immorality is relevant.” *Foulkes v. Sellway*, 3 Esp. 236; *Daddelcy v. Mortlock*, Holt, N.P. 151; Phip. Ev., 4th Ed., p. 171. **C**

(b) So also are specified acts of immorality relevant. (*Ibid*). **D**

(c) “Where a general charge of immorality, and not merely of specific acts, is pleaded by the defendant, the plaintiff may, in the first instance, give evidence of general good character as part of her case.” *Jones v. James*, 18 L.T. 243; Phip. Ev., 4th Ed., p. 171. **E**

(4) Seduction.

(a) “In cases of seduction evidence of the general character for immorality on the part of the person seduced is relevant.” *Bamfield v. Massey*, 1 Camp. 460; *Dodd v. Norris*, 3 Camp. 519; *Verry v. Watkins*, 7 C. and P. 308; Phip. Ev., 4th Ed., p. 171. **F**

(b) “So also are previous specific acts of immorality relevant” (*Ibid*). **G**

(c) “But not subsequent specific acts of immorality.” (*Ibid*). **H**

(5) Petitions for damages for adultery.

(a) “In—the wife's general character for adultery is relevant.” *Smith v. Allison*, B.N.P. 27; Phip. Ev., 4th Ed., p. 171. **I**

(b) So also are her previous acts of adultery relevant. (*Ibid*). **J**

(c) But not her subsequent acts of adultery, “for these might be the effect of the co-respondent's own misconduct.” *Elsam v. Fancett*, 2 Esp. 562; *Winter v. Henn*, 4 C. and P. 494; Phip. Ev., 4th Ed., p. 171. **K**

N.B.—The above reason applies also to cases of seduction. Phip. Ev., 4th Ed., p. 171. **L**

(d) “The husband's general character for, and particular acts of, infidelity are also relevant, for, in such a case, he can hardly complain of the loss of that society upon which he has himself placed so little value.” *Bromley v. Wallace*, 4 Esp. 237; Phip. Ev., 4th Ed., p. 171. **M**

2.—“Explanation.”

(1) English Law.

(a) The word “character” as used in English Law is not synonymous with “disposition,” but it simply means “reputation,” or the general credit which a man has obtained in public opinion. *R. v. Rowton*, 34 L.J.M. C. 57; Tay. Ev., 10th Ed., S. 360, p. 272; see Explanation to this section (*contra*). **N**

2.—“*Explanation.*”—(Continued).

- (b) This rule rests rather on authority than on reason, and would probably have been long ago discarded but for two causes; *viz.*, (i) the rule in practice is seldom strictly enforced; (ii) as “the best character is generally that which is the least talked about,” the Judges have modified it, to a certain extent, by permitting witnesses to give negative evidence on the subject, and state that “they never heard anything against the character of the person on whose behalf they have been called.” *Tay. Ev.*, 10th Ed., S. 350, p. 273. N 1

(2) *Effect of English rule.*

- (a) “One consequence of the view of the subject taken in the case of (*R. v. Rowton*) is that a witness may with perfect truth swear that a man, who to his knowledge has been a receiver of stolen goods for years, has an excellent character for honesty, if he has had the good luck to conceal his crimes from his neighbours.” Sir James Stephen, *Digt. of Ev.*, note XXV, *History of the Criminal Law*, Vol. 1, 450; *Wigm. Ev.*, 05 Ed., S. 1986, p. 2645. O
- (b) “It is the essence of successful hypocrisy to combine a good reputation with a bad disposition, and according to *R. v. Rowton* the reputation is the important matter.” (*Ibid*) P
- (c) “The case of *R. v. Rowton*, (Leigh and C. 520) expressly decides that, if a man gains a reputation for honesty or morality by the grossest hypocrisy, he is entitled to give evidence of it, which evidence cannot be contradicted by people who know the truth.” (*Ibid*). Q

(3) *Reason of English rule.*

- “Although the common reputation in which a person is held in society may be undeserved and the evidence in support of it must, from its very nature, be indefinite, yet some inference, varying in degree according to circumstances, may fairly be drawn from it; since it is not probable that a man, who has uniformly sustained a character for honesty or humanity, will forfeit that character by the commission of a dishonest or a cruel act. The mere proof of isolated facts can, however, afford no such presumption.” *Tay. Ev.*, 10th Ed., S. 351, p. 273. R

(4) *Policy of the English rule.*

- (a) “So far as practical policy and utility is concerned, there ought to be no hesitation between reputation and personal knowledge and belief. A perusal of the records of State trials will show how natural, straightforward, and useful was this method of seeking after belief founded on personal experience and intimacy. Put any one of us on trial for a false charge, and ask him whether he would not rather invoke in his vindication, as Lord Kenyon said, ‘the warm, affectionate testimony’ of those few whose long intimacy and trust has made them ready to demonstrate their faith to the jury, than any amount of colorless assertions about reputation.” *Wigm. Ev.*, 05 Ed., S. 1986, p. 2643. S
- (b) “The Anglo-American rules of evidence have occasionally taken some curious twistings in the course of their development; but they have never done anything so curious in the way of shutting out evidential light as when they decided to exclude the person who knows as much

2.—“Explanation.”—(Continued).

as humanly can be known about the character of another and have still admitted the second hand, irresponsible product of multiplied guesses and gossip which we term ‘reputation.’” Wigm. Ev., 05 Ed., S. 1986, p. 2644. **T**

- (c) “An affectionate and warm evidence of character, when collected together, should make a strong impression in favour of a prisoner.” *Per* Lord Kenyon, C.J., in *R. v. Thelwall*, McNally Ev. 323; Wigm. Ev., 05 Ed., S. 1986 (note), p. 2643. **U**

(5) The following pronouncements may be noticed against the policy of the English rule and in favour of the rule in the explanation.

- (a) “Reputation is only the reputation of the judgment of others. There is no rule of law that, to make evidence of reputation admissible, it must be founded on the judgment of any definite number. If, then, the judgment of ten or a less number of men is admissible under the name of reputation, how can the judgment of one only, that is how can the estimate of disposition formed by one man only, or in other words, individual opinion, be excluded?” *R. v. Rowton*, Leigh and C. 525; Wigm. Ev., 05 Ed., S. 1986 (note), p. 2644. **Y**

- (b) “Disposition cannot be ascertained directly; it is only to be ascertained by the opinion formed concerning the man; which must be founded either on personal experience or on the expression of opinion by others, whose opinion again ought to be founded on their personal experience. I think that each source of evidence is admissible. You may give in evidence the general rumour prevalent in the prisoner’s neighbourhood and, according to my experience, you may have also the personal judgment of those who are capable of forming a more real, substantial, guiding opinion than that which is to be gathered from general rumour.” *Per* Erie, C.J., in *R. v. Rowton*, Leigh and C. 520, 532, 539; Wigm. Ev., 05 Ed., S. 1986 (note), p. 2644. **W**

- (c) “I never saw a witness examined as to character without an inquiry being made into his personal means of knowledge of that character. The evidence goes to the jury depending entirely upon the personal experience of the witness who has offered his testimony.” (*Ibid*). **X**

- (d) “Suppose a witness to character were to say: ‘This man has been in my employ for twenty years; I have had experience of his conduct; but I have never heard a human being express an opinion of him in my life; for my own part, I have always regarded him with the highest esteem and respect, and have had abundant experience that he is one of the worthiest men in the world.’ The principle the Lord Chief Justice has laid down in *R. v. Rowton* would exclude this evidence, and that is the point where I differ from him.” (*Ibid*). **Y**

- (e) “To my mind, personal experience gives cogency to the evidence; whereas such a statement as ‘I have heard some persons speak well of him,’ or ‘I have heard general report in favour of the prisoner,’ has a very slight effect in comparison.” (*Ibid*). **Z**

- (f) “I apprehend that a man’s disposition is the principal matter to be inquired into, and that his reputation is merely accessory, and admissible only as evidence of disposition. The judgment of the particular witness is superior in quality and value to mere rumour.” *Per* Willes, J., in *R. v. Rowton*, Leigh and C. 520; Wigm. Ev., 05 Ed., S. 1986, p. 2644, 2645. **A**

2.—“*Explanation.*”—(*Continued*).

- (g) “Numerous cases may be put in which a man may have no general character in the sense of any reputation or rumour about him at all, and yet may have a good disposition. For instance, he may be of a shy, retiring disposition, and known only to a few; or again he may be a person of the vilest character and disposition, and yet only his intimates may be able to testify that this is the case. One man may deserve that character (reputation) without having acquired it, which another man may have acquired without deserving it. In such cases the value of the judgment of a man's intimates upon his character becomes manifest.” (*Ibid*). **B**
- (h) “In ordinary life, when we want to know the character of a servant we apply to his master. A servant may be known to none but the members of his master's family; so the character of a child is known only to its parents and teachers, and the character of a man of business to those with whom he deals. According to the experience of mankind, one would ordinarily rely rather on the information and judgment of a man's intimates than on general report; and why not in a Court of law?” (*Ibid*). **C**
- (i) “Those who know the character of the man, his moral habits, are, by law, competent to give their opinion whether it is equal for truth to that of men in general, while those who know nothing but the witnesses' reputation, or what is generally said of him, are not competent.” *Per* Wright, J., in *Seely v. Blair*, Wright, 685. Wigm. Ev., 05 Ed., S. 1886, p. 2645. **D**
- (j) “The character of persons is known to those who are acquainted with them before it is known abroad; they have character before they have reputation.” (*Ibid*). **E**
- (k) “A man's actions are his character; they speak louder than words.” (*Ibid*). **F**
- (l) “A man's character must be true, his reputation may be most false.” (*Ibid*). **G**
- (m) “If I have reared a child, and his character which has been subject to my scrutiny is bad, and I know him to be subject to no moral restraint, I can testify to his character: yet he may have no reputation abroad.” (*Ibid*). **H**
- (n) “As it is the fact of disposition which is important and material, there can be no reason why this fact may not be proved by any witness who knows what it is.” *Per* Berry, J., in *State v. Lee*, 22 Minn. 409; Wigm. Ev., 05 Ed., S. 1886, p. 2645. **I**
- (o) “There is certainly no reason why general repute is any better or more satisfactory evidence of disposition than the testimony of one who knows what the disposition is from his own personal observation.” (*Ibid*). **J**
- (2.f) “Whether the witness knows what he pretends to know in regard to the disposition of a person in question, whether his opportunities for acquiring such knowledge have been sufficient or his ability to acquire it has been competent, are matters which there is no practical difficulty in testing, either upon a preliminary or cross-examination, or both.” (*Ibid*). **K**

2.—“*Explanation.*”—(Continued).

- (q) For a powerful argument against the rule of English law, see Mr. William Jhonstone's Arguments (Cincinnati, Clarke & Co., 1887), p. 104; Wigm. Ev., 05 Ed., note, p. 2646. L
- (r) “Evidence of the disposition of a person, by one who knows such disposition from personal observation, is not evidence of opinion in any objectionable sense. It is evidence of a fact, just as much evidence of a fact as is evidence of the disposition of a horse.” *Per Berry, J.*, in *State v. Lee*, 22 Minn. 410; Wigm. Ev., 65 Ed., S. 1986, p. 2643. M
- (s) “Character and reputation are the same; the reputation which a man has in society is his character.” *Per Duucan, J.*, in *Kimmel v. Kimmel*, 9 S. and R. 398; Wigm. Ev., 05 Ed., S. 52, p. 120. N
- (t) “Character and general reputation are the same, of course, if by ‘character’ we understand the common estimation in which a man is held, by his acquaintance, for truth; and the books upon evidence so use the term.” *Per Redfield, C.J.*, in *Powers v. Leach*, 26 Vt. 278; Wigm. Ev., 05 Ed., S. 52, p. 120. O

(6) Limitation of the English rule.

- (a) The case of *R. v. Rowton* is seldom if ever acted on in practice. The question always put to a witness to character is, what is the prisoner's character for honesty, morality or humanity? as the case may be; nor is the witness ever warned that he is to confine his evidence to the prisoner's reputation. Steph. Dig., 7th Ed., note to Ch. VI. p. 187; Tay. Ev., 10th Ed., S. 350, p. 273. P
- (b) “It would be no easy matter to make the common run of witnesses understand the distinction.” (*Ibid*). Q
- (c) “For a good illustration of this futility of trying to make the straightforward lay mind comprehend the limits of this perverse artificial rule of law, see the testimony in Kehoe's Trial (Molly Maguires), Pa., 1876, West Rep. 145—165; Wigm. Ev., 05 Ed., note at p. 2645. R
- (d) “And by the operation of the Criminal Evidence Act, 1898, the previous convictions, or bad character, of prisoners become relevant in a large proportion of the cases in which they give evidence.” Steph. Dig., 7th Ed., note to Ch. VI, p. 187. S

(7) Kind of character contemplated—English Law.

- (a) “The character or disposition offered, whether for or against him, must involve the specific trait related to the act charged.” Wigm. Ev., 05 Ed., S. 59, p. 129. T
- (b) “The testimony of the accused's civil behaviour, going to church, appearing in the trained bands, going to Paul's, being there at common service, this is well. But he is not charged for this but for seditious publication. A man may do all this, and yet be a naughty man in printing abusive books to the misleading of the king's subjects.” *Dover's Trial*, 6 How. St. Tr. 539 (552); (*Ibid*). U
- (c) “The meaning of witnesses to character is this; for instance, put the case of a man who is charged with a crime of a particular description? Suppose a man charged with an unnatural crime; would it be any evidence at all to that man's character that he paid his bills regularly, and that he was not a dishonest man, or anything of that sort?

2.—“*Explanation.*”—(Continued).

No ; your examination to character must always be analogous to the nature of the charge ; and you would there inquire whether he was a man of chastity ; you would inquire into his regard for women, into his morals, and into his conversation, so far as it might robuff the inference of such horrible and detestable idea having passed in his mind.” *Per* Mr. Erskine, arguing in *Hardy’s Trial*, and *Horne Tooke’s Trial*, 24 How. St. Tr. 1076 ; Wigm. Ev., 05 Ed., S. 59, p. 128. Y

(d) “So if a man is indicted for any other offence, if a man is indicted for a robbery, I say, I will show you that he was not a necessitous man, that he possessed a large fortune at that time, that he was a man whose ideas were moral and totally contrary to any such practice. That is the nature of character.” (*Ibid*). W

(e) “The object and effect of such evidence is to disprove guilt by furnishing a presumption that the defendant would not have committed the offence ; and, hence, the character sought to be proved must be such as would make it unlikely that the party would do the controverted act.” *Per* McClellan, J., in *Morgan v. State*, 88 Ala. 224 : 6 So. 761 ; Wigm. Ev., 05 Ed., S. 59, p. 218. X

(f) The evidence produced must be “good character with respect to the species of crime charged against him.” *Per* Martin, B., in *R. v. Rowton*, Leigh and C. 520, 537 ; Wigm. Ev., 05 Ed., S. 59-n, p. 128. Y

(g) “It must be a trait having reference and analogy to the subject of the prosecution.” *Kilgore v. State*, 74 Ala. 7 ; Wigm. Ev., 05 Ed., S. 59-n, p. 129. Z

(h) Thus “in a case of assault with intent to kill, character for truth was excluded.” *Morgan v. State*, 88 Ala. 223, 6 So. 761 ; Wigm. Ev., 05 Ed., S. 59-n, p. 129. A

(i) But in a case of battery upon a woman, character for “running after women” was admitted. *Balkum v. State*, 115 Ala. 117 ; (*Ibid*). B

(j) The character must be “such as would make it unlikely that the defendant would be guilty of the particular crime with which he is charged.” *Kee v. State*, 28 Ark. 155 ; (*Ibid*). C

(k) In a case of attempt to rape, the character for morality and good behaviour and general character was excluded, because, the character ought to “bear some analogy and reference to the nature of the charge.” *People v. Joseph*, 7 Cal. 129 ; Wigm. Ev., 05 Ed., S. 59-n, p. 129. D

(l) In a case of larceny, the defendant’s habits “as to steadiness, drinking, or anything of that sort, was excluded.” *People v. Chrisman*, 135 Cal. 282 ; Wigm. Ev., 05 Ed., S. 59-n, p. 129. E

(8) Evidence of previous convictions, use of—S. 54, Evidence Act—Law before and after amendment.

(a) When determining whether a person has committed an offence his previous convictions should altogether be out of consideration and he should be supposed as of unblemished character. 27 P.W.R. (Cr.), 1908=11 P.R. 1908 (Cr). F

2.—“*Explanation*”—(Concluded).

- (b) S. 54, Evidence Act, refers solely to the relevancy of a previous conviction to prove that an accused committed the offence with which he is charged. In cases where S. 75, I.P.C., is not applicable, the Evidence Act gives no authority to a Court to take a previous conviction into consideration for the purpose of enhancing a sentence after the accused has been convicted. L.B.R. (1872—92). 449; but see L.B.R. (1893—1900), 93. G
- (c) A tribunal is not debarred by S. 54, Evidence Act, or by any other of its provisions, from considering any previous convictions for the purpose of determining the amount of punishment, on the prisoner being convicted of a fresh offence. L.B.R. (1893—1900), 93; but see L.B.R. (1872—92), 449. H
- (d) The admissibility in evidence in criminal cases of previous convictions, and evidence of bad character generally, discussed and explained. 7 P.R. 1895 (Cr). I
- (e) The effects of the provisions of the present law are as follows :—
- (i) Except for the purposes of awarding enhanced punishment in cases falling within the provisions of S. 75, I.P.C., evidence of previous convictions now stands upon the same footing, as regards admissibility, as other evidence of bad character;
 - (ii) such evidence is only relevant where the accused has given evidence that he has a good character, or where the bad character of any person is itself a fact in issue (S. 54, Evidence Act); or
 - (iii) where the existence of the judgment of conviction is itself a fact in issue, or relevant by some other provision of the Evidence Act (*vide* S. 43), such as S. 14 or S. 8, and possibly certain other sections referring to the relevancy of facts. 7 P.R. 1895 (Cr).

FACTS WHICH NEED NOT BE PROVED.

Fact judicially
noticeable need not
be proved.

56. No fact of which the Court will take judicial notice need be proved.

N.B.—For Notes see under S. 57, *infra*

Facts of which
Court must take
judicial notice.

57. The Court shall take judicial notice of the following facts :—

(1) All laws or rules having the force of law, now or heretofore in force, or hereafter to be in force, in any part of British India ¹ :

(2) All public Acts passed or hereafter to be passed by Parliament, and all local and personal Acts directed by Parliament to be judicially noticed ² :

(3) Articles of War for Her Majesty's Army or Navy ³ :

(4) The course of proceeding of Parliament and of the Councils for the purposes of making Laws and Regulations established under the Indian Councils Act, or any other law for the time being relating thereto ⁴ :

Explanation.—The word ‘Parliament,’ in clauses (2) and (4), includes—

1. The Parliament of the United Kingdom of Great Britain and Ireland :
2. The Parliament of Great Britain :
3. The Parliament of England :
4. The Parliament of Scotland ; and
5. The Parliament of Ireland :

(5) The accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland :

(6) ⁵ All seals of which English Courts take judicial notice ⁶ ; the seals of all the Courts of British India, and of all Courts out of British India, established by the authority of the Governor-General or any Local Government in Council ; the seals of Courts of Admiralty and Maritime Jurisdiction and of Notaries Public ; and all seals which any person is authorized to use by any Act of Parliament or other Act or Regulation having the force of law in British India :

(7) The accession to office, names, titles, functions, and signatures of the persons filling for the time being any public office in any part of British India if the fact of their appointment to such office is notified in the *Gazette of India* or in the official gazette of any Local Government ⁷ :

(8) The existence, title, and national flag of every State or Sovereign recognized by the British Crown ⁸ :

(9) The divisions of time, the geographical divisions of the world, and public festivals, fasts, and holidays notified in the official gazette ⁹ :

(10) The territories under the dominion of the British Crown ¹⁰ :

(11) The commencement, continuance, and termination of hostilities between the British Crown and any other State or body of persons ¹¹ :

(12) The names of the members and officers of the Court, and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates, attorneys, proctors, vakils, pleaders, and other persons authorized by law to appear or act before it ¹² :

(13) The rule of the road on land or at sea.

In all these cases, and also on all matters of public history, literature, science, or art¹³, the Court may resort for its aid to appropriate books¹⁴ or documents of reference.

If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so¹⁵, unless and until such person produces any such book or document as it may consider necessary to enable it to do so.

(Notes).

(General).

(1) Principle of the section.

- (a) The reason why Courts take judicial notice of the facts mentioned in the section is that they are "so notorious or clearly established that evidence of their existence is unnecessary." Phip. Ev., 4th Ed., p. 11.K
- (b) It is for the sake of convenience that the Courts are allowed to take judicial notice of certain facts which are specified in this section. U.B.R. (1897—1901), Vol. I, p. 31 (24). L

(1-A) Practice under the section.

Among these are all laws and rules having the force of law in British India, and when such laws or rules are relied on they should be duly quoted under the section. Otherwise it is of course impossible to tell what is in the mind of the Court. U.B.R. (1897—1901), Vol. I, p. 31 (34).M

(2) Scope of sections 56 and 57.

- (a) "It is necessary to consider what is meant by 'need not be proved' in S. 56. A fact is said to be proved when, considering the matters before it, the Court believes it to exist. (S. 3.) But no one, whether he be a Judge or not, can believe a thing to exist unless there is some matter before him which leads him to that belief. Everything, therefore, which a man believes must be proved in some way. The meaning of the section will, however, be apparent if we consider together with S. 56 the last words of S. 57. What these two provisions really come to is this:—with regard to the facts enumerated in S. 57, if their existence comes into question, the parties who assert their existence or the contrary need not in the first instance produce any evidence in support of their assertions." Mark. Ev., p. 49. N
- (b) "They need only ask the Judge to say whether these facts exist or not, and if the Judge's own knowledge will not help him, then he must look the matter up; further, the Judge can, if he thinks proper, call upon the parties to assist him." Mark. Ev., p. 49. O
- (c) "But in making this investigation the Judge is emancipated entirely from all the rules of evidence laid down for the investigation of facts in general. He may resort to any source of information which he finds handy, and which he thinks will help him." Mark. Ev., p. 49. P
- (d) "Thus he might consult any book, or obtain information from a bystander." Mark. Ev., p. 49. Q

(3) Section, not exhaustive.

- (a) The list of matters judicially noticed in this article is not intended to be quite complete. Steph. Dig., 7th Ed., Notes to Art. 58, p. 187; Whit. Stokes' Anglo-Indian Codes, Vol. II, p. 887 (note). R

(General)—(Continued).

(b) "It may be doubted whether an absolutely complete list could be formed, as it is practically impossible to enumerate everything which is so notorious in itself, or so distinctly recorded by public authority, that it would be superfluous to prove it." Steph. Dig., 7th Ed., Notes to Art. 58, p. 188. S

(c) For instance, the Anglo-Indian Courts take judicial notice of the ordinary course of nature, the meaning of English words. Whit. Stokes, Vol. II, p. 897 (note); Steph. Dig., 7th Ed., Notes to Art. 58, p. 187. T

(d) They also take judicial notice of all other matters which they are directed by any Act to notice (as);

(i) In Bengal, list of landholders who have not made road-cess returns. See Act IX of 1850, S. 19 (Bengal). U

(ii) In Madras, bye-laws framed by the Commissioner of Police. See Madras Act III of 1862, S. 5. Y

(iii) In Bombay, notifications in the Gazette. See Bombay Act X of 1866, S. 4. W

(iv) In Oudh, the list of taluqdars and grantees published by the Commissioner. See Act I of 1869, S. 10. X

(e) But it is submitted by Messrs. Ameer Ali and Woodroffe that "the section does not forbid the Courts to take notice of any facts other than those mentioned, the Courts may and will take judicial notice of, generally speaking, all those other facts at least, of which English Courts take judicial notice." A. A. and W. Ev., 4th Ed., p. 340. Y

(f) Thus, though the section does not expressly so provide, the Courts here as in England will, it is apprehended, take judicial notice of matters appearing in their own proceedings. A. A. and W. Ev., 4th Ed., p. 340. Z

(g) An enlargement of the field of judicial notice will further be in accordance with the tendency of modern practice according to which "Judges import into cases heard by them more and more of their own general knowledge of matter which occur in daily life." Powell Ev., 934. A

(h) It was decided before the passing of the Evidence Act that the Courts were bound to take judicial notice that a certain person was the Justice of the Peace for Bengal. 1 B.L.R. (O.Cj.), 15. B

(4) Scope of the rule as to judicial notice—English Law.

(a) "The doctrine of judicial notice extends to all departments of law, and is not confined to that of evidence." Phip. Ev., 4th Ed., p. 11. C

(b) And it applies not only to Judges, "but also to juries with respect to such matters as come within the sphere of their everyday knowledge and experience." R. v. Rosser, 7 C. and P. 648; Phip. Ev., 4th Ed., p. 11. D

(c) Thus in one case the jury was asked to notice, without proof, the meaning of the imputation "Frozen Snake" in a libel case. *Hoare v. Silverlock*, 12 Q.B. 624 (638); Phip. Ev., 4th Ed., p. 11. E

(d) "Matters directed by Statute to be judicially noticed, or which have been so noticed by the well established practice or precedents of the Courts, must be recognised." Phip. Ev., 4th Ed., p. 11. F

(e) "But beyond this, Judges have a wide discretion and may notice much which they cannot be required to notice." Phip. Ev., 4th Ed., p. 11. G

(General)--(Continued).

(5) Theory of judicial notice.

(a) "Of the propositions involved in the pleadings, or relevant thereto, proof by evidence may be dispensed with in two situations. (1) Where the opponent by a solemn or infra-judicial administration has waived dispute; (see S. 58, *infra*) and (2) where the Court is justified, on general considerations, in assuming the truth of the proposition without requiring evidence from the party. The former is considered under the head of judicial admissions. The latter is the process most commonly meant by the term judicial notice." Wigm. Ev., 05 Ed., S. 2565, p. 3598. H

(b) For a most learned discussion of the subject of judicial notice, and its history, see Professor J.B. Thayer's Preliminary Treatise on the Law of Evidence, c. 7. I

(6) Effect of judicial notice—Not conclusive.

(a) "That a matter is judicially noticed means merely that it is taken as true without the offering of evidence by the party who should ordinarily have done so." Wigm. Ev., 05 Ed., S. 2567, p. 3601. J

(b) "But the opponent is not prevented from disputing the matter by evidence, if he believes it to be disputable." Wigm. Ev., 05 Ed., S. 2567, p. 3601. K

(c) "It is true that occasionally a Court is found declaring a thing judicially noticed and at the same time refusing to listen to evidence to the contrary; but usually this is in truth laying down a new rule of substantive law by declaring certain facts immaterial; whenever a Court forbids the production of the evidence, it removes the subject from the realm of the law of evidence properly so called." Wigm. Ev., 05 Ed., S. 2567, p. 3601. L

(d) "Since judicial notice is an expedient for hastening the trial and eliminating superfluities, it would be proper to prevent the party in whose favour the fact is noticed from offering evidence of it." *State v. Chungren*, 105 Ia. 169; 74 N.W. 496; Wigm. Ev., 05 Ed., S. 2567-n, p. 3601. M

(7) Court must be requested to take judicial notice—Practice

(a) Judicial notice being a dispensing with the duty of the one party from producing evidence, it would seem that the party must in point of form, make a request for it. *Amundson v. Wilson*, 11 N.D. 193; Wigm. Ev., 05 Ed., S. 2568, p. 3602; see also Mark Ev., p. 49. N

(b) Upon this request the Court is bound to declare the fact noticed, or at least to make that investigation which it deems necessary. *State v. Mages*, 35 Or. 520; Wigm. Ev., 05 Ed., S. 2568, p. 3602. O

(8) Judicial notice by jury.

(a) "In general, the jury may, in modern times, act only upon evidence properly laid before them in the course of the trial. But, so far as the matter in question is one upon which men in general have a common fund of experience and knowledge, through data notoriously accepted by all, the analogy of judicial notice obtains to some extent and the jury are allowed to resort to this information in making up their minds." Wigm. Ev., 05 Ed., S. 2570, p. 3605. P

(General)—(Continued).

- (b) "But the scope of this doctrine is narrow; it is strictly limited to a few matters of elemental experience in human nature, commercial affairs, and everyday life." *Wigm. Ev.*, 05 Ed., S. 2570, p. 3605. **Q**
- (c) "Thus the natural instincts of human conduct, with reference to care or negligence at the time of danger, may be considered." (*Ibid*). • **R**
- (d) "The dangerousness of smoking a pipe in a barn near the straw, the conditions affecting the various kinds of values, the intoxicating nature of a certain liquor, and even (though this illustrates how local conditions may affect the application) that a game played with bone-counters was played for money were considered by the jury; but such a matter of private and variable belief as the character of a particular witness cannot be so taken into consideration by the jury." *Jenny Electric Co. v. Branham*, 145 Ind. 314; *Wigm. Ev.*, 05 Ed., S. 2570, p. 3606. • **S**
- (e) The range of such general knowledge is not precisely definable: but in these days when too much emphasis is placed in the selection of jurors, on the blankness of their mental tablets, there can be no harm in the liberal application of the present principle. *Houston v. State*, 13 Art. 66 (*Ibid*). **T**
- (f) As a natural part of the above doctrine these matters may be referred to by counsel in their arguments. *Perry v. R. & Co.*, 55 Ala. 413; *Ohio, etc., R. Co. v. Ridge*, 5 Blackf. 78; *Wigm. Ev.*, 05 Ed., S. 2570, p. 3607. **U**

(9) Private knowledge of Judge or jury, use of—Practice.

- (a) "There is a real but elusive line between the Judge's personal knowledge as a private man and his knowledge as a Judge. The latter does not necessarily include the former; as a Judge, indeed, he may have to ignore what he knows as a man, and contrariwise." *Amundson v. Wilson*, 11 N.D. 193; *Wigm. Ev.*, 05 Ed., S. 2569, p. 3602. **V**
- (b) "It is plainly accepted that the Judge or the jury is not to use from the bench, under the guise of judicial knowledge, that which he knows only as individual observer." *Fox v. State*, 9 Ga. 373, 376; *Wigm. Ev.*, 05 Ed., S. 2569, p. 3603; *Phip. Ev.*, 4th Ed., p. 11. **W**
- (c) But if they have material facts to impart, they should be sworn as witnesses. 3 I.A. 259; *R. v. Antrim*, 2 I.R. 603 (649); *Tay. Ev.*, S. 1379; *Phip. Ev.*, 4th Ed., p. 11. **X**
- (d) But formerly, the practice was different, and the Judges could act on their private knowledge. *Per Thayer*, *Pr. Tr. Ev.*, 298; *Phip. Ev.*, 4th Ed., p. 11. **Y**
- (e) Where a Judge gives evidence as witness, he cannot, either when acting alone or with others, "adjudicate on his own testimony, but should take no further part in the trial." *R. v. Hacker*, 5 How. St. Tr. 1181; *R. v. Antrim*, 2 I.R. 193, 141; *R. v. Galtway*, 31 Ir. L. T. R. 160; *Phip. Ev.*, 4th Ed., p. 11; but see *Besb Ev.*, S. 88. **Z**

(10) Judge to communicate information to jury—Practice.

- "Where there is a jury, not only the Judge, but the jury also, must be informed as to the existence or non-existence of any fact in question. In the cases mentioned in S. 57, therefore, the Judge must not only inform himself but he must communicate his information to the jury." *Mark. Ev.*, p. 49; see also *Tay. Ev.*, 10th Ed., S. 21. **A**

I.—“*Clause (1).*”(1) “**Laws or rules having the force of law**”—**Meaning.**

(a) “ ‘Laws or rules having the force of law’ includes statutory law as well as unwritten law whether of a personal or local nature.” 21 A. 412; 7 A. 461. B

(b) The general rules of Hindu and Mahomedan law do not require proof. They can, if necessary, be ascertained from the necessary books. 21 A. 412; 7 A. 461.

(2) **Mahomedan Ecclesiastical Law.**

The — is a law having the force of law in British India, and as such will be judicially taken notice of. Whit. Stokes, Vol. II, p. 887; 7 A. 461. D

(3) **Hindu Law.**

(a) The Court cannot take judicial notice of what the Hindu law is with regard to Hindu custom; that must always be proved. *Per* Garth, C.J., in 8 C. 582 (587). E

(b) In the Court below, sworn translations of Sanskrit works, little known, embodying Hindu law, as to the custom in the different schools in respect to the law of adoption, were admitted and acted on by the Courts in India. On special application the Judicial Committee ordered such translations should be sent by the Registrar of the High Court in India, and to form part of the record, to be used on the hearing of the appeal. 12 M.I.A. 397 (P.C.). F

(4) **Usual methods of ascertaining general law.**

(a) The — is by reference to authoritative text books, to judicial decisions, and to the opinions of pandits. 21 A. 412 (423). G

(b) Anybody living must be taken to fall under those general rules of law unless he could show some valid local, tribal, or family custom to the contrary. 21 A. 412 (423). H

(c) Special customs may be proved by evidence of what actually is done. 21 A. 412 (423)

(5) **Law Reports.**

(a) No Court shall be bound to hear cited, or shall receive or treat as an authority binding on it, the report of any case decided by any High Court other than a report published under the authority of the Governor-General in Council. See Act XVIII of 1875 (Improvement of Law Reports), S. 3. J

(b) The above section was framed to constitute a monopoly, if the Judges so desired, for the authorised Law Reports. It only says that no Court shall be bound to have cited the report of any case, etc.; it does not prevent the Court from looking at an unreported judgment of other Judges of the same Court. 28 C. 289 (292)=5 C.W.N. 826; see also 5 C.W.N. cxvii (4 C.W.N. 872, *diss.*). K

(c) A judgment is none the less an authority, because it has not been reported. Otherwise the question of whether or not a judgment could or could not be so regarded, would depend upon the mere whim of the Reporter. 28 C. 289 (292)=5 C.W.N. 826. See also 5 C.W.N. cxvii (4 C.W.N. 792, *diss.*). L

I.—“ Clause (I).”—(Continued)

(6) Judicial notice of custom in England.

(a) Judicial notice will be taken of the following custom :—

Judicial notice was taken of local customs of descent, (as)

(i) Gavelkind,

(ii) Borough-English. *Re Chenoweth*, 2 Ch. 488 ; Phip. Ev., 4th Ed., p. 12. Tay. Ev., 10th Ed., S. 5, p. 6. **M**(b) The custom of merchants, at least where such custom has become notorious and has been settled by judicial determinations. *Erskine v. Murray*, 2 Ld. Raym. 1542 ; *Barnett v. Brandao*. 6 M. and Gr. 630 ; Tay. Ev., 10th Ed., S. 5, p. 6. **N**(c) The custom as to the lien which a vendor has on goods remaining in his possession for unpaid purchase-money. *Imperial Bank v. Lond. and St. Katharine's Dock Co.*, 5 Ch. D. 195 ; Tay. Ev., 10th Ed., S. 5, p. 6. **O**(d) The custom as to the general lien of an innkeeper on all the property belonging to his guest for the entire amount of his bill. *Mulliner v. Florence*, 3 Q.B.D. 484 ; Tay. Ev., 10th Ed., S. 5, p. 6. **P**(e) The custom as to the general lien of bankers and factors on the securities of their customers in their custody. *Lond. Chart. Bk. of Australia v. White*, 4 App. Cas. 413 ; Tay. Ev., 10th Ed., S. 5, p. 6. **Q**(f) The custom as to the practice of drawing bills of lading in sets, and of dealing with one of a set as representing the cargo independently of the rest. *Sanders v. Maclean*, 11 Q.B.D. 327 ; Tay. Ev., 10th Ed., S. 5, p. 6. **R**(g) The custom as to the usage among money-dealers of treating scrip certificate payable to the bearer, whether of a foreign Government or of a Company, as negotiable instruments transferable on delivery. *Goodwin v. Roberts*, 1 App. Cas. 476 ; *Rumball v. Metrop. Bk.*, 2 Q.B.D. 194 ; Tay. Ev., 10th Ed., S. 5, p. 6. **S**(h) The custom as to the practice of hotel-keepers holding their furniture on hire. *Craiscour v. Salter*, 18 Ch. D. 30 ; Tay. Ev., 10th Ed., S. 5, p. 6. **T**(i) The custom of a month's notice or a month's wages, being that to which a domestic servant is entitled when dismissed otherwise than for misconduct. *Moult v. Halliday*, 1 Q. B. 125 (*per Channell, J.*) ; Tay. Ev., 10th Ed., S. 5, p. 6. **U**(j) The custom of law of the road. *Leame v. Bray*. 3 East. 593 ; Tay. Ev., 10th Ed., S. 5, p. 6. **Y**(k) The custom which defines the nature of a liveryman's office. *King v. Clerk*, 1 Salk, 349, *ibid.* **W**(l) Judicial notice will be taken of the general practice of conveyancers. *Re Rosher*, 53 L.J. Ch. 722 ; Phip. Ev., 4th Ed., p. 12. **X**(m) Also notice will be taken of the rules of average adjustment. *Lohre v. Aitchison*, 3 Q.B.D. 558, 561 ; Phip. Ev., 4th Ed., p. 12. **Y**(n) But no Court will take judicial notice of a custom merely because it has been certified to in another. *Piper v. Chappell*, 14 M. and W. 649 ; Tay. Ev., 10th Ed., S. 5, p. 8. **Z**(o) The Courts will not take judicial notice of the laws, usages or customs of a foreign State. Tay. Ev., 10th Ed., S. 5, p. 8. **A**

1.—“*Clause (1).*”—(Concluded).

N.B.—(1) As to what laws and rules have the force of law in British India. See Field Ev., 6th Ed., pp. 4 and 5; and the introduction to the *Statute Law of India* prefixed to *Field's Chronological Table and Index*; Field Ev., 6th Ed., S. 57, p. 216. **B**

(2) For a brief account of the legislative powers exercised by the Government in India. See Field Ev., 6th Ed., pp. 216—219. **C**

(3) For limitations on the power of Indian Legislature. See *Damodhar Gordhan v. Deoram Kanji*, 3 I.A. 102 and 3 C. 63. **D**

(4) The High Court has power to question the validity of the Legislative Acts of the Governor-General in Council. *Per* Garth, C.J., and Markby and Ainslie, JJ. in 3 C. 63 (F.B.). **E**

2.—“*Clause (2).*”(1) *Clause (2) based on English Law.*

This clause is founded on Lord Brougham's Act of 1831, now reproduced in the Interpretation Act, 1889, 52 and 53 Vic., Ch. 63, S. 9. See *Cnn. Ev.*, 11th Ed., p. 141. **F**

(2) *Acts, division of—English Law.*

(a) “Acts are either public or private, general or special.” Field Ev., 6th Ed., p. 219. **G**

(b) “The distinction between public and private Acts was first made in the reign of Richard III. A public or general Act is a universal rule applied to the whole community, which the Courts must notice judicially and *ex officio*, although not formally set forth by a party claiming an advantage under it.” Field Ev., 6th Ed., p. 219. **H**

(c) “But special or private Acts are rather exceptions than rules, since they only operate upon particular persons and private concerns, and the Courts are not bound to take notice of them, if they are not formally pleaded, unless an express clause is inserted in them that they shall be deemed public Acts and shall be judicially noticed as such without being specially pleaded, which provision is now usually introduced.” Field Ev., 6th Ed., p. 220. **I**

(d) “For convenience of reference, the printed Statute Book of a Parliamentary Session is classified thus:—

(i) Public General Acts.

(ii) Local and personal Acts, declared public and to be judicially noticed.

(iii) Private Acts, printed by the Queen's printer, and whereof the printed copies may be given in evidence.

(iv) Private Acts not printed. All Acts of Parliament are to be presumed to be public unless the contrary be declared therein.” See 13 and 14 Vic., Ch. 21. **J**

(3) *Matters judicially noticed by English Courts.*

(a) *English Judges recognise, without proof, the following:—*

(i) “The common law. *Hein. ad Parol.*, L. xxii. t. iii. S. 119; *Tay. Ev.*, 10th Ed., S. 5, p. 4. **K**

(ii) Statute law. *R. v. Sutton*, 4 M. and S. 542; *Tay. Ev.*, 10th Ed., S. 5, p. 4. **L**

(iii) All legal claims, demands, estates, titles, rights, duties, obligations, and liabilities existing by the common law or by any custom, or created by any statute. 36 and 37 Vic., Ch. 66, S. 24. **M**

2.—"Clause (2)."—(Concluded)

- (iv) All public statutes, and all Acts of Parliament of whatever nature passed since 1850, unless the contrary is expressly provided: 62 and 65 Vic., Ch. 68, S. 9; Phip. Ev., 4th Ed., p. 11; see also Tay. Ev., 10th Ed., S. 5, p. 4.
- (v) Every branch of unwritten law obtaining in England or Ireland: Phip. Ev., 4th Ed., p. 11; Tay. Ev., 10th Ed., S. 5, p. 4.
- (vi) In a common law Court, if points of equity, or of parliamentary, ecclesiastical or admiralty law arise, they must be determined not by calling experts, but by the Court itself, either of its own knowledge, or by inquiry or by hearing authorities and argument. *Sims v. Marriott*, 17 Q.B. 281, 288; *Chandler v. Grieves*, 2 H. Bl. 606-n; *Reynolds v. Fenton*, 3 C.B. 187, 191; Phip. Ev., 4th Ed., p. 12; Tay. Ev., 10th Ed., S. 5, p. 4.
- (vii) Scotch, colonial, or foreign law must, however, be proved as a fact by skilled witnesses. Phip. Ev., 4th Ed., p. 12; see also notes under S. 45, *supra*.
- (viii) As to notice by British Consular Courts of foreign local law. See *Secretary of State v. Charlesworth*, 17 T.L.R. 265 (Eng.); Phip. Ev., 4th Ed., p. 12.

3.—"Clause (3)."

(1) Provisions as to articles of war—Act V of 1869.

Articles of war for native officers, soldiers, &c., are contained in Act V of 1869 (Indian Articles of War).

(2) English law on the point.

English Courts judicially notice the following:—

- (a) The articles of war, whether in the naval, the marine or the land service, 29 and 30 Vic., Ch. 109; Tay. Ev., 10th Ed., S. 5, p. 4; Phip. Ev., 4th Ed., p. 12.
 - (b) Articles of war made for the government of the forces in India. Army Act, 1881, Ss. 175—178; *Bradley v. Arthur*, 4 B. and C. 304; Phip. Ev., 4th Ed., p. 12; Tay. Ev., 10th Ed., S. 5, p. 4.
 - (c) Articles of war made for the auxiliary force, that is, the militia and the yeomanry. The Army Act, 1881, Ss. 175—178; Phip. Ev., 4th Ed., p. 12; Tay. Ev., 10th Ed., S. 5, p. 4.
 - (d) Articles of war made for the volunteers. The Army Act, 1881, Ss. 175—178; Tay. Ev., 10th Ed., S. 5, p. 4; Phip. Ev., 4th Ed., p. 12.
 - (e) Articles of war made for the reserve forces. The Army Act, 1881, S. 190, sub-sec. 9; Phip. Ev., 4th Ed., p. 12; Tay. Ev., 10th Ed., S. 5, p. 4.
- But judicial notice will not be taken of the book called the "Rules and Regulations of the Government of the Army." *Bradley v. Arthur*, 4 B. and C. 304; Phip. Ev., 4th Ed., p. 12.

4.—"Clause (4)."

(3) Procedure and privileges of Parliament—English Law.

of judicial notice will be taken of the procedure and privileges of both Houses of Parliament. *Stockdale v. Hansard*, 9 Ad. and E. 1; *Bradley v. Arthur*, 17 Q.B.D. 271; Phip. Ev., 4th Ed., p. 12; Tay. Ev., 10th Ed., S. 5, p. 4.

4.—“**Clause (4).**”—(Concluded).

- (b) But not of orders in Council, nor transactions in Parliamentary journals. *A.-G. v. Theakstone*, 8 Price, 89; *R. v. Knollys*, 1 Ld. Ray. 10, 15; Phip. Ev., 4th Ed., p. 12. **A**
- (c) Court will also take judicial notice of the jurisdiction and rules of procedure of the various divisions of the High Court. Jud. Act, 1873, S. 24; Ros. N.P. 82; Tay. Ev., S. 15; Phip. Ev., 4th Ed., p. 12. **B**
- (d) But the proceedings and practice of inferior Courts, unless regulated by statute, are only noticed by themselves and not by each other, or by the High Court. Steph. Art. 58 (5). *Van Sandau v. Turner*, 6 Q.B. 773, 781; *Dance v. Robson*, M. and M. 295; Phip. Ev., 4th Ed., p. 12. **C**
- (e) Courts will also notice the privileges of their own officers and solicitors. *Stokes v. Mason*, 9 East, p. 426; *Walford v. Fleetwood*, 14 M. and W. 149; Phip. Ev., 4th Ed., p. 12. **D**

5.—“**Clause (6).**”(1) **Scope of this clause**

- (a) “The provisions of this clause are far in advance of English law and are in accordance with the rule acted upon in America.” Field Ev., 6th Ed., p. 220. **E**
- (b) “In England the signatures of the superior equity and common law Judges, of the Commissioners and Registrars of the Courts of Bankruptcy and, in certain cases, of the officers of the Courts of Chancery and Bankruptcy in all proceedings under the winding-up clauses of the Companies’ Act, 1862, are by statute judicially noticed.” Field Ev., 6th Ed., p. 1220. **F**
- (c) “On the other hand” “it appears highly probable that the Courts would not recognise the signatures of the Lords of the Treasury to their official letters, and it is even a matter of some doubt whether the Royal Sign Manual would be judicially noticed.” Tay. Ev. cited in Field Ev., 6th Ed., p. 220. **G**

6.—“**All seals of which English Courts take judicial notice, etc.**”(1) **The English Courts will judicially notice the following seals.—**

- (a) (i) The great seal of the United Kingdom. Tay. Ev., 10th Ed., S. 6, p. 8; Field Ev., 6th Ed., p. 220. **H**
- (ii) The great seals of England, Ireland and Scotland, respectively. *Lord Melville’s case*, 1806, 29 How. St. Tr. 707; Tay. Ev., 10th Ed., S. 6, pp. 8-9. **I**
- (iii) The King’s Privy Seal and Privy Signet, whether in England, Ireland or Scotland. *Foggassa’s case*, 1949, Y. B. 24, Edw. 3, 23, cited in *Olive v. Gunn* 1658, 2 Sid. 116; Tay. Ev., 10th Ed., S. 6, p. 9; Field Ev., 6th Ed., p. 220. **J**
- (iv) The Water Great Seal and the Water Privy Seal, framed under the Crown Office Act, 1877. 40 and 41, V. c. 41 S. 4; Tay. Ev., 10th Ed., S. 6, p. 9. **K**
- (v) The Seal and the Privy Seal of the Duchy of Lancaster. Tay. Ev., 10th Ed., S. 6, p. 9. **L**
- (vi) Seal and the Privy Seal of the Duchy of Cornwall. 26 and 27 V. c. 49, S. 2; Tay. Ev., 10th Ed., S. 6, p. 9. **M**

6.—“All seals of which English Courts take judicial notice, etc.”

—(Continued).

- (vii) The seals of the old superior Courts of justice. Tay. Ev., 10th Ed., S. 6, p. 9; Field Ev., 6th Ed., p. 220. **N**
- (viii) The seals of the Supreme Court and its several decisions. Tay. Ev., 10th Ed., S. 6, p. 9. **O**
- (ix) The seals of the old High Court of Admiralty, whether for England or Ireland. *Green v. Waller*, 1703, 2 Ld. Raym. 893. **P**
- (x) The seals of the Prerogative Court of Canterbury. *Kempton v. Cross*, 1735, Cas. temp. Hardw. 108. **Q**
- (xi) The seals of the Court of the Vice-Warden of the Stannaries. 6 and 7 W. 4, c. 106. Tay. Ev., 10th Ed., S. 6, p. 9. **R**
- (xii) The seals of all Courts constituted by Act of Parliament, if seals are given to them by the Act. *Doe v. Edwards*, 1839, 9 A. and E. 554. Tay. Ev., 10th Ed., S. 6, p. 9; Field Ev., 6th Ed., p. 220. **S**
- (xiii) The seals of the Court for the divorce and matrimonial causes in England. 20 and 21 V., c. 85. Tay. Ev., 10th Ed., S. 6, p. 9. **T**
- (xiv) The seals of the Court for matrimonial causes and matters in Ireland. 33 and 34 V., c. 110. S. 11, Ir. Tay. Ev., 10th Ed., S. 6, p. 9. **U**
- (xv) The seals of the Central Office of the Royal Courts of Justice and of its several departments. R.S.C. 1883, Ord. LXI, rr. 1, 6, 7. Tay. Ev., 10th Ed., S. 6, p. 9. **V**
- (xvi) The seals of the principal Registry. Tay. Ev., 10th Ed., S. 6, p. 9. **W**
- (xvii) The seals of the several district Registries of the Supreme Court of Judicature. 36 and 37 V., c. 66, S. 61; Tay. Ev., 10th Ed., S. 6, p. 9. **X**
- (xviii) The seals of the principal Registry, and of the several district Registries of the old Court of Probate in England. 20 and 21 V., c. 77. Tay. Ev., 10th Ed., S. 6, p. 9. **Y**
- (xix) The seals of the present Court of Probate in Ireland. 20 and 21 V., c. 79, S. 27, Ir. Tay. Ev., 10th Ed., S. 6, p. 9. **Z**
- (xx) The seals of the old and new Courts of Bankruptcy. See 46 and 47 V., c. 52, S. 137; Tay. Ev., 10th Ed., S. 6, p. 9. **A**
- (xxi) The seals of the Insolvent Debtors' Court (now abolished). *Doe v. Edwards*, 1839, 9 A. and E. 554; Tay. Ev., 10th Ed., S. 6, p. 9. **B**
- (xxii) The seals of the Court of Bankruptcy and Insolvency in Ireland. 20 and 21 V., c. 60. S. 362, Ir. Tay. Ev., 10th Ed., S. 6, p. 9. **C**
- (xxiii) The seals of the Land Estates Court, Ireland. 21 and 22 V., c. 72. Tay. Ev., 10th Ed., S. 6, p. 9. **D**
- (xxiv) The seals of the record of Title Office of that Court. 28 and 29 V., c. 83, S. 56, Ir. Tay. Ev., 10th Ed., S. 6, p. 9. **E**
- (xxv) The seals of the County Courts. 51 and 52 V., c. 43, S. 180. Tay. Ev., 10th Ed., S. 6, p. 10. **F**
- (xxvi) The seals of the Corporation of London. *Doe v. Mason*, 1793, 1 E. p. 33. Tay. Ev., 10th Ed., S. 6, p. 10. **G**
- (xxvii) The seal of a foreign or colonial notary public. *Re Earl's Trusts*, 1858, 4 K. and J. 300. Tay. Ev., 10th Ed., S. 6, p. 10. **H**
- (xxviii) Various statutes render different other seals admissible in evidence without proof of their genuineness. For a list of such statutes, see Tay. Note. **I**
- (b) “The common seal of the City of Glasgow is not one of the seals of which English Courts take judicial notice.” 22 O. 491 (494). **J**

6.— 'All seals of which English Courts take judicial notice, etc.'"

—(Concluded).

(2) Seal of notary public.

A certificate of a notary public, whose official seal is attached to his certificate, is required to be judicially noticed by this section. 22 C. 491 (494). **K**

(3) Seal not distinctly legible— Effect.

Where the seal is not distinctly legible, Courts will not take judicial notice of it. 10 C.L.R. 169 (476). **L**

(4) Signature of the jailor.

In this case service of process had been made on the plaintiff, a prisoner in jail. The service had been effected by leaving a copy of the summons with the jailor as provided by S. 15 of the Prisoner's Testimony Act (XV of 1869), and the jailor had endorsed it in accordance with S. 16. It was observed that the Court would take judicial notice of the signature of the jailor under S. 16 of the above Act. *Per* Phear, J., in 1 B.L.R. (O.C.), 51. **M**

(5) Registered power of attorney.

(a) A — was admitted under this section without proof, the Registering Officer being a Court under S. 3, Evidence Act. 14 C. 176 (189). But see 17 C. 903. **N**

(b) Mere registration of a document is not in itself sufficient proof of its execution. 17 C. 903 (906). (14 C. 176, *diss.*) **O**

7.— 'Clause (7) "

(1) Rules of English Law corresponding to this clause.

(a) "English Courts will also judicially recognise the political constitution or frame of their own government; its essential political agents or public officers sharing in its regular administration, and its essential and regular political operations and actions." *Tay. Ev.*, 10th Ed., S. 18, p. 19; *Philp. Ev.*, 4th Ed., p. 13; *Whaley v. Carlisle*, 17 Ir. C.L.R. 792. **P**

EXAMPLES.

(b) Tribunals in England take judicial notice of the following:—

(i) The accession and demise of the sovereign of their country. *Holman v. Barron*, 2 Ld. Raym. 795; *Tay. Ev.*, 10th Ed., S. 18, p. 19. See also Cl. (5), *supra*. **Q**

(ii) The heads of departments and the principal officers of state, whether past or present. *R v. Jones*, 2 Camp. 231. *Tay. Ev.*, 10th Ed., S. 18, p. 19; *Whaley v. Carlisle*, 17 Ir. C.L.R. 792; *Philp. Ev.*, 4th Ed., p. 13. **R**

(iii) The marshals and sheriffs, but not the deputies of these functionaries. *Grant v. Baagje*, 3 East, 128. *Tay. Ev.*, 10th Ed., S. 18, p. 19; *Philp. Ev.*, 4th Ed., p. 13. **S**

(iv) The Judges of the Supreme Court, though not of those of the inferior Courts. *Van Sandau v. Turner*, 6 Q.B. 773; *Philp. Ev.*, 4th Ed., p. 13. **T**

7.—“*Clause 7.*”—(Concluded).(2) **Official Gazette—Judicial notice.**

(a) The Judges will take notice of the London, Dublin, or Edinburgh Gazette on its mere production. Tay. Ev., 10th Ed., S. 15, p. 16. **U**

(b) “And it is unnecessary to prove that it was bought at the Office of the King’s printer, or to offer any evidence as to whence it came.” *R. v. Forsyth*, R. and R. 271, Tay. Ev., 10th Ed., S. 15, p. 16. **Y**

(3) **Journals of Parliament—Judicial notice**

(a) Also the journals of either House of Parliament are evidence, if they purport to be printed by the official printers. 8 and 9 V. c. 113, S. 3, cited, Tay. Ev., 10th Ed., S. 18, p. 19. **W**

(b) But the Court will not recognise private orders made at the counsel table. 6 Vin. Abr. 490. Tay. Ev., 10th Ed., S. 18, p. 19. **X**

(c) Nor will the Courts judicially notice any order of council “even though they regard the Crown and the Government.” *Aff-Gent v. Theobalds*, 8 Price, 89. Tay. Ev., 10th Ed., S. 18, p. 20. **Y**

(4) **Chief Commissioner’s notification**

The Courts in the Central Provinces are bound to take judicial notice of the ——— issued in accordance with the provisions of S. 7 of the Central Province’s Tenancy Act. S C P. L. R. 7. **Z**

(5) **Presumption as to document purporting to be judgment—Appointment of Kazi—Gazette—Seal.**

See 10 C. L. R. 169.

8.—“*Clause (8)*”(1) **Rule of English Law corresponding to this clause.**

(a) Judicial notice will be taken of all public matters affecting the Government of the country. Philp. Ev., 4th Ed. p. 13. **A**

(b) Thus judicial notice was taken of the following —

(i) The accession and demise of the Sovereigns of England, *Taylor v. Barclay*, 2 Sim. 213; Philp. Ev., 4th Ed., p. 13, see also clause (5). *supra*. **B**

(ii) The existence and titles of all other acknowledged Sovereign Powers. (*Ibid*). **C**

(iii) The Judges are bound to know whether a state has been recognised as independent or not. (*Ibid*). **D**

(2) **Status of a foreign Sovereign.**

(a) “The ——— is a matter, of which the Courts of this country take judicial cognizance, that is to say, a matter which the Court is either assumed to know or to have the means of discovering without a contentious enquiry, as to whether the person cited is or is not, in the position of an independent sovereign.” *Mihell v. Sultan of Johore*, 1 Q. B. 149 (161); A. A. and W. Ev., 4th Ed., p. 343. **E**

(b) “Of course the Court will take the best means of informing itself on the subject, if there is any kind of doubt, where the matter is not as notorious as the status of some great monarch, such as the Emperor of Germany.” *Mihell v. Sultan of Johore*, 1 Q. B. 149 (161); A. A. and W. Ev., 4th Ed., p. 343. **F**

8.—“ Clause (8). ”—(Concluded).

- (c) In one case where the person whose status was to be ascertained was the Sultan of Johore, the means which the Judge took of informing himself as to his status (and which was held to be a proper means) was by inquiry at the Colonial Office. Per Kay, L.J., in *Mighell v. Sultan of Johore*, 1 Q.B. 149 (161); A.A. and W. Ev., 4th Ed., p. 313-n. G

(3) Non-recognition of foreign states.

The Courts also take judicial notice of the——. See Code of Civ. Procedure, 1882, S. 431. H

9.—“ Clause (9). ”

(1) “ Divisions of time ”—Meaning—Native eras.

- (a) The phrase “ divisions of time ” includes also Native eras. Whit. Stokes, Vol. II, p. 883. I
- (b) “ Thus the Bengali, Willanti, Pash, Sambat, Hindi, Hijri, and Jalus eras will be judicially noticed in those districts in which they are current.” Field Ev., 6th Ed., p. 220. J

(2) “ Divisions of time ” judicially noticed by English Courts.

English Courts take judicial notice of the following —

- (i) The course of time. *Bury v. Blogg*, 1848, 18 L.J.Q.B. 86. Tay. Ev., 10th Ed., S. 16, p. 16. K
- (ii) The course of the heavenly bodies. *Collier v. Nokes*, 2 C. and Kir. 1012. Tay. Ev., 10th Ed., S. 16, p. 16. L, M
- (iii) Public division of time (as)
- (a) The ordinary public fasts and festivals. 6 Vin. Abr. 492, pl. 8—44. Tay. Ev., 10th Ed., S. 16, p. 16. N
- (b) The commencement and the ending of legal sittings. 6 Vin. and Abr. 490, pl. 32. Tay. Ev., 10th Ed., S. 16, p. 16. O
- (c) The coincidence of the years of the reign of any sovereign of this country with the years of our Lord. *Holman v. Burrow*, 2 Ld. Raym. 795. Tay. Ev., 10th Ed., S. 16, p. 16. P
- (d) The coincidence of days of the week with the days of the month. 6 Vin. and Abr. 492, pl. 6, 7, 8. *Ibid.* Q
- (e) The order of the months. *R. v. Brown*, M. and M. 161. *Ibid.*, p. 17. R
- (f) The Court is bound judicially to notice what days of the month fall on Sundays. *Hanson v. Shackleton*, 4 Dowl. 48. Tay. Ev., 10th Ed., S. 16, pp. 16-7. S
- (g) But a Court could not judicially notice at what hour the sunset in the month of November. *Collier v. Nokes*, 2 C. and Kir. 1012, Tay. Ev., 10th Ed., S. 16, p. 17. T
- (iv) As to the meaning of the word “ month,” see *Simpson v. Margitson*, 17 L.J.Q.B. 81. Tay. Ev., 10th Ed., S. 16, p. 17. U
- (v) As to the meaning of “ calendar month ” as applied to imprisonment, see *Migotti v. Colville*, 4 C.P.D. 233. Tay. Ev., 10th Ed., S. 16, p. 17. V

(3) Reference to almanacs.

“ Also reference may be made to the usual almanacs, when occasion requires.” Field Ev., 6th Ed., p. 220. W

9.—“ Clause (9) ”—(Concluded)

(4) Instruments deemed to be made with reference to Gregorian Calendar.

All instruments should, for the purposes of the Limitation Act, be deemed to be made with reference to the Gregorian Calendar. See S. 25, Limitation Act. X

(5) Public festivals, etc

Courts also judicially notice the following —

- (i) The days of special public feasts and thanksgivings. *Tay Ev.*, 10th Ed., S 18, p 18. Y
- (ii) The stated days of general political elections. *Tay Ev.*, 10th Ed., S 18, p 19. Z
- (iii) The date and place of the sittings of the Legislature. *R v. Wilde*, 1 Lev. 396 *Tay Ev.*, 10th Ed., S. 19, p 19. A

(6) Holidays notified in official Gazette

Even holiday notified in the official Gazette of any local Government may be judicially noticed. See *Whit Stokes*, Vol II p 988. B

(7) Geographical divisions of time

- (a) Courts in England will also recognise the principal geographical divisions. *Tay Ev.* 10th Ed S 17 p 17. C
- (b) Thus they have judicially noticed the following:
 - (i) The territorial extent of the jurisdiction and sovereignty exercised *de facto* by their own Government. The Foreign Jurisdiction Act, 1890 53 and 54 V, c 37 *Tay Ev.* 10th Ed S 17, p 18 see also cl 10 *infra*, *Philp Ev.*, 4th Ed., p 13. D
 - (ii) The local divisions of their country. *Whyte v Rose*, 1 P. and D. 199 *Deybel's case* 1 B. and Ald 243 *R v St Maurice*, 16 Q B 908 *Tay. Ev.*, 10th Ed., S 17 p 18. E
 - (iii) The geographical positions and the names of places as shown on the Admiralty chart. *Burrell v Dwyer* 9 App Cas 345 *Tay Ev.*, 10th Ed., S 17, p 18 *Philp Ev.*, 4th Ed., p 13. F
 - (iv) But Courts are not obliged to judicially notice mere local divisions, nor their precise limits. *Deybel's case*, 1 B. and Ald 243 *Tay. Ev.*, 10th Ed., S 17, p 18. G
 - (v) The Courts have in one case, noticed that the Queen's prison was situated in England. *Wales v Gatty* 11 C.B. 666 *Tay. Ev.* 10th Ed., S 17, p 19. H
 - (vi) And in another case it was judicially noticed that the term “The St Lawrence” applied to both the Gulf and river of that name. *Per Lord Blackburn* in *Burrell v Dwyer*, 9 App Cas 345 *Philp. Ev.*, 4th Ed., p 13, 14. I

10.—“ Clause (10) ”.

(1) Scope of the clause

“ If it be true that the Indian Courts might take judicial notice of the territories of the Queen in India, then, if there has been a cession of territory, they must take notice of that, and they must do so independently of this Gazette, which is no part of the cession but only evidence of it.”
Per Lord Selborne in 1 A. 367 (404). J

10.—“ Clause (10).”—(Concluded).

(2) Extent of British jurisdiction judicially noticed by English Courts.

- (a) Judicial notice will be taken of the— Phip. Ev., 4th Ed., p. 13; the Foreign Jurisdiction Act, 1890, 53 and 54 V., c. 37; Tay. Ev., 10th Ed., S. 17, p. 18. **K**
- (b) “ Under the Foreign Jurisdiction Act, 1890, §. 1. the Court when in doubt may and should apply to one of His Majesty's principal Secretaries of the State, who is to furnish the information required, which shall be ‘conclusive evidence’ of the matters stated.” *Foster v. Globe Syndicate*, 1 Ch. 811; Phip. Ev., 4th Ed., p. 13. **L**
- (c) “ Judicial notice will also be taken of the territorial and administrative divisions of the country into counties, etc.” *Deybel's case*, 4 B. and All. 243; *R. v. Ely*, 15 Q.B. 827; Phip. Ev., 4th Ed., p. 13. **M**

11.—“ Clause (11).”

(1) Scope of the clause—Practice of English Courts.

- (a) English Courts take judicial notice of a war in which the country is engaged. *R. v. De Benerger*, 3 M. and S. 67; Phip. Ev., 4th Ed., p. 13; *Dolder v. Tal. Huntingfield*, 11 Ves. 292, Tay. Ev., 10th Ed., S. 18, p. 19. **N**
- (b) And also of all “ public matters which affect the Government of the country.” *Taylor v. Barclay*, 2 Sim. 213. Tay. Ev., 10th Ed., S. 18, p. 19. **O**
- (c) But no judicial notice will be taken of wars between foreign powers. *Dolder v. Huntingfield*, 11 Ves. 292, Phip. Ev., 4th Ed., p. 13. **P**

(2) Examples of documents admitted to prove hostilities

- (a) The *Gazette of India*, or *Calcutta Gazette*, containing official letters on the subject of hostilities between the British Crown and Mahomedan fanatics on the frontier were admitted in evidence under Ss. 6 and 8 of Act II of 1855 as proof of the commencement, continuation, and determination of hostilities. 7 B.L.R. 63. **Q**
- (b) Similarly, under S. 6, a printed letter from the Secretary of the Government of the Punjab to the Secretary to the Government of India was properly resorted to by the Court for its aid as a document of reference. 7 B.L.R. 63. **R**
- (c) It was not necessary that these documents should be interpreted to the prisoner. It was sufficient that the purposes for which they were put in were explained to him. 7 B.L.R. 63.

12.—“ Clause (12).”

(1) Law as to enrolment of vakils and mukhtears.

The— is contained in “ The Legal Practitioners' Act,” XVIII of 1879. **T**

(2) Practice of English Courts—Solicitors.

- (a) In one case “ judicial notice was taken that one of the solicitors named on the record had been suspended.” *Pickles v. Sutcliffe*, 37 L.Jo. 543; Phip. Ev., 4th Ed., p. 12. **U**
- (b) But, “ a mere printed, but unidentified copy of the Law Society's Rules was refused to be judicially taken notice of.” (*Ibid*). **Y**

13.—“On all matters of...science or art.”

(1) “All matters of science or art”—Meaning.

(a) “The introduction of the words ‘and also in all matters of science or art’ into S. 57 is very strange. It cannot be meant that the Court is to take judicial notice of all such matters. If so, the special provisions as to evidence on points of science or art in S. 45, and the further and special provisions which we shall come to presently in S. 60 as to the use of treatises, would be meaningless.” Mark. Ev., p. 49. **W**

(b) “What perhaps is meant is that, though the parties must obey the law as laid down in Ss. 45 and 60, the Judge may ‘resort for his aid’ to appropriate books without any restriction.” Mark. Ev., pp. 49–50. **X**

(2) Rules of Law—Reference—Practice.

“With regard to rules of law the Judge stands in a somewhat different position to that in which he stands in regard to what, as opposed to law, are called the ‘facts’ of the case. The responsibility of ascertaining the law rests wholly with the Judge. It is not necessary for the parties to call his attention to it and the last paragraph of the section is not applicable to it.” Mark. Ev., p. 49. **Y**

(3) Judicial notice that a certain place was the scene of dacoities at a certain period.

In one case the Courts judicially noticed the fact that at a certain particular period “that the district of Agra was notorious as the scene of frequent and recent dacoities.” 23 A. 124 (125). **Z**

(4) Secondary evidence.

It is common knowledge, of which Courts are entitled to take notice, that the original records of the Agra Division were destroyed during the mutiny of 1857, and therefore under S. 56 (c) of the Evidence Act, the copy is admissible as secondary evidence of the original. 22 A. 294 (302). **A**

14.—“Court may resort for its aid to appropriate books, etc.”

(1) Scope of the rule

“The provision that the Court may resort for its aid to appropriate books, is an advance of English Law, under which though an expert called as a witness, will be allowed to refresh his memory by referring to a professional treatise regarded by him as of authority yet the books themselves cannot be cited.” Field Ev. 6th Ed., p. 221. **B**

(2) Refreshing memory of Judge—Practice.

(a) “When in doubt as to any matter to be noticed, the Judge may refer for information to appropriate sources.” Phip. Ev., 4th Ed., p. 17; Tay. Ev., 10th Ed., S. 21, p. 21. **C**

(b) “The Judge may resort to such means of reference as may be at hand, and as he may deem worthy of confidence.” Gresh. Ev., 295; Tay. Ev., 10th Ed., S. 21, p. 21. **D**

(c) Thus he may refer to dictionaries for the meaning of words. Phip. Ev., 4th Ed., p. 17; Tay. Ev., 10th Ed., S. 20, p. 21; *Clementi v. Golding*, 2 Camp. 25. **E**

(d) “To histories, firmans and treaties to determine the status of a foreign ruler.” The Charkieh, 42 L.J.Ad. 17; Phip. Ev., 4th Ed., p. 17, cited in 2 A. 1 (17). **F**

14.—“Court may resort for its aid to appropriate books, etc.”—(Continued).

(e) If the point in dispute be a date, the Judge may refer to an almanac. *Page v. Faucet*, 1591, Cro. Eliz. 227; *Tutton v. Drake*, 5 H. and N. 649; Tay. Ev., 10th Ed., S. 21, p. 21. G

(f) If it be the construction of a statute he may refer to the printed copy. *R. v. Jeffries*, 1 Str. 446; *Spring v. Eve*, 2 Mod. 240; Tay. Ev., 10th Ed., S. 21, p. 21. H

(g) Courts may also submit inquiries to the officials of a public department. *Mugbell v. Sultan of Johore*, 1894, 1 Q.B. 149; Foreign Jurisdiction Act, 1890, S. 4, ante, 13; Phip. Ev., 4th Ed., p. 17; Tay. Ev., 10th Ed., S. 21, p. 22. I

(3) British and Fasli calendars.

Under cls. (8) and (13) of this section, a Court which is called upon to decide as to what particular date in the English calendar a certain date in the Fasli year corresponds with, may resort for its aid to appropriate books or documents of reference, and in such a case an almanac containing the British and Fasli calendars may be referred to. 4 O.C. 182 (B.). J

(4) Oudh Judicial calendar.

The “Oudh Judicial calendar” was not compiled expressly for the purpose of showing corresponding dates in the different eras, and is not appropriate document of reference in such a case. 4 O.C. 182 (B.). K

EXAMPLES.

The following books, etc., have been resorted to by Courts in this country :—

- (1) “Histories, firmans, and treaties to determine the status of a foreign ruler.” The Charkieh, 42 L.J.Ad. 17; Phip. Ev., 4th Ed., p. 17, cited in 2 A. 1 (17). L
- (2) The collection of treaties published by Mr. Aitchison, the Secretary to the Government of India in the Foreign Department. 2 A. 1 (17); 17 B. 431 (439) (P.C.). M
- (3) Aitchison’s “Treaties, Engagements, and Sanads,” (Ed. of 1864). 17 B. 431 (439) (P.C.). 1 B. 367 (388, 389, 395, 397, 431, 458) (P.C.); 2 A. 1 (17). N
- (4) Hertslet’s Commercial Treaties, Vol. XII, p. 1194. 1 B. 367 (387) (P.C.). O
- (5) The treaty of Troyes whereby England and France were to be united under one king. 2 A. 1 (23). P
- (6) Treaty with the Nawab of Bhopal by the East India Company in 1818. 2 A. 1 (15). Q
- (7) Sir Thomas Munro’s Minute of the 15th March, 1822. 17 B. 431 (447) (P.C.). R
- (8) Sir John Shore’s Minute of June, 1789, p. 44. 3 W.R. 29 (33). S
- (9) Lord Cornwallis’s Minute. 3 W.R. 29 (33); 3 W.R. (Act X. Rulings) 29 (33). T
- (10) Arbuthnot’s ‘Selection from the Minutes of Sir T. Munro,’ Vol. I, p. 284, 20 M. 299 (302). U
- (11) Despatch of Court of Directors, 19th September, 1702. 3 W.R. (Act X. Rulings), 29 (32). V
- (12) Fifth Rep. 1812, pp. 16, 19, 20, 60, 206, 478 and para. 370. 3 W.R. (Act X. Rulings), 29 (32). W

14.—“Court may resort for its aid to appropriate books, etc.”—(Continued.)

- (13) Directions for Revenue Officers in the North-Western Provinces, promulgated by the Lieutenant-Governor and prepared by Mr. Thomason, 3 W.R. (Act X, Rulings), 29 (102). **X**
- (14) Proceedings of the Board of Revenue, dated 5th January, 1818, quoted in the note at p. 223 of Dewan Bahadur Srinivasa Raghava Ayyangar's "Progress in the Madras Presidency." 20 M. 299 (301). **Y**
- (15) Circular Letters of the Political Agents. 1 B. 369 (456) (P.C.). **Z**
- (16) A letter to the Board of Revenue by a Collector of Malabar which is cited in R.A. 35 of 1187. 18 M. 1 (8) (P.C.). **A**
- (17) Replies from the Foreign Office. The case of the Charkish, L.R. 4 A. and E. 59, cited in 2 A. 1 (17). **B**
- (18) Lord Palmerston's speech in the debate on the Relinquishment by the British Crown of the protectorate of the Ionian Islands. 1 B. 367 (380) (P.C.). **C**
- (19) Speech of Lord Thurlow, in the debate in the House of Lords, on the cession made in 1763 at the Peace of Versailles. 1 B. 367 (386) (P.C.). **D**
- (20) British and Foreign State papers, Vol. II, p. 370. 1 B. 367 (387) (P.C.). **E**
- (21) Parl. Hist., Vol. XXII, p. 490. 1 B. 367 (386) (P.C.). **F**
- (22) The work of Grotius, Vattel, Puffendorf, Chalmers, Wheaton, Phillimore and Twiss. 1 B. 367 (80) (P.C.); see also 2 A. 1 (23). **G**
- (23) Vattel cited by Sir R. Phillimore in his International Law. 1 B. 369 (399) (P.C.). **H**
- (24) Domat, 2413. 18 W.R. 359 (364). **I**
- (25) Adam Smith's Wealth of Nations, B.V. Ch. 2. 12 B.H.C. 199 (207). **J**
- (26) Malthus' definition of Rent. 3 W.R. 91 (92). **K**
- (27) Mill's Political Economy, Vol. II, p. 292. 3 W.R. (Act X, Ruling 29 (40, 41, 56). **L**
- (28) Harrington's Analysis. 3 W.R. 29 (31, 33, 84); 3 W.R. (Act X, Rulings), 29 (82). **M**
- (29) Hallam's Middle Ages, Vol. III, p. 97 (*Ibid*). **N**
- (30) Smollett's History, Vol. II, p. 97. 2 A. 1 (15). **O**
- (31) Grant Duff's History of the Mahrattas. 17 B. 431 (439) (P.C.). **P**
- (32) Tod's Rajputana. 3 W.R. (Act X, Rulings) 29 (56 and 57). **Q**
- (33) Malcolm's Central India. 3 W.R. (Act X, Rulings), at pp. 56 and 57. **R**
- (34) Buchanan's Journey in Mysore. 3 W.R. (Act X, Rulings) at pp. 56 and 57. **S**
- (35) Mount Stuart Elphinstone's History of India, Vol. I, Ch. II: 3 W.R. (Act X, Rulings), 29 (31, 55). **T**
- (36) History of the Bejaigarh Raj, as contained in the printed "Duncon Records," Vol. I, p. 173. 17 A. 456 (460) (P.C.). **U**
- (37) Wilks's History of Mysore. 1 M. 205 (213) (F.B.). **V**
- (38) A Portuguese work dated 1606, "India Orientalis Christiana" published in 1794. 15 M. 241. **W**
- (39) A reprint of an account Geographical, Statistical and Historical of Orasa Proper or Cuttack by A. Stirling, Esq. 32 C. 1 (13) (P.C.). **X**
- (40) Mr. Emerson Tenent's 'Ceylon,' 5th Ed., Vol. II, p. 564. 27 M. 551 (554) = 14 M.L.J. 248 = 1 Weir 386. **Y**
- (41) Simcox's Primitive Civilization, Vol. II, p. 832. 19 M. 31 (33). **Z**

14.—“Court may resort for its aid to appropriate books, etc.”—(Continued).

- (42) Hough's "History of Christianity in India" published in 1839. 15 M. 241. **A**
- (43) Martin's edition of Buchanan Hamilton's "Eastern India." 23 C. 60 (74). **B**
- (44) Rajendra Lal Mitra's "Buddha-Gaya." 23 C. 60 (74). **C**
- (45) Fergusson's History of Architecture. 20 L.A. 84 (P.C.). **D**
- (46) Stephen's History of the Criminal Law of England. 23 C. 604 (608). **E**
- (47) Dutton's "Hindu Manners, Customs and Ceremonies," Beauchamp's Ed., p. 225. 22 M. 113 (115). **F**
- (48) Benrodair's Caste Rules. 7 C.W.N. 716 (715). **G**
- (49) Logan's Malabar District Manual. 19 M. 31 (33); 15 M. 241 (247). **H**
- (50) Wigram on Malabar Law and Custom. 18 M. 1 (8) (P.C.). **I**
- (51) Wynyard's Settlement Report. 1843. 17 A. 156 (460) (P.C.). **J**
- (52) Roberts' Settlement Report, 21st July, 1847. 17 A. 156 (460) (P.C.). **K**
- (53) Hunter's Statistical Account of Bengal. 32 C. 1 (13) (P.C.). **L**
- (54) 'Report on Shark and Pearl Fisheries,' by Mr. H. S. Thomas (1884). p. 16, S. 45. 17 M. 551 (553) = 14 M.L.J. 248 = 1 Weir 386. **M**
- (55) Dr. Thurston's 'Notes on Pearl Fisheries and Marine Fauna of the Gulf of Mannar,' (1890), pp. 11 and 12. 17 M. 551 (553) = 14 M.L.J. 248 = 1 Weir 386. **N**
- (56) Mr. Thomas' Report, p. 15, S. 45. 17 M. 551 = 14 M. L.J. 248 = 1 Weir 386. **O**
- (57) Mr. Prinsep's Tables. 18 W.R. 349 (354). **P**
- (58) Horace Hayman Wilson's Glossary of Judicial and Revenue Terms, compiled and published in 1850, under the authority of Court of Directors of the East India Company. 7 B.H.C. 45 (56); see also 3 W.R. (Act X, Rules), 29 (103); 17 B. 431 (443); 18 M. 1 (3); 22 M. 264 (267). **Q**
- (59) Mr. W. H. Morley's Glossary, Vol. I, p. 640. 7 B.H.C. 45 (56). **R**
- (60) Logan's Glossary, p. 211. 18 M. 1 (8) (P.C.). **S**
- (61) "Kattywad Directory," pp. 54—56. 1 B. 369 (455) (P.C.). **T**
- (62) Balfour's 'Cyclopaedia of India,' 3rd Ed., Vol. I, p. 656. 17 M. 551 (553) = 14 M.L.J. 248 = 1 Weir 386. **U**
- (63) 'Encyclopaedia Britannica,' 9th Ed., Vol. V, p. 364. 27 M. 551 (553) = 14 M.L.J. 248 = 1 Weir 386. **V**
- (64) Imperial Gazetteer. 27 C. 860 (867). **W**
- (65) "Annual Register." 1 B. 369 (436) (P.C.). **X**
- (66) Shakespeare's Dictionary. 16 A. 191 (194) (P.C.). **Y**
- (67) McCulloch's Commercial Dictionary. 12 B.H.C. 199 (206). **Z**
- (68) Oxford New Dictionary. 24 B. 293 (299). **A**
- (69) Taylor's Medical Jurisprudence. 12 C.L.R. 86. See also 10 C. 140 (142); 15 B. 452 (457); 23 C. 608. **B**
- (70) Taylor's and Chovvers' Works on Medical Jurisprudence. 24 A. 445 (449). **C**
- (71) Dr. Lyon's Medical Jurisprudence for India. 24 A. 445 (449). **D**
- (72) Medical Gazette, Vol. 19, p. 646. 24 A. 445 (449). **E**
- (73) Maudsley's Responsibility in Mental Disease, Ch. III. 23 C. 604 (608). **F**

14.—“Court may resort for its aid to appropriate books, etc.”—(Concluded).

(74) Tuke's Psychological Medicine, p. 269. 23 C. 604 (608). **G**

N.B.—In one case their Lordship of the Privy Council depreciated the system of deriving inferences of the facts from medical books and judicial dicta, instead of depending upon the facts established by evidence in the case. 25 C. 1 (14) (P.C.). **H**

(75) Sworn translations of Sanskrit works on adoption. 12 M.I.A. 398. **A**

(76) Wheaton on International Law. 1 B. 369 (399) (411) (P.C.). **J**

(77) Forsyth's Constitutional Law, p. 340. 2 A. 1 (22). **K**

(78) Smith's Mercantile Law, p. 576. 20 C. 771 (792). **L**

(79) The Civil Law. 3 W.R. at p. 101. **M**

(80) Civil Code of Italy Art. 3. 18 W.R. 359 (366). **N**

(81) 'Puffendorf's Law of Nature and Nations,' B. VIII, Ch. 5, S. 9. 1 B. 369 (411) (P.C.). **O**

(82) Mr. Justice Jardine's Notes on Buddhist Law, II Marriage, pp. 8 and 9 U.B.R. (1897—1901), Buddhist Law—Divorce, p. 28. **P**

(83) "Forsyth's Cases and Opinions," p. 185. 1 B. 367 (387) (P.C.). **Q**

(84) Hale's 'Pleas of the Crown,' 27 M. 551 (557) 41 M.L.J. 248-1 Weir 386 **R**

(85) Coke's Inst. Bk. iv, c. 71. 2 A. 1 (16) (23). **S**

(86) Broom and Hadley's Commentaries, Vol. I, p. 124. 2 A. 1 (16). **T**

(87) Kent's Commentaries 10th Ed., Vol. I, ss. 165, 166. 2 A. 1 (23) (14) ; 1 B. 367 (384) (P.C.). **U**

(88) Stephen's Black-stone, Vol. II, p. 503. 2 A. 1 (23). **Y**

(89) Clark's treatise upon "Early Roman Law." 18 W.R. 359 (366). **W**

(90) Murphy's Obstet. Rep., p. 1. 24 A. 145 (149). **X**

(91) Comyn's Digest, Prerogative, Bk. iii. 2 A. 1 (23). **Y**

(92) Dumont's Corps Diplomatique, Vol. VII, part 2, p. 100. 1 B. 367 (393) (P.C.). **Z**

(93) Grotius's de Jure Belli ac Pacis, B. II, Cap. 6, Ss. 3, 4. 1 B. 367 (398) (P.C.). **A**

(94) Koch and Schaeffl, Histoire des Traites de Paix, Vol. I, pp. 314, 315. 1 B. 367 (393) (P.C.). **B**

(95) Atthankepa U.B.R. (1897—1901), Buddhist Law, Divorce, p. 34; U.B.R. (1897—1901), Buddhist Law, Divorce, p. 39. **C**

(96) Manugye Dhammathat. Ch. XII, p. 345 (3rd Ed.). Ss. 3 and 43. U.B.R. (1897—1901), Buddhist Law, Divorce, p. 34. U.B.R. (1897—1901), Buddhist Law, Inheritance, p. 112. **D**

(97) Richardson's Manu, 3rd Ed., pp. 314—319. U.B.R. (1897—1901), Buddhist Law, Inheritance, p. 142. **E**

(98) Wagaru Dhammathat, Dr. Forchhammer's. U.B.R. (1897—1901), Buddhist Law, Inheritance, p. 142. **F**

(99) Kin Wun Mingyi's Digest, p. 81. U.B.R. (1897—1901), Buddhist Law, Inheritance, p. 142. **G**

(100) Lutter's Manual of Buddhist Law, p. 35. U.B.R. (1897—1901), Buddhist Law, Inheritance, Vol. II, p. 142. **H**

15.—“The Court . . . may refuse to do so, etc.”

(1) Scope of the rule.

It will be observed that though the Court may refuse, it is not imperative that it should refuse. Field Ev., 6th Ed., p. 222. L.

(2) Reference to Gazettes.

(a) “The Gazettes are usually supplied to, filed, bound, and preserved in the office of all Courts in India: and when any matter may be placed beyond doubt by the mere production of the Gazette, the Court might properly have it produced from its own record room.” Field Ev., 6th Ed., p. 222. J

(b) But “Advocates and pleaders should, however, make a request to this effect in sufficient time to prevent delay at the hearing.” Field Ev., 6th Ed., p. 222. K

(3) Rules of the English Courts—Practice.

(a) Courts in England may also refuse to take judicial notice of any given matter “unless the party interested produces the necessary books of reference.” Phip. Ev., 4th Ed., p. 17; Tay. Ev., 10th Ed., S. 21, p. 22. L

(b) Thus in one case, Lord Ellenborough declined to notice the King’s proclamation without the production of the Gazette containing it. Phip. Ev., 4th Ed., p. 17; Tay. Ev., 10th Ed., S. 21, p. 22. M

(c) So also the Court declined to notice judicially the contents of the Articles of War, where those were not produced. *Il. v. Withers*, cited in R. Holt, 5 T R. p. 442, Steph. Art. 59, Phip. Ev., 4th Ed., p. 17; Tay. Ev., 10th Ed., S. 21, p. 22. N

(4) Power of Court to make necessary inquiries.

(a) “In some cases, Courts have themselves made the necessary inquiries, and that, too, without strictly confining their researches to the time of the trial.” Tay. Ev., 10 Ed., S. 21, p. 22; Phip. Ev., 4th Ed., p. 17. O

(b) “The Judges will also, on occasions, inquire from the masters as to what is the practice at chambers of Judges with reference to questions of procedure not specifically dealt with by the rules, or with reference to questions arising in the taxation of bills of costs.” Tay. Ev., 10th Ed., S. 21, p. 23. P

(c) In one case where it was suggested that it might be desirable to inquire what has been the practice of the High Court at Calcutta and Madras in certain cases, the Court directed letters to be written by the Prothonotary to the officers of both these Courts requesting them to give the required information. 8 B. 511 (516). Q

(d) In another case the Court directed its Registrar to write to the Foreign office to obtain information regarding the circumstances under which it came into existence as a British Cantonment, and the real character of its connection with the British Government. 421 O. 177 (178). R

(e) In a third case the Prothonotary was directed by the High Court to communicate with the Secretariat as to whether a certain territory was within the limit of British India. 9 B. 244 (247). S

(f) A notification in the Bombay Gazette was referred to of the 12th February, 1885. 9 B. 244 (247). T

N.B.—See also notes under “COURTS MAY RESORT TO APPROPRIATE BOOKS, etc.”

15.—“The Court... may refuse to do so, etc.”—(Continued).

(General).

N.B.—As the enumeration of the cases in the section is “not exhaustive” and as it is apprehended that Courts here “may and will take judicial notice of all those other facts at least, of which English Courts take judicial notice,” the following further examples from English and American Law are noted below.

A.—EXAMPLES FROM ENGLISH CASES.

(1) Notorious facts.

The following have been judicially noticed as being notorious facts by English Courts:—

- (i) The ordinary course of nature. *Williams v. Eady*, 10 T.L.R. 41; *Robinson v. Smith*, 17 T.L.R. 235, 423, *Sullivan v. Creed*, 1904; 2 I.R. 335; *Mahon v. Dublin Co.*, 39 Ir.L.T.R. 126; post, 108; Phip. Ev., 4th Ed., p. 16, *Heathcote's Divorce*, 1 Macq. 277, H.L. Tay. Ev., 10th Ed., S. 15, p. 16. **U**
- (ii) The recklessness of boys. (*Ibid*) **Y**
- (iii) The standards of weight and measure. *Hocking v. Cooke*, 4 T.R. 314; *O'Donnell v. O'Donnell*, 1 L.R. Ir. 284 Phip. Ev., 4th Ed., p. 16; Tay. Ev., 10th Ed., S. 16, p. 17. **W**
- (iv) The public coin and currency, (*Kearney v. King*, 2 B. and Ald. 303), and its difference of value in early and modern times. *Bygones v. Foot*, L.R. 3 Q.B. 497; Phip. Ev., 4th Ed., p. 16; *Glossop v. Jacob*, 1 Stark. 69, Tay. Ev., 10th Ed., S. 16, p. 17. **X**
- (v) The course of post, the stamps of post-offices on letters. Phip. Ev., 4th Ed., p. 16. **Y**
- (vi) The fact that post-cards are enclosed documents whose contents are visible to those dealing with them. *Robinson v. Jones*, 4 L.R. Ir. 391; post, 87, 103, Phip. Ev., 10th Ed., p. 16. **Z**
- (vii) The meaning of common words and phrases, *e.g.*, that beans are a species of pulse. *R. v. Woodward*, 1 Moo. C.C. 323, Phip. Ev., 4th Ed., p. 16; Tay. Ev., 10th Ed., S. 16, p. 17. **A**
- (viii) The difference of time in places east and west of Greenwich. (*Curtis v. Marsh*, 3 H. and N. 866, Phip. Ev., 4th Ed., p. 16. **B**
- (ix) The existence of the Universities of Oxford and Cambridge, and the fact that they are national institutions for the advancement of learning and religion. *Re Oxford Rate*, 8 E. and B. 184; Phip. Ev., 4th Ed., p. 16. **C**
- (x) Courts will also notice the almanac annexed to the Common Prayer Book as being part of the law of the land. *Collier v. Nokes*, 2 C. and K. 1012; *Tutton v. Danks*, 5 H. and N. 647; Phip. Ev., 4th Ed., p. 17. **D**
- (xi) The number of days in a given month. 1 Rol. Ab. 824; Phip. Ev., 4th Ed., p. 17. See also notes under cl. (9), *supra*. **E**
- (xii) That a certain day of a month was a Sunday. *Hanson v. Shackleton*, 4 Dowl. 48; Phip. Ev., 4th Ed., p. 17; see also notes under cl. (9), *supra*. **F**

(2) Proceedings of Court.

Every Court will moreover take judicial notice of matters appearing in its own proceedings.” Tay. Ev., 10th Ed., S. 5, pp. 3—7; *Scoll v. Brown*, 2 Q.B. 724; *Hunt v. Pineburgh*, Times, Dec. 8, 1888; Phip. Ev., 4th Ed., p. 171. **G**

15.—“The Court....may refuse to do so, etc.”—(Continued).

General—(Continued).

A.—EXAMPLES FROM ENGLISH CASES—(Concluded).

(3) Rules made under statutes.

It will also take judicial notice of the Rules made by the Chancellor or other authorised officials under various Acts (*i.e.*, under the Bankruptcy Act, 1883, S. 123; Land Transfer Act, 1875, S. 111; the Crown Office Act, 1877; ss. 3, 4, and the Gas and Water-works Act, 1873, S. 11); and of the jurisdiction and rules of procedure of the various divisions of the High Court. Jud. Act, 1873, S. 21; Ros. N.P. 82; Tay. Ev., S. 19; Philp. Ev., 4th Ed., p. 12. H

(4) Laws of the Colonies.

Even the—of Jersey, Guernsey, or Scotland, must be proved as facts, unless steps have been taken either under the British Law Ascertainment Act, 1859, or under the Foreign Law Ascertainment Act, 1861, to obtain a legal opinion on the subject from a superior Court of the country whose laws are under dispute. *Lord v. Colburn*, 29 L.J.Ch. 297; Tay. Ev., 10th Ed., S. 5, p. 8. I

(5) Laws of Ireland.

“The—being substantially the same as those of England, except where varied by statute, a very able Judge has suggested that the English Courts would probably judicially recognise them.” *Reynolds v. Fenton*, 3 C. B. 194, explaining *Ferguson v. Mahon*, 11 A. and E. 179; Tay. Ev., 10th Ed., S. 5, p. 8. J

B.—EXAMPLES FROM AMERICAN CASES.

(1) Acts of State, the form of Government, etc.

The following will be judicially noticed —

- (a) The existing form of Government, State and nation. *Church v. Hubbard*, 2 Cranch 187, 238; *Grusoids v. Titbarn*, 2 Conn. 85, 90; *U. S. v. Johns*, 4 Dall 412, 416; *The Santissima Trinidad*, 2 Wheat. 283, 335; *Womack v. Drarman*, 7 Port. 513; *Lincoln v. Battelle*, 6 Wend. 475; *Cary v. State*, 76 Ala. 78; *U.S. v. Palmer*, 3 Wheat. 610, 634; *Burnett v. State of Tennessee*, Mart. and Yerg. 132; *Walden v. Canfield* 2 Rob. (La) 466; *U. S. v. Reynes*, 9 How. 127; *Watson v. Wailor*, 23 N.H. 471, 496. K
- (b) The existence and usual symbols of all sovereign Governments recognised by national authority. (*Ibid*). L
- (c) The official seals of States and State officials, whether domestic or foreign. (*Ibid*). M
- (d) And all public treaties and proclamations or other acts of the supreme authority, State or nation. (*Ibid*). N
- (e) Judicial notice will also be taken of the Chief Executive authority of jurisdiction, State and nation, under which the Court is constituted. *Hizer v. State*, 12 Ind. 330; *Lindsey v. A.-G.*, 33 Miss. 508; *State v. Williams*, 5 Wis. 368; *Jones v. Gale's Cur.*, 4 Martin, 635; *Deuces v. Colorado Co.*, 32 Tex. 570; *Wells v. Company*, 47 N.H. 226, 220. O
- (f) The accession, privileges, and signature of such authority. (*Ibid*). P

15.—"The Court....may refuse to do so, etc."—(Continued).

(General)—(Continued).

K—EXAMPLES FROM AMERICAN CASES—(Continued).

(a) A public proclamation of amnesty by the President of the United States is an act of which all Courts of the United States are bound to take notice. *Armstrong v. U.S.*, 13 Wall. 154; see also *Moog v. Hand*, 77 Ala. 597. Q

(a) The existence and signature of heads of departments, and other chief Officers acting under supreme authority, State or national, will be judicially noticed. *Fort, N. & R.R. Co. v. Womans*, 17 How. 30; *Brown v. U. S.*, 91 U. S. 37, 42; *Ingram v. State*, 27 Ala. 17; *Major v. State*, 2 SneedH., *Peayle v. John*, 22 Mich. 461, *Himmelmann v. Houdley*, 41 Cal. 213, *Templeton v. Marjon*, 16 La. An. 138, *Walcott v. Gibbs*, 37 Ill. 118. R

(a) Judicial notice will be taken by a Court in a State of United States of America of the office of tax collector and other county offices for the time being with their respective incumbents. *Wetherbee v. Dunn*, 32 Cal. 106, *Thelmann v. Burg*, 73 Ill. 294, *Stubbs v. State*, 53 Miss. 437. S

(a) But judicial cognizance will not be taken of who are the sheriff's deputies. *State Bank v. Curran*, 10 Ark. 112, *Leland v. Paterson*, Minor (Ala.), 14 T

(L) Public laws.

(a) The common and public statute law of the United States will be judicially noticed by Courts of that country. *U.S. v. Turner*, 11 How. 663, 668; *Lery v. State*, 6 Ind. 281; *Canal Co. v. R.R. Co.*, 4 G. and J. 1, 63. U

(b) The State jurisdiction, if any, under which the Court in question is constituted. (*Ibid*) Y

(c) So also the law of nations is also a subject of judicial recognition. *The Scotia*, 11 Wall. 178, 188. W

(a) So also the law merchants-mercantile customs and usages. *Brown v. Piper*, 91 U.S. 37, 42. X

(a) So the Supreme Court of United States will take cognizance of the public laws and judicial practice of the several States and Territories of United States of America. *Owings v. Hull*, 9 Pet. 607; *Jasper v. Porter*, 2 McLean, 579; *Muller v. McQuerry*, 5 McLean., 469, *Elwood v. Flammigan*, 104 U. S. 562, *R.R. Co v. Bank of Ashland*, 12 Wall. 226; *Renaud v. Abbott*, 116 U. S. 277. Y

(f) So also where one State has recognised acts done in pursuance of the laws of another State, its Courts will take judicial cognizance of those laws so far as may be necessary to determine the validity of the acts alleged to be done in conformity with them. *Carpenter v. Dexter*, 8 Wall. 513, 531; *Graham v. Williams*, 21 La. An. 594. Z

(a) But Courts will not take cognizance of private statutes. *Allegheny v. Nelson*, 25 Pa. St. 332; *Leland v. Wilkinson*, 6 Pet. 317; *Bank v. Converse*, 38 La. An. 963. A

15.—“The Court... may refuse to do so, etc.”—(Continued).

General—(Continued).

B.—EXAMPLES FROM AMERICAN CASES—(Continued).

- (h) Nor of legislative journals. *Grob v. Ghuslain*, 45 Ill. 119. *Coleman v. Dobbins*, 8 Ind. 156. But see *Prescott v. Trustees*, 19 Ill. 324. **B**
- (i) Nor of Municipal ordinances or other regulations of local authority *Hassard v. Municipality &c.*, 7 La. An. 495; *Clise v. Mobile*, 30 Ala. 538. *Gurru v. Wells*, 8 Ia. 286; *State v. Oddile*, 42 Mo. 210. **C**
- (j) Nor of the Statute law of another State. *Bennell v. Holt*, 89 Ill. 71; *Neese v. Farmers' Ins. Co.*, 55 Ia. 604. **D**
- (k) But Courts will, perhaps, judicially notice powers of a public nature conferred upon a Municipal corporation, created by the legislative Act, though the Act is not in terms declared to the public. *Faulstich v. Hannibal*, 1 Dillon (U.S.) 118; *State v. Mayor*, 11 Humph. 217; *Briggs v. Whipple*, 7 Vt. 15; *Case v. Mobile*, 30 Ala. 538; *Prell v. McDonald*, 7 Kans. 426. **E**
- (l) Judicial cognizance is taken of the divisions of a province. *McDonald v. Dicare*, 1 Ohy. Ch. 34. **F**
- (m) Of the official Gazette. *Dubois v. Fauteur*, 7 R.L. 190. **G**
- (n) And of a change of Attorney-General recited therein. *Simms v. R.R.*, 22 L.C. Jur. 20. **H**
- (o) So Courts will take judicial cognizance of the appointment of one of its officers as Judge. *Fay v. Miville*, 2 Rev. de Leg. 333. **I**
- (p) So of a barrister appointed to the bench. *Tremaine v. Tonnancour*, 2 Rev. de Leg. 471. **J**
- (q) Of Usury Laws not relied on as a defence. *Girdlestone v. O'Reilly*, 21 Q. B.C. 409. **K**

(3) Seals, &c.

- (a) A Court will also, it seems, take judicial cognizance of its own seal and practice. *Gilliland v. Sellers*, 2 Oh. St. 223; *Lindsay v. Williams*, 17 Ala. 229, 231; *Watson v. Hay*, 3 Kerr (N.B.), 559; *Rodgers v. State*, 50 Ala. 102; *Newell v. Newton*, 10 Pick. 470; *Tucher v. State*, 11 Md. 322; *Delafield v. Hand*, 3 Jones, 310; *Mountjoy v. State*, 78 Ind. 172. *Headman v. Rose*, 63 Ga. 458; *Hangslaben v. People*, 89 Ill. 164. **L**
- (b) The seal, practice and Judges of all Courts of general jurisdiction constituted under the Constitution of the United States or the same authority as itself. (*Ibid*). **M**
- (c) The seal of foreign Courts of admiralty and prize. (*Ibid*). **N**
- (d) And in certain limited instances, judicial notices will also be taken of the seals of notaries public. (*Ibid*). **O**
- (e) As to admiralty Courts, see Story's Conf. Laws, S. 643; *Croudson v. Leonard*, 4 Cranch, 434; *Thompson v. Stewart*, 3 Conn. 171; *Rose v. Himely*, 4 Cranch, 241, 292. **P**
- (f) The seal of a notary public is, perhaps, matter of judicial cognizance chiefly, if not solely, in the case of the protest of a foreign bill of exchange. *Orr v. McLean*, 243, 247. See also *Browne v. Bank*, 6 S. and R. 484; *Chanoine v. Fowler*, 3 Wend 173; *Porter v. Judson*, 1 Gray, 175; *Yeaton v. Fry*, 5 Cranch, 385. **Q**

15.—“The Court....may refuse to do so, etc.”—(Continued).

General.—(Continued).

B.—EXAMPLES FROM AMERICAN CASES—(Continued).

- (g) But the memoranda of a notary, regularly kept, are competent evidence, after his death, of the matters to which they relate. *Nicholls v Webb*, 8 Wheat, 326, 337. P.
- (h) Superior Courts will take cognizance of who are the justice of inferior tribunals. *Ripley v Varney*, 2 Pick. 591, *Follan v. Lefevre*, 3 Rob. (La), 13. S
- (i) A Court will take judicial cognizance of its records. *Hansleben v. People*, 89 Ill. 164. T
- (j) The signature and duties of its officers. *Central Land Co. v. Cathorn* 16 W. Va. 361, *Wood v. Putz*, 10 Martin, 196. U
- (4) **Course of nature, &c.**
- (a) No proof need be offered of the ordinary course of nature. *Floyd v. Richs*, 14 Ark. 236; *Dwakens v. Smithwick*, 1 Fla. 158; *Sprowl v. Lawrence*, 33 Ala. 674; *Dixon v. Nicolls*, 39 Ill. 372; *Floyd v. Johnson*, 2 Litt. (Ky.), 109, 113; *Wilson v. Van Leer*, 127 Pa. St. 371, *R. R. v. Ladd*, 92 Ala. 287; *Allum v. Owen*, 31 Ala. 167, 171. Y
- (b) Or the natural and artificial divisions of time. (*Ibid*). W
- (c) Sundays and other ordinary public fasts and festivals will be judicially noticed. *Saswer v. Farmer's Bank*, 4 Mo. 409. X
- (b) **Language.**
- (a) No proof need be given of the usual meaning of English words. *Com. v. Kneeland* 20 Pick. 206, 239. Y
- (b) Set of customary abbreviations. *Moseley v. Mastin*, 37 Ala. 216; *Stephen v. State*, 11 Ga. 225; *States v. Liquors*, 73 Me. 278; *Gresham v. McGregor*, 78 Cal. 258; *Weaver v. McKelhenon*, 13 Mo. 89, *Kile v. Yellowhead*, 80 Ill. 208. Z
- (c) But slang and other special phrases, must be proved. *Baltimore v. State*, 15 Md. 376. A
- (d) Thus in one case the Court found themselves unable to judicially know that “St. Louis, Mo.” was in the state of Missouri. *Ellis v. Park*, 8 Tex. 205. B
- (6) **Matters of general knowledge.**
- (a) Judicial notice will be taken of the legal standard of weights and measures. *Daily v. State*, 10 Ind. 536; *U.S. v. Burns*, 5 McLean 23; *Reid v. McWhinnie*, 27 Q.B.U.C. 289; *U.S. v. Fuller*, 4 N.M. 358; *Gady v. State*, 83 Ala. 51; *Duvall et al v. State*, 63 Ala. 12; *Mallory v. State*, 62 Ga. 164; *Chesapeake Bank v. Swain*, 29 Md. 483; *Hampton v. Haggard*, 3 Monr. (Ky), 149. C
- (b) Of the current coin, or other circulating medium. (*Ibid*). D
- (c) But not of the market value of the notes of a bank or government at any particular time. *Peenster v. Ringo*, 5 Monr. 336; *Modawall v. Holmes*, 40 Ala. 391. E

15.—“The Court....may refuse to do so, etc.”—(Continued).

(General—(Continued)).

B.—EXAMPLES FROM AMERICAN CASES—(Continued).

- (d) No proof need be given with regard to matters of public history. *U. S. v. U. S. Pac. R. R.*, 91 U.S. 72, 79; *Williams v. State*, 67 Ga. 260; *Banner v. Phillips*, 77 Ala. 427; *U. S. v. Coin*, 1 Woolw (U.S.), 217; *Bank of Augusta v. Earle*, 13 Pet. 519, 590; *Paye v. Treadwell*, 16 Cal. 220; *Bank v. Cheney*, 94 Ill. 430; *Smith v. Speed*, 50 Ala. 276, 279; *Kelsey v. Co.*, 37 Conn. 397. But see *McKinnon v. Bliss*, 21 N.Y. 206; *Ohio Life Ins. Co. v. Debolt*, 16 How. (U.S.), 416, 435. **F**
- (e) So judicial notice was taken of the abolition of slavery. *Ferdinand v. State*, 39 Ala. 706. **G**
- (f) So cognizance will be taken of the important geographical divisions or marked geographical features of the country. *Mossman v. Forrest*, 27 Ind. 233; *Walter v. Allen*, 72 Ala. 456; *Martin v. Martin*, 51 Me. 336; *Vanderhouser v. State*, 28 Ind. 257; *State v. Tootle*, 2 Harr. (Del.), 511. **H**
- (g) Whether the Mississippi at New Orleans is a tidal river is matter of which the Court will take judicial notice. *Peigneur v. Howard*, 7 Pet. 324-341. **I**
- (h) Thus it has been judicially noticed that the Mersey is a tidal river. *Whitney v. Gauche*, 11 La. An. 132. **J**
- (i) Judicial notice will be taken of the political divisions of the country for the purposes of general or local government. *Story*, Eq. Pl. S. 24; *Vanderwerker v. People*, 5 Wend. 530; *State v. Powers*, 25 Conn. 48; *Ham v. Ham*, 39 Me. 263; *Wright v. Phillips*, 2 Greene (Ia.) 191; *Rose v. Austill*, 3 Cal. 183; *Wright v. Hawkins*, 28 Tex. 152; *Martin v. Martin*, 51 Me. 366. **K**
- (j) Judicial cognizance has been taken of prominent geographical facts relating to foreign countries, in so far as such facts may fairly be assumed to be within the knowledge of persons of ordinary intelligence and education. *Whitney v. Gauche*, 11 La. An. 432. **L**
- (k) As to what minor matters are of general knowledge, there is naturally great diversity of decisions. *Udderzook's case*, 76 Pa. St. 340; *Coxens v. Higgins*, 1 Abb. Ct. of App. Dec. 451. **M**
- (l) Thus the accuracy of photographic process has been recognised in some cases. (*Ibid.*) **N**
- (m) So also the usual method and distance of travel. *Hipes v. Cochran*, 13 Ind. 175; *Oppenheim v. Wolf*, 3 Sandf. Ch. 571; *Isaacson v. R.R.*, 94 N.Y. 278; *R. R. v. Pilgreer*, 62 Ala. 305. **O**
- (n) So also the customary usages of bankers and trade. *Amer. Nat. Bank v. Bushey*, 45 Mich. 135-140; *Saloman v. State*, 28 Ala. 83, 88. **P**
- (o) So judicial notice has been taken of the variation of the magnetic needle. *Bryan v. Beckley*, 6 Latt (Ky), 91, 95. **Q**
- (p) The cases on this head will be found to turn rather on the individual experience of particular Judges than on any well defined rules. *King v. Gallun*, 109 U.S. 99. **R**
- (q) Courts have taken notice of the contents of the Bible. *State v. Dist. Board*, 76 Wis. 177. **S**

15.—“The Court....may refuse to do so, etc.”—(Concluded).

General—(Concluded).

B.—EXAMPLES FROM AMERICAN CASES—(Concluded).

- (r) That vacant buildings are dangerous. *White v. Phoenix Ins. Co.*, 83 Me. 279. **T**
- (s) That larger beer is a malt liquor. *Netso v. State*, 24 Fla. 363; *Tanker v. State*, 90 Ala. 617. **U**
- (t) That whiskey is intoxicating. *Frese v. State*, 23 Fla. 178; see also *Hlatz v. Rohrbach*, 116 N.T. 150. **V**
- (u) Of the course of husbandry. *Wetler v. Kelly*, 83 Ala. 440; *Loeb v. Richardson*, 74 Ala. 311. **W**
- (c) Of the principle on which an ordinary ice-cream freezer operates. *Brown v. Piper*, 91 U.S. 37. **X**
- (w) Of the height of a human body. *Hunter v. N. Y. R. R.*, 23 N.E. Rep. 9. **Y**
- (x) Of the nature of cigars. *Jacobs case*, 98 N.Y. 98, 113. **Z**
- (y) So of the facts of the almanac. *Reed v. Wilson*, 41 N.J.L. 29; *R. R. v. Lehman*, 56 Md. 209; *McIntosh v. Lee*, 57 Ia. 556; *Ecker v. Bank*, 61 Md. 292; *People v. Chee Kee*, 61 Cal. 404. **A**
- (z) So a Court has taken cognizance that a pile of lumber is likely to attract children to play about it. *Spengler v. Williams*, 6 So. Rep. 613 (Miss.) **B**
- (aa) But Courts have refused to take judicial cognizance of the end of the pasture season. *Gore v. Downer*, 59 Vt. 139. **C**
- (bb) Courts have refused to take judicial notice that gun and turpentine are inflammable. *Moseley v. Ins. Co.*, 55 Vt. 142. **D**
- (cc) Nor would Courts take judicial notice that kerosene oil is a refined oil. *Bennett v. Ins. Co.*, 8 Daly. 171. **E**

(7) Reference to books.

- (a) A Judge, if he is acquainted with any fact which he is judicially asked to notice, may satisfy his mind on the point by reference to any personal or documentary source. *U.S. v. Teschmaker*, 22 How. 392; *Wagner's case*, 61 Me. 178; *Gardner v. The Collector*, 6 Wall. 499, 511; *Brown v. Piper*, 91 U.S. 37, 42. **F**
- (b) A Judge may even refuse to take such judicial cognizance until satisfied by evidence presented to him for that purpose. (*Ibid*). **G**
- (c) Encyclopedias or works of general history are, in no sense evidence, *per se*, in the absence of statutory provisions. Conf. S. 640. **H**
- (d) Their legitimate use, in the Court's discretion, is to satisfy the mind of the Court in regard to matters of which the Court is asked to take judicial notice. *Moris v. Harmon*, 7 Pet. 554; *Ashworth v. Kuttridge*, 12 Cush. 193; *Whitton v. Alb. City Ins. Co.*, 109 Mass. 24; but see Steph. Dig. • Ev. art. 35; *Conn. x. Alburger*, 1 Whart. 469. **I**
- (e) A newspaper as evidence to the same extent. (*Ibid*). **J**
- (f) Neither can such works be read to the jury as a matter of right. *Stilling v. Thorp*, 54 Wis. 528. **K**

N.B.—See Best Ev., 8th Ed., Chamberlayne's notes, pp. 253—56.

58. No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands¹, or which by any rule of pleading in force at the time, they are deemed to have admitted by their pleadings²: Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions³.

(Notes).

1.—“No fact need be proved in any proceeding under their hands.”

(1) Court to try questions at issue, not facts admitted.

(a) A Court, in general, has to try the questions on which the parties are at issue, not those on which they are agreed. 5 B. 143 (152), referring to *McGowan v. Smith*, 26 L.J. Ch. 8. **L**

(b) Where parties allow a suit to be conducted in the lower Court as though a certain fact was admitted, they cannot subsequently, in special appeal, question it and recede from their tacit admission. 23 W.R. 174, following *Stracy v. Blake*, 1 M. and W. 168 and *Doe v. Roe*, 1 E. and B. 279. See, also, Tay. Ev., 10th Ed., S. 783 and Phip. Ev., 4th Ed., p. 231. **M**

(2) Admissions exclude evidence of facts so admitted.

(a) Subject to certain exceptions, pleadings or their default are conclusive and exclude any evidence at the trial, or finding of the jury against the facts admitted. *The Rothbury*, 10 T.L.R. 60; and *Maclaren v. Davies*, 6 T.L.R. 372. Phip. Ev., 4th Ed., p. 10. **N**

(b) Where the defendant admits all the facts pleaded in the statement of claim, the plaintiff will not be permitted to let in evidence except by the permission of the Court and on special grounds. *The Hardwick*, 9 P.D. 32; see the Annual Practice, 1908, Vol. I, p. 426, see, also, Phip. Ev., 4th Ed., p. 10. **O**

(c) And admissions which have been deliberately made for the purposes of the suit, whether in the pleading or by agreement, will act as an estoppel to the admission of any evidence contradicting them. 5 B. 143 (152), referring to *McGowan v. Smith*, 26 L.J. Ch. 8. **P**

(3) Object of admissions.

It is with the object of doing away with the necessity of proving documents or facts admitted that admissions are obtained, and the party unreasonably refusing or neglecting to admit any documents or facts when called upon to do so, may be ordered to pay the costs of proof. See the Annual Practice, 1908, Vol. I, pp. 426-7. **Q**

(4) Rule is only permissive.

(a) The rule is only permissive, and a plaintiff by not taking advantage of it, and going to trial in the ordinary way, cannot be deemed thereby to have waived his right to rely at the trial, on the admission implied in the pleadings. *Tildesley v. Harper*, 7 C.D. 403. See the Annual Practice, 1908, Vol. I, p. 429. **R**

(b) “This rule enables the parties to get rid of so much of the action, as to which there is no dispute.” *Tharp v. Holdsworth*, 3 C.D. 640; per *Jessel, M.R.* See the Annual Practice, 1908, Vol. I, p. 429. **S**

1.—“No fact need be proved in any proceeding...under their hands.”

—(Continued).

(5) Sufficiency of verbal admissions.

“An oral admission is sufficient, if it is clearly proved that it was made.”

Re Beeny, 1 Ch. 499. See the Annual Practice, 1908, Vol. I, p. 429. **T**

(6) Admissions must be clear.

But the Court will not pass a final judgment upon admissions contained in a pleading or affidavit, unless the admissions are clear and unequivocal. *Landergan v. Feast*, 34 W.R. 691; see the Annual Practice, 1908, Vol. I, p. 430. **U**

(7) Party relying on admissions should leave no other fact to be inferred therefrom.

A party relying on such admissions should not leave any other fact to be inferred from them, for, by doing so, he will be prevented from proving it at the trial. *Sanders v. Sanders*, 19 Ch.D. 373, 380; Philp. Ev., 4th Ed., p. 10. See, also, the Annual Practice, 1908, Vol. I, p. 426. **V**

(8) Admissions in one proceeding whether conclusive in subsequent proceedings.

An admission contained in the defence of one action will not be regarded as conclusive in other proceedings between the same parties, but on a different issue. *Re Walters*, 61 L.T. 872. See the Annual Practice, 1908, Vol. I, p. 430. **W**

(9) Declarations in Court's order as to parties' rights not to be based on admissions.

A declaration in an order of Court with respect to the rights of parties should not be based on admissions, but on evidence. *Williams v. Powell*, W.N. 94 (141); see the Annual Practice, 1908, Vol. I, p. 426. **X**

(10) When plaintiff can claim judgment on admissions in the defence.

A plaintiff may apply for a judgment on the admissions contained in the statement of defence, after he has joined issue and given notice of the trial. *Brown v. Pearson*, 21 C.D. 716. See the Annual Practice, 1908, Vol. I, p. 428. **Y**

(11) Value of admission in pleadings after their amendment.

Admissions contained in the original pleadings cannot be relied on after their amendment. See the Annual Practice, 1908, Vol. I, p. 426. **Z**

(12) Erroneous admissions may be withdrawn.

Where the Court is satisfied that the admissions were made under a mistake, it may permit them to be withdrawn. *Hollis v. Burton*, 3 Ch. 226. See the Annual Practice, 1908, Vol. I, p. 431. **A**

(13) Admissions dispensing with proof may be made by pleadings or their default.

(a) Admissions intended to dispense with proof at the trial may be made in civil cases by the pleadings or their default. *Ripley v. Arthur*, 86 L.T. 735; Philp. Ev., 4th Ed., p. 10. **B**

(b) Where, in a foreclosure suit, the defendants required permission to refer to the mortgage deeds and did not admit that they had the effect attributed to them in the statement of claim, save as such deeds, when produced, should appear, held it was a sufficient admission to entitle the plaintiff to a decree. *Barnard v. Wisland*, 30 W.R. 947. But see *Smith v. Davies*, 28 C.D. 650. See the Annual Practice, 1908, Vol. I, p. 429. **C**

I.—“No fact need be proved in any proceeding under their hands.”

—(Continued).

(14) Or in pursuance of notice.

(a) A party may make admissions in order to dispense with proof at the trial pursuant to notice under O. 32, rr. 2 to 5 of the Supreme Court of Judicature in England. *Philp. Ev.*, 4th Ed., p. 10. **D**

(b) By r. 2, a party, to whom a notice has been given, may admit “any documents, saving all just exceptions” which will dispense with formal proof, but preserve other objections to admissibility. *Budley v. May. of D.*, 120 L.T. Jo. 521; *Philp. Ev.*, 4th Ed., p. 10. **E**

(15) Or by agreement of parties.

A party or his agent may make admissions for the purpose of dispensing with the proof at the trial by agreement or otherwise, before or at the trial. *Philp. Ev.*, 4th Ed., p. 10. **F**

(16) Distinction between admissions dispensing with proof and admissions tendered as evidence at hearing.

(a) “Admissions made for the purpose of dispensing with proof at the trial must be distinguished from those tendered as evidence, the former not being usually receivable in other proceedings and the latter not being usually conclusive.” *Philp. Ev.*, 4th Ed., p. 10. **G**

(b) There is a distinction between evidentiary admissions and admissions by the pleadings. *L.B.R. (1907), Evidence*, 1. **H**

(17) Hearing, meaning of.

(a) “At the hearing.” means, when there are more hearings than one, the final hearing. *Whitley Stokes*, Vol. II, p. 889. **I**

(b) Thus, where A sues to eject B for non-payment of rent and B at the first hearing orally asserts payment in full, at the final hearing no evidence of title or tenancy need be offered. *Whitley Stokes*, Vol. II, p. 889. **J**

(18) Facts admitted at the hearing

“With regard to facts admitted at the hearing, the expression ‘at the hearing’ is ambiguous. If it means before the evidence has begun to be taken, then what I have said already applies to it. If it means after the evidence has begun to be taken, then, in a civil case, no doubt the party or his pleader may at any time relieve his adversary from the necessity of proof; and the generality of the language used in this section would lead to the inference that this was so in a criminal trial also, though it is generally supposed to be otherwise, and that on a criminal charge admissions made after a plea of not guilty can only be made use of as evidence.” *Mark. Ev.*, p. 51. **K**

(19) Facts admitted prior to the hearing.

(a) “With regard to the facts admitted prior to the hearing, it is quite correct to say that they ‘need not be proved,’ in the sense that no evidence need be given of them. Not only this need not be done, but it would not be allowed to be done.” *Mark. Ev.*, p. 51. **L**

(b) “As to admissions before the hearing, it is certain that, in a criminal case, they can only be used as evidence, and for this purpose it does not signify whether they are in writing or not. Admissions in writing before the hearing in civil cases would come under consideration when

I.—“No fact need be proved in any proceeding under their hands.”

—(Continued).

the Judge is considering what issues are to be tried. Still, even then, they must be proved to be genuine, unless they are admitted in the presence of the Judge. The direction given to the Court by the last paragraph of S. 58 is controlled by the provisions of the Civ. Pro. Code, which require the Judge to determine what issues are to be tried before the taking of evidence begins. If a Judge wished to allow a party to withdraw his admission, he would have to amend the issues.” Mark. Ev., p. 51. M

(20) Evidentiary value of Judge's statements as to what takes place before him at trial.

(a) The statement of the Judge who presides at a trial, whether it be in a criminal or civil case, is conclusive as to what has taken place at the trial. 10 B.H.C.R. 75 (81). N

(b) We must consider the statement of the Judge as absolute verity and we ought to take his statement precisely as a record, and act on it in the same manner as on a record of Court which of itself imports absolute verity. *R. v. Aaron Mellor*, 27 L.J.N.S. 121, Mag. Ca.; *per Martin B.*, cited 10 B.H.C.R. 77 (82). O

(c) We are bound to give credence to the statement of the Judge, and to take what the Judge so states to be incontrovertibly the fact. It is suggested that this is not a record, but we have no more power of contradicting the statement of a learned Judge reserved for our consideration than we have the power of contradicting any allegation upon a record. *R. v. Aaron Mellor*, 27 L.J.N.S. 121, Mag. Ca.; *per Coleridge, J.*; cited 10 B.H.C.R. 75 (81). P

(d) Neither the affidavits of bystanders, nor of jurors, nor the notes of counsel nor of shorthand writers are admissible to controvert the notes or statement of the Judge, 10 B.H.C.R. 77 (81), referring to *Rea v. Uggah*, 5 B. and Ad. 1081, 1087; *Gibbs v. Pike*, 4 B. and Ad. 683, 684; and *Erert v. Youells*, 4 B. and Ad. 683, 684. Q

(e) The rule of law is that a judgment deliberately recording the admission of a pleader must be taken as correct, unless it is contradicted by an affidavit or the Judge's own admission that the record he made was wrong. 16 W.R. 107. R

(21) Admissions by counsel for dispensing with proof at trial—Conclusiveness.

(a) Admissions by counsel are, in civil cases, conclusive, when they are made for the purpose of dispensing with proof at the trial. *Urquhart v. Butterfield*, 37 Ch. D. 357, and *Harvey v. Croydon Union*, 26 Ch. D. 249. See Phip. Ev. 4th Ed., p. 230 and Tay. Ev. 10th Ed., S. 783, p. 552. S

(b) A counsel, in his opening, stated that his client had paid a certain cheque but adduced no evidence to prove it; the defendant was, after notice to produce, allowed to give secondary evidence of the contents of the cheque, without giving further proof of the plaintiff's possession. *Duncombe v. Dawell*, 8 C. and P. 222; approved in *Haller v. Worman*, 3 L.T.N.S. 741. But, see also *Machell v. Ellis*, 1 C. and K. 682, in which Pollock, C.B., refused to take the facts from the opening of counsel. Tay. Ev., 10th Ed., S. 783, p. 553; and Phip. Ev. 4th Ed., p. 231. T

1.—"No fact need be proved in any proceeding...under their hands."

--(Continued).

- (c) In England, formal admissions by counsel at a trial have been allowed in order to dispense with mere formal proofs, as appears from Lord Abinger's remarks in *Reg. v. Thornhill*, 8 C. and P. 769 (770). See, also, *The English Annual Practice*, 1908, Vol. I, pp. 399 and 432, Phip. Ev., 4th Ed. p. 11, and Steph. Dig., 7th Ed., Art. 60, p. 73. **U**
- (d) For a case where it was held that a fact may be admitted by a prisoner's counsel and that such admission would dispense with the proof of that fact, see 12 W.R. (Cr.) 80 (81), under S. 18, p. 222. *supra*. **Y**
- (e) The Court refused to rely on a consent made by the counsel of the prisoners observing, "so far as prisoners can assent to anything, that arrangement was assented to by the vakils of each party. I do not rely on any consent." 12 W.R. (Cr.) 76. **W**
- (f) Admission made by a prisoner's vakil cannot be used against the prisoner. 17 W.R. 49 (Cr.). See, also the cases noted under S. 18, pp. 220-226, *supra*. **X**
- (22) **Counsel's admissions bind client.**
- (a) Where a pleader in the conduct of a suit, makes admissions on behalf of a client, the client is bound by such admissions. 5 N.W.P. 2. **Y**
- (b) The admission and consent of a vakil, made with due authority, will bind his client, though not present at the time of making it. 2 M.L.A. 253. **Z**
- (c) A vakil's admission during the trial of a suit is legal evidence by which his client is bound, though it is open to the latter to show that the effect of the admission is not such as to invalidate his claim. 9 W.R. 375. **A**
- (d) In a case of defamation against the editor of a newspaper, it was held that a Magistrate, in holding that the accused was bound by an admission made at the trial by his solicitor that the accused did not repudiate the responsibility, was supported in his view by S. 58, Evidence Act, an Act which extends to all judicial proceedings, in or before any Court. Rat. Un. Cr. C. p. 769 (770). **B**
- (e) In India there is nothing to prevent a prisoner on being questioned under S. 312 of the Crim. Pro. Code to make an admission; and it is obvious that some admissions on formal matters of law can be better trusted to his legal adviser and there seems to be no reason in principle why, when the admission has been so made in his presence at the trial, so as to dispense with the attendance of witnesses for the prosecution, it should not be held to bind him. If the repudiation of the admission as to second and third heads of charges had been made at once on the charge being read, the Magistrate might, under S. 58, have considered whether he should require the prosecution to prove the fact. Rat. Unrep. Cr. Cases, p. 770. **C**
- (f) An affidavit of the solicitor or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents or facts, is made sufficient evidence of such admissions, if evidence thereof were to be required by O. 32, r. 7. See the *Annual Practice*, 1908, Vol. I, p. 432. **D**

I.--"No fact need be proved in any proceeding..under their hands"

—(Continued).

(23) But not erroneous admissions on points of law.

(a) Where a vakil, upon a mistaken view of the law, goes beyond and contravenes his instructions, his erroneous consent cannot bind his client. 16 W.R. 246 (247). **E**

(b) A person is not bound by an admission of a point of law, nor precluded from asserting the contrary in order to obtain the relief to which, upon a true construction of the law, he may appear to be entitled. 18 W.R. 359 (367) (P.C.) 9 B.L.R. 377 1 A. Sup. Vol. 47 **F**

(c) An erroneous admission by counsel on a point of law does not bind the party. 4 C.W.N. 271 (277) (P.C.) **G**

(d) A plaintiff is not bound by the admission of his pleader, if it is erroneous on law 24 B. 360 (363) **H**

(24) Power of vakil conducting suit to abandon useless issue.

A vakil's general powers in the conduct of a suit include the abandonment of an issue which, in his discretion, he thinks it inadvisable to press. 25 M. 367 (377) (P.C.) **I**

(25) Husband's admissions in favour of wife bind heirs

(a) Where the husband, during his lifetime, did in every way both publicly and privately, whenever called upon to make any representation on the subject, always represented that certain immoveable property was his wife's, the purchasers from her could not, after his death, be equitably turned out of the property in favour of his heirs. The heirs, after his death, would be as much bound by the father's misrepresentations as he would have been during his life 13 W.R. 292 **J**

(b) The heirs were as much bound by the misrepresentations made by the father as the father would have been, if the wife, in his lifetime, had actually sold the property to a bona fide purchaser. 19 W.R. 292 (297). **K**

(26) Admissions of documents between co defendants to which the plaintiff is no party.

Where documents are admitted between co-defendants to which the plaintiff is not a party, such admissions cannot be entered as evidence against him, or included in an order for taxation and payment of the general costs of the action. *Dodds v. Tate*, 25 Ch. D. 617. See the Annual Practice, 1908, Vol. I, p. 427. **L**

(27) Parties to application for order against defendant on his admissions.

An application for an order against a defendant on his admissions must be made by all the plaintiffs and not merely by some of them. *Re Wright*, 2 Ch. 747. See the Annual Practice, 1908, Vol. I, p. 429 **M**

(28) Infant's admissions.

The Court, will not, on motion, give judgment on the admissions contained in the defence of an infant defendant, nor, on the default of the infant in filing a defence. *Byrne v. H.* 5 L.R. Ir. (Ch. D.) 134. See the Annual Practice, 1908, Vol. I, p. 490. **N**

1.—“No fact need be proved in any proceeding..under their hands.”

-(Concluded).

(29) Admissions as to documents—Secondary evidence.

(a) A plaintiff's admission of the want of stamp of a document was held to exclude secondary evidence of the counterpart. 3 M.H.C.R. 158 cited in 13 M. 312. **O**

(b) When a document is inadmissible, no secondary evidence of its contents can be received. 13 M. 308 (312), relying on 3 M.H.C.R. 158. **P**

(c) An admission of copies, pursuant to a notice to admit, does not dispense with the necessity of producing the originals, should the adversary object to the production of the copies. See the Annual Practice, 1908, Vol. I, p. 427. **Q**

(d) The admission of a copy will not entitle a party to withhold proof of the original. *Sharp v. Lamb*, 11 A. and E. 805; Phip. Ev., 4th Ed., p. 10. **R**

(e) A party's admission, made not in the pleadings but in a deposition, is merely secondary evidence and cannot supply the place of the document itself. 8 B.H.C. 163 (165). **S**

(f) Where a document is admitted, this fact does not make it relevant and does not tantamount to putting it in evidence. *Watson v. Rodwell*, 11 Ch. D. 150; 1 *er* James, L.J. See Steph. Dig., 7th Ed., Art. 60, p. 73. **T**

(g) Where a regulation provided that, where documents are produced and not disputed, they should be received without proof, the Privy Council held that a will was sufficiently in evidence for the purposes of a case before it. 6 M.L.A. 510 (521). See also 6 B.L.R. Ap. 49. **U**

(h) Although a plaintiff, when the defendant denies his claim, is bound to prove his case by the document on which he relies, still if the defendant admits any sum to be due, that admission, irrespective of proof offered by the plaintiff, is sufficient to warrant a decree in the plaintiff's favour for the amount covered by the admission. 6 W.R. 132. **Y**

(30) Section whether applicable to criminal cases

(a) As to whether the section is confined in its operation to civil cases only, see Can. Ev., 10th Ed., p. 213 and 11th Ed., p. 144 and Steph. Dig., 7th Ed., Art. 60, p. 73, Mark. Ev. cited *supra*. **W**

(b) For a case where the rule that, in criminal cases, except by a plea of guilty, admissions dispensing with proof, as distinguished from admissions or confessions which are evidential, are not allowed in cases of felony, was applied to a case of misdemeanour, see *It v. Thornhill*, 8 C. and P. 575; Steph. Dig., 7th Ed., Art. 60, p. 73, and Phip. Ev., 4th Ed., p. 11. **X**

(c) Under the English Law, a prisoner under trial for felony can make no admissions so as to dispense with proof, though a confession may be proved against him. The present section appears to allow an accused person to admit at the trial such facts as he pleases to admit. See Steph. Dig., Art. 60, and Mark. Ev. cited *supra*. **Y**

2.—“Or which by any rule of pleading in force at the time..pleadings.”

(1) Scope of section.

(a) S. 58, Evidence Act, governs admissions by the pleadings. U.B.R. (1907), Evidence, 1. Z

(b) Although a sale deed is inadmissible in evidence as being unregistered, an admission by the (vendor) defendant, in his preliminary examination, of an agreement alleged in the plaint, to the effect that he would make good any loss the (plaintiff) purchaser might incur in respect of the property sold, is not excluded by S. 91, Evidence Act, and renders proof of the agreement unnecessary. U.B.R. (1907), Evidence, 1. A

(c) “In order to understand this section, it is necessary to understand what is meant by the rules of pleading, having especial regard to civil cases, and to trials before the Court of Sessions, because, in other cases, there is no regular pleading. Mark. Ev. 50. B

(d) “In a trial before the Court of Sessions, the only thing before the Judge at the commencement is the charge which states, more or less in detail, the facts relied on to establish the guilt of the accused. To this charge the accused is required to plead. If he pleads guilty, or admits all the facts mentioned in the charge, or sufficient to constitute his guilt, there will be no trial. In any other case, he is deemed not to plead guilty and then evidence must be given of the facts necessary to constitute the charge, the admission of the accused being used against him, should the prosecution think it fit to do so.” Mark. Ev., p. 50. C

(e) “In civil cases, it is otherwise. By means of the plaint, the written statements, and the questions which the Judge has a right to put to the parties, and which they are bound to answer, the “issues,” as they are called, are settled by the Judge, and the facts in dispute may be very considerably narrowed and defined, because, as to many of the facts the parties may turn out to be agreed. These issues are settled before the trial commences, and, therefore, before any evidence is given at all, so that the Judge, when he begins to take evidence, may be in possession of important facts bearing upon the case which never come into question at all.” Mark. Ev., pp. 50—1. D

(2) Facts alleged in pleadings are admissions of party stating them.

(a) “Facts alleged positively in a pleading must be taken to be the admissions of the party alleging them, or, if such facts are admitted by the opposite party in his pleading or otherwise in writing, they may be read as admissions against him, unless, in other case, such party be an infant, lunatic, or of unsound mind.” See the Annual Practice, 1908, Vol. I, p. 126. E

(b) A written statement cannot be called for by an Appellate Court, or read as evidence against any party to the suit, save the person by whom it is made, and those who are bound by admissions made by him. 5 W. R. 50 (51). F

(c) An admission or even a confession of judgment by one of several defendants in a suit is no evidence against another defendant. 15 B.L.R. 10. G

(3) Admissions to be treated as true.

(a) “A party moving upon admissions in a pleading must accept as true the statements contained in it; and, therefore, where, in an action for infringement of patent, the defence admitted infringement in ten instances, but denied any further infringement, it was held that the

2. Or which by any rule of pleading in force at the time..pleadings."*— (Continued).*

plaintiff was entitled to an injunction and inquiry as to damages as to the ten instances only, and that, on the inquiry, evidence as to any other instances must be excluded. *United Telephone Co. v. Donahoe*, 31 C.D. 399. See the Annual Practice, 1908, Vol. I, p. 430. **H**

- (b) A second adoption cannot take place in the lifetime of the first adopted son. Where the son of the son first adopted sued as heir of the second adopted son to obtain the property left by him, and the suit throughout was contested with respect to his claim as heir of that second adopted, held that the plaintiff could not, on appeal, shift his ground and regard the second adopted son as a trespasser, and seek to recover the property on the ground of its having belonged to the ancestor. **11 B.L.R. 301. I**

(4) Admission of effect of document will not tender proof of it unnecessary.

"Where a party admits that, subject to production, a document is to the effect stated in the pleadings, or refers to it for greater certainty, he has in general a right to insist on its being read; and such admission or reference will not dispense with the necessity of proving the document." See the Annual Practice, 1908, Vol. I, p. 427. **J**

(5) Court has discretion in appreciating evidence of defendant's written statement.

Where a defendant's written statement is referred to as evidence in the plaintiff's favour, the whole of it becomes evidence in the suit, and the Court can, in its discretion, attach thereto, or to any portion thereof, so much value as seems to it fit. **9 W.R. 290. K**

(6) Admission of fact on the pleadings is not proof of it.

- (a) An admission of a fact on the pleadings by implication is not an admission for any other purpose than that of the particular issue, and is not tantamount to proof of the fact. **23 W.R. 214 (P.C.) = 2 L.A. 113. 15 B.L.R. 10**, referring to *Edmunds v. Groves*, 2 M. and W. 642. *Smith v. Martin*, 9 M. and W. 304, and *Robbins v. Maidstone*, 4 Q. B. 815. See, also, O. XII, rr. 2 and 4 C.P.C., 1908. **L**

- (b) The fact that a defendant has, in his written statement, set up a defence simply of limitation in a suit for the possession of land does not constitute an admission of the title of the plaintiff so as to dispense with the obligation on the plaintiff to prove his title. **Marsh 549. M**

(7) Doctrine of admission by non-traverse.

- (a) The strict rule that averments not traversed must be taken to be admitted is not applicable to the Indian Courts. **2 W.R. 19 (P.C.) = 9 M.L.A. 287 (301). N**

- (b) In a suit for enhancement of rent, a defendant is not bound to traverse a statement made by the plaintiff in the notice of enhancement as to the description of the land in question. The doctrine of admission by non-traverse is not applicable to written statements filed under Act X of 1859. **9 W.R. 83. O**

- (c) "Where a defence denying allegations in the statement of claim as to the law of Trinidad had been struck out for want of discovery, North, J., refused to treat the case as if the defendant had admitted the allegations." *Jenny v. Mackintosh*, 61 L.T. 108. See the Annual Practice, 1908, Vol. I, p. 430. **P**

2. —“Or which by any rule of pleading in force at the time . . . pleadings”—
(Continued).

- (d) The mere fact of non-traverse of the plaintiff's allegation of heirship was held not to amount to an admission of title, especially where there was a general denial of the plaintiff's allegations, including that of the plaintiff's title, and where the real question at issue was as to the share to which the plaintiff was entitled. 17 W. R. 171 (172). **Q**
- (e) A ryot, who puts in *dahils* as evidence to support his case, is bound to prove them. Their admission as genuine is not to be legally presumed, merely because they are not formally disputed by the landlord. 7 W. R. 526. **R**
- (f) The system of procedure in this country is not such that, if a defendant fails to dispute or contest a point, he thereby admits it. On the contrary, if he allows judgment to go by default, the plaintiff is just as much bound to prove his case. 14 W. R. 55 (56). **S**
- (g) The mere fact that an allegation in a plaint is not traversed does not relieve a plaintiff from the burden of proving his case. 13 M. 308 (312), *referring to* 7 B.H.C. R. 136. **T**
- (h) The language of Lord Cairns holds true in this country also that the first object of pleading is to inform the persons against whom the suit is directed, what the charge is that is laid against them. *Brown v. McIntock*, 6 Eng. and Ir. Ap. at p. 453, *cited in* 5 B. 113 (152). **U**
- (i) The principle is equally valid as applied to either party in the cause. 5 B. 113 (153). **V**
- (j) The Court is to frame the issues according to the allegations made in the plaint or in the written statements tendered in the suit. 5 B. 113 (153). **W**
- (k) But, where the issues as they stand were suggested by the defendant's counsel, and waive controversy as to the actual execution of a document, assume it to have been executed, and raise questions only that depend for their pertinence on that assumption, the plaintiff is not called upon to prove the execution of the document or to put it in evidence. 5 B. 113 (153). **X**
- (l) If, the document being pronounced absolutely invalid for the same purpose on consideration of public policy, it were sought to defeat the law through the effect usually given to an admission in the pleadings, such an attempt could not be allowed to succeed. 5 B. 143 (153). **Y**
- (m) Where the plaintiff's claim on an alleged title, and then allegation is not traversed by the defendant, their position requires no further proof. 12 W. R. 469. **Z**
- (n) Averments upon which no issue is framed must be taken to be admitted. 18 W. R. 287. **A**
- (o) An allegation, *e. g.*, of obstruction to a way not denied in the written statement or put in issue at the hearing makes it fair to presume that the obstruction was not denied. 26 B. 735 (737), *referring to* 18 W. R. 287. **B**

(8) Admission of part of claim.

Where a man sues for arrears of rent as due under a *kabuliat*, and the defendant denies the *kabuliat*, but admits that a certain amount of rent is due to the plaintiff, the suit is not, if the plaintiff fails to satisfy the Court that the *kabuliat* is a genuine one, to be dismissed altogether, but the plaintiff is entitled to a decree for the balance admitted. 13 B.L.R. 246, *note*. **C**

2.—“Or which by any rule of pleading in force at the time....pleadings”—
(Concluded).

(9) Pleadings—Estoppel.

Where a person has not caused anybody to believe something to be true which she in a subsequent suit alleges not to be true, she would be entitled to raise any defence in that subsequent suit which the facts of the case will support. 19 C. 513 (532) (P.C.). **D**

(10) Nature of averment in written statement.

The averment in the written statement is not in the nature of a plea of confession and avoidance so as to shift the burden on to the defendant. 17 M. 173 (476), following 9 W. R. 190. **E**

3. —“Provided....admissions.”

(1) Court's powers under proviso.

(a) Where the Court is satisfied that an admission has been obtained by fraud, or that there is other good and sufficient cause, it will be in its discretion, under the proviso to S. 58 of the Evidence Act, to require the fact to be proved otherwise than by such admission. 25 M. 183 (205). Per *Blashyan Ayyangar, J.* **F**

(b) Where a sale out of Court was asked, the Court “required the statement of claim to be verified, notwithstanding that the defendants pleading admitted the allegations.” *Willis v. W.*, 38 W. R. 7. See the Annual Practice, 1908, Vol. I, p. 130. **G**

2) Proviso inapplicable where serious questions, e. g. of law or at issue.

The rule (contained in the section) is not meant to apply when there is any serious question of law to be discussed. Per *Mellish, J.* in *Gilbert v. Smith* 2 C. D., p. 689. See the Annual Practice, 1908, Vol. I, p. 431. **H**

(3) Power only discretionary.

“In any case, the power of the Court is discretionary only and will not be exercised where the case cannot be conveniently tried on motion.” *Mellor v. Sidebottom*, 5 C. D. 342. See the Annual Practice, 1908, Vol. I, p. 431. **I**

(4) Cases where proof of document dispensed with.

(a) A plaintiff in his written statement in a former suit between the same parties and in his admission in Court in the suit in question when examined in order to the framing of issues had stated that he had agreed not to redeem the lands he now sued to redeem during the defendant's life-time. *Held*, in the face of these admissions and on the authority of the law as contained in S. 58, that the defendant was not bound to produce evidence of the agreement. U.B.R. (1897—1901), 379 (381), referring to 3 M. H. C. R. 342; 5 B. 143; 24 C. 20; and Field Ev., 5th Ed., p. 379. **J**

(b) The fact that a document is referred to in the plaint or written statement, and its terms and execution admitted on the record by the pleadings, will dispense with its proof or its being put in evidence; and its non-registration is immaterial. U.B.R. (1904), Evidence p. 1. **K**

